

Two Models of Public Pensions in State Supreme Court Decisions

Thomas M. Johnson, Jr.

November 2015



THE
FEDERALIST
SOCIETY

1776 I St., N.W., Suite 300
Washington, DC 20006
fedsoc.org

ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce “white papers” on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organizational stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts, and criticisms by writing to us at info@fedsoc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about the Federalist Society, please visit our website: www.fedsoc.org.

ABOUT THE AUTHOR

Thomas M. Johnson, Jr. is Of Counsel in the Washington, D.C. office of Gibson, Dunn & Crutcher. He practices in the firm’s Litigation Department and is a member of the Labor and Employment and Appellate and Constitutional Law Practice Groups.

Mr. Johnson has represented clients in a wide range of state and federal appellate and trial proceedings, in areas including labor and employment, ERISA, trademark infringement and false advertising, administrative law, class action defense, and constitutional law.

Mr. Johnson received his law degree, magna cum laude, in 2005 from Harvard Law School, where he was Deputy Editor-in-Chief of the Harvard Journal for Law and Public Policy and won the Irving Oberman Memorial Award, for his third-year paper on separation of powers. Before joining the firm, he clerked for one year for the Honorable Jerry E. Smith on the Fifth Circuit Court of Appeals in Houston, TX. Mr. Johnson received a B.A. in Government magna cum laude from Georgetown University in 2002.

Mr. Johnson is admitted to practice in the state of New York and District of Columbia.

Two Models of Public Pensions in State Supreme Court Decisions

By Thomas M. Johnson, Jr.

At least twenty-two states are likely to run budget shortfalls next year, ranging from \$67 million in Delaware to a staggering \$6 billion in Illinois.¹ These deficits have resulted in part from shrinking tax revenues in the wake of the Great Recession and in part from massive unfunded liabilities in state pension plans for public employees. In response to this crisis, several states have enacted legislative reforms to public pension benefits, such as adjusting benefit levels, increasing employee contributions, reducing contributions by state employers, or enacting 401(k)-style alternatives to traditional defined-benefit plans.

In turn, public-sector unions, representing state employees, have brought lawsuits challenging the validity of these legislative reforms. The plaintiffs in these cases have rested their challenges on a variety of legal theories—including impairment of contracts, takings, and due process under the state and federal constitutions. State supreme courts, applying different legal frameworks, have reached different conclusions, upholding reform legislation in some states while striking it down in others.

While the precise contours of these challenges and the particular results have differed, judicial decisions in this area have reflected two basic and competing conceptions of the nature of public pension benefits. These conceptions differ on both the extent to which employees have an enforceable property right in their benefits and the institutional competency of the courts to superintend a public employee benefit system.

Under the first model, which I will call the “Classical Model,” public pension benefits are awarded to employees as an act of legislative grace for serving in good behavior.² Under this model, employees have no

1 Associated Press, The 22 states projecting budget shortfalls, available at <http://news.yahoo.com/22-states-projecting-budget-shortfalls-152948094.html> (May 9, 2015).

2 For one state’s articulation of the Classical Model, see *Spina v. Consolidated Police & Firemen’s Pension Fund Comm’n*, 41 N.J.

enforceable right to their benefits unless and until they “vest,” that is, until the employee has completed some predetermined period of service. Proponents of this model view it as a feature, not a defect, that legislatures may adjust the criteria for awarding unvested benefits in light of changing circumstances or unforeseen economic events—such as a recession. Under the “Classical Model,” only the legislature has the institutional capacity to make tradeoffs among competing budgetary priorities to ensure the state’s continued fiscal health and the solvency of the pension system.

Under the second model, which I will call the “Contract Model,” public employee benefits are judicially-enforceable entitlements.³ Under this model, public employees accept employment in expectation of, and in reliance on, receipt of certain pension payments in retirement. Therefore, this view holds, once an employee starts work, the legislature cannot alter existing benefit levels or even increase contributions that an employee must make to the pension system via payroll deductions. The legislature, in turn, cannot reduce the state’s contribution levels on the theory that the state has irrevocably guaranteed to each employee a certain level of plan solvency. In this model, courts must act to safeguard employees’ contractual rights from the caprice of legislators who may be tempted in times of economic trouble to raid the coffers of state retirement funds.

