No. 22464 - Stanley W. Booth, William D. Tooten, Charles R. Martin and Gordon L. Clark, individually v. James L. Sims, as the Executive Secretary of the State of West Virginia Consolidated Public Retirement Board, Loretta K. Elder, David A. Haney, David A. Wyant, Toney Lautar, Jr., James H. Morton, Elizabeth Poundstone, S. S. Satterfield, Janet F. Wilson, all as members of the West Virginia Consolidated Public Retirement Board, Chuck Polan, as Chairman of the West Virginia Consolidated Public Retirement Board, Glen Gainer, III, as Vice Chairman of the West Virginia Consolidated Public Retirement Board, and Governor Gaston Caperton and State Treasurer Larrie Bailey, both as ex officio members of the West Virginia Consolidated Public Retirement Board

Miller, J., dissenting and concurring:[1]

I cannot understand why the majority fails to follow our major pension cases that have been unanimously decided over the past fifteen years. They represent the majority view elsewhere. To abandon their teaching for the nebulous concepts contained in the majority opinion does nothing but confuse our pension law and invite unnecessary litigation.

We recognized the contractual nature of public employee pension rights in our earlier case of Wagoner v. Gainer, 167 W. Va. 139, 279 S.E.2d 636 (1981). There, the Legislature had amended the judicial pension act so as to prevent retired judges from receiving

[1]Pursuant to an Administrative Order entered by this Court on September 13, 1994, retired Justice Thomas B. Miller was recalled for the September 1994 term because of the physical incapacity of Chief Justice W. T. Brotherton, Jr.

75% of the salary received by an active judge. This amendment precluded a retired judge from obtaining the pension benefit of a pay raise given to an active judge. We held that the amendment was unconstitutional and set these principles in syllabus points 1 and 3:

> 1. The West Virginia Retirement System for Judges creates contractually vested property rights for retired and active participating plan members, and these rights are enforceable and cannot be impaired or diminished by the State.
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> 3. While the Legislature has the right to make reasonable alterations to the judicial pension fund, such alterations cannot impair the benefit level where there are extant statutorily-created inequities and special unfunded benefit provisions that affect the equal application of the law or the financial integrity or cost of the pension fund.

We expanded on these pension principles in Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988). There, a retired member of the Public Employees Retirement System (PERS) brought a writ of mandamus against the Governor and other officials charged with operating PERS. He claimed that their actions were contrary to the PERS statutes and were jeopardizing the fiscal integrity of the fund. In Dadisman, we reemphasized the point that employees in a public employee pension system have contractual rights, as has been generally held elsewhere:

> In other jurisdictions, the modern trend and majority view is that a public employee's rights under a public pension statute are contract rights. 60A Am.Jur.2d Pensions and Retirement Funds § 1620 (1988); see, e.g., Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968); Halpin v. Nebraska State Patrolmen's Retirement System, 211 Neb. 892, 320 N.W.2d 910 (1982); Singer v. City of Topeka, 227 Kan. 356, 607 P.2d 467 (1980) (and cases cited therein); State Teachers' Retirement Board of Giessel, 12 Wis.2d 5, 106 N.W.2d 301 (1960).

Id. at 790, 384 S.E.2d at 827. This same principle as to the contractual nature of a public pension right has been reaffirmed in later cases from other jurisdictions. For example, the California Supreme Court in Legislature of the State of California v. Eu, 54 Cal.3d 492, 528, 816 P.2d 1309, 1331, 286 Cal.Rptr. 283, 305 (1991), made this statement:

> Petitioners find ample support for their position in California cases confirming that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. (Citations omitted).