The “Classical Model” was predominant at the time that states first started experimenting with public pensions during the Progressive Era.⁴ Following the experience of the Great Depression and two world wars, states each took one of two divergent paths. Some states, notably New York, viewed with alarm the possibility

391, 400 (1964); *Hozer v. State, Dep’t of Treasury, Consol. Police and Firemen’s Pension Fund Comm’n*, 95 N.J. Super. 196, 199 (App. Div. 1967).

3 For one state’s articulation of the Contract Model, see *Hoar v. City of Yonkers*, 295 N.Y. 274, 277-79 (1946); *Subway-Surface Supervisors Asso. v New York City Transit Authority*, 392 N.Y.S.2d 460, 466-67 (App. Div. 1977), *modified*, 44 N.Y.2d 101, 108-09 (1978) (ordering dismissal of judgment in relevant part for lack of standing).

4 See, e.g., *Stuhr v. Curran*, 44 N.J.L. 181, 188-91 (Ct. E. & A. 1882) (collecting cases); *Laba v. Bd. of Educ.*, 23 N.J. 364, 391 (1957) (same).

that legislatures could resort to reducing public pension benefits as an expedient to deal with economic crises, and so adopted the “Contract Model” by enshrining pension rights into the state constitution.⁵ Other states explicitly rejected New York’s approach and adhered to the “Classical Model,” reasoning that the country’s recent experience with depression and war reinforced the need for legislative flexibility to deal with unforeseen circumstances.⁶

States of course need not adopt a pure “Classical Model” or “Contract Model” but instead may select a hybrid approach. For example, one state may decide that employees have a contractual right to a certain level of retirement benefits, but permit the legislature to periodically increase or decrease the amount that the state or the employee pays into the system. Another state may conclude that both benefit levels and contribution levels are contractual, but permit the legislature to adjust peripheral features of the system to save money—such as tax implications or cost of living adjustments. Critically, all states across the spectrum appear to share the baseline view that once benefits “vest,” that is, once an employee satisfies the service requirements needed to earn pension credits, that portion of the employee’s retirement benefit cannot be reduced.

Four recent decisions—in New Jersey, Illinois, Michigan, and Oregon—illustrate how courts apply these two different models in practice. Through interpretation of the constitutional and statutory texts unique to each jurisdiction, courts have attempted to discern whether, and to what extent, their state has adopted a Classical or Contract Model of public pension benefits. The decisions frequently also reveal the judges’ own reflections on the appropriate spheres of legislative and judicial oversight of the public pension system.

THE CLASSICAL MODEL

New Jersey (majority opinion)

The New Jersey Supreme Court’s recent decision in *Burgos v. New Jersey*⁷ provides perhaps the most thorough recent articulation of the Classical Model of public pension benefits. The Court’s adherence to the

5 See N.Y. Const. art V, § 7.

6 See *infra* nn.9-12 and accompanying text.

7 2015 N.J. LEXIS 566 (N.J. Jun. 9, 2015).

Classical Model in *Burgos*, reflecting deference to the political branches’ efforts to reform the state pension system, stands in stark contrast to the robust role this same Court has recently assumed in policing other parts of the state budget—such as the amount spent on public education in troubled school districts.⁸ The different tone struck in *Burgos* may reflect the Court’s recognition of New Jersey’s historic adherence to the Classical Model of pensions as well as a sober assessment of the difficulties presented by judicial supervision of the employee benefit system. In any event, the majority decision drew a sharp dissent, discussed in the next section, which resonated with arguments typical of the Contract Model.

At the 1947 Constitutional Convention that established the modern New Jersey Constitution, delegate Ronald Glass proposed an amendment providing that “benefits payable by virtue of membership in any state pension or retirement system shall constitute a contractual relationship and shall not be diminished or impaired.”⁹ This proposal was based on a similar provision in the New York Constitution.¹⁰ Delegate Nathan Jacobs, chairman of the Judiciary Committee, vocally opposed this and similar proposals:

Some of us may well believe in full pensions as a matter of legislative authority. I see no place whatever for it in the Constitution, and it relates again to the principle of flexibility. . . . A constitutional requirement is for all time, until further constitutional change. Depressions do not change it; emergencies do not change it; things that you fail to foresee now do not change it. It’s there.¹¹

The amendment was ultimately defeated.¹²

8 See, e.g., *Abbott v. Burke*, 206 N.J. 332, 376 & n.23 (2011) (ordering the State Legislature to provide additional funding to troubled school districts for fiscal year 2012 in an amount equal to approximately \$500 million).

9 3 State of New Jersey Constitutional Convention of 1947, 393.

10 See *id.*

11 1 State of New Jersey Constitutional Convention of 1947, 475 (statement of Sen. Jacobs).

12 See 3 State of New Jersey Constitutional Convention of 1947, 192.

The Convention did, however, adopt two other constitutional provisions designed to provide the legislature with flexibility over how to appropriate state assets. The Debt Limitation Clause provides that “[t]he Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year,” unless enacted by public referendum.¹³ The Appropriations Clause, in turn, provides that “[a]ll moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year.”¹⁴ One legislature, in other words, cannot saddle a future legislature with debts exceeding one percent of the state’s budget, absent a popular vote.

These authorities provide the backdrop for the lawsuit in *Burgos*. In 2011, to address massive unfunded pension liabilities, the New Jersey Legislature amended the state’s public pension law to add Chapter 78, which required employees to contribute more to future benefits through payroll deductions and set a schedule for contributions by state agency employers.¹⁵ Chapter 78 further provided that state employees “shall have a contractual right to the annual required contribution amount being made by” the state, and that “[t]he failure of the State or any other public employer to make the annually required contribution shall be deemed to be an impairment of the contractual right of each employee.”¹⁶

While the Legislature made the promised contributions for Fiscal Years 2012 and 2013, it did not appropriate sufficient funds for the most recent two years when state revenues fell short of expectations.¹⁷ In response, public employee unions sued to enforce Chapter 78’s payment schedule.¹⁸ The plaintiffs argued that the law created an enforceable contract entitled

to protection against impairment under the Contract Clauses of the state and federal constitutions.¹⁹

The New Jersey Supreme Court recognized that the language in Chapter 78 expressed the state’s definite intent to make the promised contributions.²⁰ But the Court concluded that, as a matter of New Jersey law, no contract had been created, and therefore, there was no impairment under the federal or state constitutions. Specifically, the Court held that the Debt Limitation and Appropriations Clauses of the New Jersey Constitution prevent the state from binding future legislatures: “[E]ach year’s appropriations act will reflect the present legislative and executive judgment as to the budgetary priority of this pressing need [for pension contributions] for which those branches will be answerable to the public and to the financial marketplace.”²¹ “It is not the place of this Court to dictate that judgment,” it explained, “for the Constitution has left such budgetary and political questions to the other two branches.”²² In other words, public employees could not look to the courts to enforce contractual rights to particular contribution levels; those decisions were instead left squarely to elected officials who must balance competing budgetary priorities. This is the essence of the Classical Model of pension benefits.

The Court also noted, consistent with the Classical Model, that any other result would enmesh the judiciary in making policy and budgetary judgments for which it is ill-suited. The New Jersey Constitution, the Court reasoned, “envisioned the absence of the Judiciary from the annual budget-making process and prevent[s] it from having to perform the unseemly role of deciding in that process whether a failure to fully fund a statutory program, including one labeled a contract, was reasonable and necessary.”²³ That role, it continued, “would have required annual incursions by the Judiciary into second-guessing spending priorities and perhaps even revenue-raising considerations in recurring years.”²⁴ The Court declined to “prioritize one appropriation

13 N.J. Const. art. VIII, § 2, ¶ 3.

14 N.J. Const. art. VIII, § 2, ¶ 2.

15 Chapter 78, L. 2011, c. 78.

16 N.J.S.A. 43:3C-9.5(c).

17 *Burgos*, 2015 N.J. LEXIS 566, at *29-30.

18 *See id.* at *20.

19 *See id.* at *20-21.

20 *See id.* at *22.

21 *Id.* at *23.

22 *Id.*

23 *Id.* at *78.

24 *Id.* at *79.

decision above another,” which it reasoned was “best left to the marketplace evaluators and the electorate, to whom the state must answer on such comparative evaluations of fiscal priorities.”²⁵

Michigan

The State of Michigan reached a similar decision, applying similar logic, in *AFT Michigan v. Michigan*.²⁶ In 2012, the Michigan legislature had, among other things, amended the Public School Employees Retirement Act²⁷ to increase the amount that certain public school employees must contribute to their pensions in order to continue accruing pension benefits at the existing rate. The change would only apply prospectively; that is, it would not affect the rate of pension benefits already vested. Employees could choose not to make the increased contributions and either accept a reduced benefit or opt out of the public pension system entirely and contribute to a 401(k)-style plan. Public school employee unions sued to prevent the amendment from taking effect, arguing that the changes impaired existing contracts, effected a taking without just compensation, and violated substantive due process rights. One issue common to all three analyses was whether the plaintiffs had an enforceable property right in continuing to receive the same pension benefits at the same contribution levels.

The Michigan Supreme Court prefaced its analysis with a defense of the Classical Model. Public employees must “contend with a variety of future uncertainties” when they “pursue and accept public employment,” the Court explained.²⁸ The “terms, conditions, and even continued existence of public employment positions” may be affected by a variety of external factors, such as “the changing fiscal conditions of the state, the evolving policy priorities of governmental bodies, . . . and the ebb and flow of state, national, and global economies.”²⁹ Because the state must have flexibility to contend with “changing circumstances,” the Court warned that it will “often be unavailing for dissatisfied public employees to

25 *Id.* at *80-81.

26 497 Mich. 197 (2015).

27 MCL 38.1301 et seq.

28 *AFT Michigan*, 497 Mich. at 215.

29 *Id.*

file constitutional lawsuits insisting on an unreasonable level of fixedness or immutability.”³⁰

While the Court agreed with plaintiffs that they had a contractual right to the pension benefits they had already earned, it concluded that this right did not guarantee against future increases in employee contributions for benefits that would be earned in future fiscal years.³¹ The Court determined that the state had not actually made any promises that it would never amend the contribution formula, and even if it had, such promises could not be enforced against the myriad public agencies that comprise the state government.³²

While many public employees “intensely dislike the policies” instituted by the state “and believe that the . . . pension choices imposed on them are unfair and unsatisfactory, . . . decisions concerning the allocation of public resources will often leave some parties disappointed.”³³ “Recourse and correction must be pursued,” the Court explained, “through those bodies authorized by our Constitution to undertake such decisions—typically the legislative branch—and not through bodies, such as this Court, that are charged only with comparing the provisions of the law with the prohibitions of our Constitution and deciding whether they are compatible.”³⁴ “The state,” the Court later explained, “is not generally constrained from modifying its own employee benefits programs to accommodate its fiscal needs.”³⁵

THE CONTRACT MODEL

Illinois

The recent decision of the Illinois Supreme Court in *Heaton v. Quinn*³⁶ illustrates application of the Contract Model of employee benefits. In that case, the state legislature amended the Illinois Pension Code by reducing retirement annuity benefits for

30 *Id.*

31 *Id.* at 243 & n.26.

32 *See id.* at 243.

33 *Id.* at 214-15.

34 *Id.*

35 *Id.* at 248.

36 *Heaton v. Quinn* (In re Pension Reform Litig.), 32 N.E.3d 1 (Ill. 2015).

certain participants in the state-funded pension systems.³⁷ Participants in these pension plans and their representatives challenged the law on various bases, including that it violated the Pension Protection Clause of the 1970 Illinois Constitution, which provides 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.”³⁸

The history of the Pension Protection Clause illustrates the different constitutional choices made by the people of Illinois and the people of New Jersey. In Illinois, there had historically been “tension” between the state’s responsibility for funding pensions and the costs of supporting other governmental programs and services.³⁹ “In the resulting political give and take,” the Court in *Heaton* explained, “public pensions have chronically suffered.”⁴⁰

Whereas in New Jersey, delegates to the 1947 Constitutional Convention expressly rejected New York’s contract-based system, the delegates to the 1970 Illinois Constitution sought to emulate New York’s example. Delegate Henry Green, who introduced the amendment, modeled it on a similar provision in the New York Constitution, which had been added during the Great Depression to prevent the New York General Assembly from defunding state pensions during times of economic crisis.⁴¹

In the decades following the 1970 Convention, the State of Illinois continually underfunded its pension system, so that by mid-2013, the five state-funded retirement plans contained only 41.1% of the funding necessary to meet its accrued liabilities. As a result, the state legislature enacted Public Act 98-599—a comprehensive set of provisions designed to reduce annuity benefits for members of the state’s five pension plans.

The Illinois Supreme Court held that these

37 *Id.* at 1.

38 Ill. Const. 1970, art. XIII, § 5.

39 *Id.* at 6.

40 *Id.*

41 *Id.* at 6-7.

provisions violated the Pension Protection Clause, which provided participants with a “legally enforceable right to receive the benefits they have been promised.”⁴² The benefits afforded by state pension laws, the Court explained, “attach once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires.”⁴³ Therefore, “once an individual begins work and becomes a member of a public retirement system, any subsequent changes to the Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that individual.”⁴⁴ This Contract Model, in which an “offer” of pension benefits is “accepted” by an employee at the onset of employment, differs markedly from the Classical Model, in which no rights attach unless and until the benefits vest.

Consistent with the Contract Model, the Illinois Supreme Court championed judicial protection of pension benefits over legislative flexibility, thus making a different determination as to the proper separation of powers in this area than the Classical Model. Without strong constitutional protections for pension benefits, “police powers could be invoked to nullify express constitutional rights and protections whenever the legislature . . . felt that economic or other exigencies warranted,” and “[n]o rights or property would be safe from the State.”⁴⁵ Indeed, a legislature could even make financial crises worse, because “through its funding decisions, it could create the very emergency conditions used to justify its suspension of the rights conferred and protected by the constitution.”⁴⁶ While the Court acknowledged the difficulties facing elected representatives dealing with economic crises, it observed that “[c]risis is not an excuse to abandon the rule of law,” but rather “is a summons to defend it.”⁴⁷

42 *Id.* at 16.

43 *Id.*

44 *Id.*

45 *Id.* at 27.

46 *Id.* at 28.

47 *Id.*

Consider also the decision in *Moro v. Oregon*,⁴⁸ where the Oregon Supreme Court considered the constitutionality of two legislative amendments to the Public Employee Retirement System (“PERS”). These amendments eliminated income tax offset benefits for nonresident retirees and modified the cost-of-living adjustment (“COLA”) applicable to PERS benefits.⁴⁹ A group of active and retired PERS members sued the state, arguing principally that the amendments impaired their contractual rights under the federal and Oregon constitutions.⁵⁰

The Court started its analysis by noting the trade-off inherent in the Classical and Contract Models. On one hand, the Court recognized that “[w]hen the legislature pursues a particular policy by passing legislation, it does not usually intend to prevent future legislatures from changing course.”⁵¹ Therefore, “[r]equiring the state to meet . . . obligations [imposed by prior legislatures] can prevent or hinder the state’s pursuit of its current policy goals by limiting funds available to pursue those goals.”⁵² On the other hand, “the state would be unable to pursue its current policy goals if it were unable to bind itself at all—that is, if it were unable to make any enforceable promises to other parties.”⁵³ The Court resolved this tension by requiring evidence that the state “clearly and unmistakably” intended to create a contract by its actions.⁵⁴

The Court then noted that, historically, PERS benefits had been interpreted as contractual in nature.⁵⁵ Specifically, “each participating [public] employer offers a promise to its employees to provide compensation, including PERS benefits, in exchange for the employees’ services.”⁵⁶ The employee, in turn, “earns a contractual

right to the offered PERS benefits at the time that the employee renders his or her services to the employer.”⁵⁷ Therefore, a key consideration in determining whether a specific benefit is part of the PERS contract is whether the legislature intended it to be “remunerative” for services rendered.⁵⁸

Applying this standard, the Court concluded that the amendment eliminating tax offset benefits was not contractual in nature: The offset was initially enacted as redress for the state’s elimination of a tax exemption, not as compensation for years of service.⁵⁹ Indeed, a later amendment that increased the offset explicitly stated that it was not a “contractual” right.⁶⁰

The Court reached the opposite conclusion, however, with respect to the COLA amendments. The Court explained that, prior to the amendments, “the COLA provisions had been in place and unchanged for 40 years,” and thus “a substantial number of PERS retirees worked their entire careers while the pre-amendment COLA provisions were in effect and then retired.”⁶¹ Because employees had in theory worked in reliance on receipt of these COLA benefits, the Court held that they “have a contractual right to receive the pre-amendment COLA for . . . benefits that are generally attributable to work performed before the amendments went into effect.”⁶² By contrast, the Court held that employees had “no contractual right to receive the pre-amendment COLA for benefits that they earned on or after the effective dates of the amendments.”⁶³

The Court concluded its analysis with a defense of the Contract Model of pension benefits. It “recognize[d] the many public policy concerns that were the impetus for the 2013 PERS amendments,” and noted that “[w]hen public employers have to pay higher PERS contribution rates without additional funding, they have less money to pay for current services provided by police officers, teachers, and other

48 357 Ore. 167 (2015).

49 *Id.* at 172.

50 *See id.*

51 *Id.* at 195.

52 *Id.* at 194.

53 *Id.*

54 *Id.* at 195.

55 *Id.*

56 *Id.* at 197.

57 *Id.* at 199.

58 *Id.* at 204-05.

59 *Id.* at 207.

60 *Id.* at 205.

61 *Id.* at 173.

62 *Id.* at 172.

63 *Id.* at 173.

employees delivering critical services to the public.”⁶⁴ But while this legislative concern is “appropriate,” such objectives must be pursued “consistently with constitutional requirements.”⁶⁵ These requirements prohibited adjustment of the COLA provisions because “[t]hey were part of the compensation that public employees—many of whom are now retired—were promised in exchange for the work that they already have performed.”⁶⁶ Hence, they could not be reduced or eliminated consistent with the state constitution.

New Jersey (dissenting opinion)

Finally, the dissenting New Jersey Supreme Court justices in the *Burgos* case framed their analysis in explicitly contractual terms. The majority decision, the dissenters wrote, “strikes down the promise made to hundreds of thousands of public workers by the political branches of government that deferred wages earned for years of service would be funded during their retirement.”⁶⁷ In their view, the majority’s decision “unfairly requires public workers to uphold their end of the law’s bargain—increased weekly deductions from their paychecks to fund their future pensions—while allowing the State to slip from its binding commitment to make commensurate contributions.”⁶⁸ The dissenters feared that the “dismal logic” of the majority’s decision would also permit the “political branches . . . [to] let the pension fund run dry and leave public service workers pauperized in their retirement.”⁶⁹

For the dissent, the political process was broken and injurious to the rights of public workers. It was the judiciary’s role, they argued, to prevent the state from permitting a majority of legislators or voters to impair workers’ contractual rights: “The majority has declared that it will not enforce a statute intended to stem decades of political dysfunction that has resulted in the balancing of budgets on the backs of public

workers.”⁷⁰ Typical of the Contract Model, the dissent viewed judicial intervention as not only desirable, but urgently needed in order to protect workers’ rights and ensure the long-term solvency of the pension system. If the Court did not act now, “some future Court may have to intrude into the political process and determine funding priorities, which the majority now so strongly condemns.”⁷¹

* * *

These recent decisions will not end the debate over the merits of public pension reform or the precise shape it should take. But the decisions do illustrate the central function that state courts have played and will continue to play in determining whether such reform is lawful. Those decisions will continue to be guided by the legal and policy considerations and philosophical assumptions that underlie the Classical and Contract Models of public pension benefits. State legislatures, courts, and even citizens acting through initiatives and constitutional amendments have roles to play in determining what model their state will embrace and how best to respond to the economic exigencies of our time.

⁶⁴ *Id.* at 234.

⁶⁵ *Id.*

⁶⁶ *Id.* at 235.

⁶⁷ *Burgos*, 2015 N.J. LEXIS 566, at *85 (Albin, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.* at *88.

⁷⁰ *Id.* at *87.

⁷¹ *Id.* at *121.