See also, Thurston v. Judges' Retirement Plan, 179 Ariz. 49, 876 P.2d 545 (1994); Davis v. Mayor and Alderman of City of Annapolis, 98 Md.App. 707, 635 A.2d 36 (1994); McDermott v. Regan, 82 N.Y. 2d 354, 624 N.E.2d 985 (1993); Hughes v. State of Oregon, 314 Or.1, 838 P.2d 1018 (1992); Ass'n of Pennsylvania State Colleges v. State System of Higher Education, 505 Pa. 369, 479 A.2d 962 (1984); Bowles

v. Washington Dept. of Retirement Systems, 121 Wash.2d 52 847 P.2d 440 (1993).

The basis for Dadisman's contractual holding was that a pension is a form of property right which is analogous to a contractual claim, as we summarized in the syllabus:

> 15. "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Syl Pt. 3, Waite v. Civil Service Commission, 161 W. Va. 154, 241 S.E.2d 164 (1877).
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> 16. Retired and active PERS plan participants have contractually vested property rights created by the pension statute, and such property rights are enforceable and cannot be impaired or diminished by the State.

We did recognize in Dadisman that where the pension was not vested, i.e., the employee had not reached all the pension eligibility requirements, the Legislature might amend the system. In syllabus point 17 of Dadisman v. Moore, supra, we set out a general standard which allowed an amendment when three conditions were met: (1) when the public interest requires it; (2) the amendment must be reasonable; and (3) reasonableness is determined by whether the amendment keeps the system sound and flexible:

> While the law recognizes that states retain some reserve power to modify by statute existing contractual pension relationships w hen the public interest so requires, such modifications must be reasonable and necessary to serve important public purposes. Legislative modifications to a pension plan must be reasonable, and the test for reasonableness is whether the alteration to the pension scheme serves to keep the system sound and flexible.

The Dadisman standard had been discussed earlier in Wagoner v. Gainer, supra, 167 W. Va. 154, 279 S.E.2d at 645:

> Legislative modifications to a pension plan must be reasonable, and the test for reasonableness is whether the alteration to the pension scheme serves to keep the system sound and flexible. Brazelton [v. Kansas Public Employees Retirement System, 227 Kan. 443, 607 P.2d 510 (1980)]; [Public Employees' Retirement Board v.] Washoe County, [615 P.2d 972 (Nev. 1980)] Betts [v. Board of Administration of Public Employees' Retirement System, 21 Cal.3d 859, 582 P.2d 614, 148 Cal.Rptr. 158 (1978)].

Much this same standard of reasonableness was drawn into syllabus point 3 of Mullett v. City of Huntington Police Pension Board, 186 W. Va. 488, 413 S.E.2d 143 (1991), where we indicated that, as to those employees whose pensions had not become vested, the "Legislature may amend the plan provided that any amendments survive a test of reasonableness". Vesting was used in the sense that the employees had not met the eligibility standards for retirement. Both Mullett and Gainer recognized, however, that where the pension was actually vested, then legislative amendments could not reduce

the pension benefits. Gainer stated "[i]t is also clear that any alterations to the pension system can only affect the rights of active members . . . ." 167 W. Va. at 152, 279 S.E.2d at 644. In Gainer, we summarized this principle, stating that ". . . courts have been willing . . . [to allow] . . . amendments to pension plans affecting non-retired, participating employees if the amendments are reasonable." 167 W. Va. at 151, 279 S.E.2d at 644. In Mullett, we quoted from Campbell v. Michigan Judges Retirement Board, 378 Mich. 169, 143 N.W.2d 755 (1966):

> The Campbell court explained in terms of contract law the effect of retirement on the appellant judges: "When they so retired and ceased to be members of the system, their contract was completely executed and their rights thereunder became vested." 143 N.W.2d at 757. Based on the vesting of the judges' contractual rights, those rights "could not, thereafter, be diminished or impaired by legislative change of the judges retirement statute."

186 W. Va. at 493, 413 S.E.2d at 148.

This same distinction exists in other jurisdictions between legislative alteration which affects a vested pension and one which is not completely vested because the employee has not met all of the eligibility requirements of the pension plan. The California Supreme Court in Allen v. Board of Administration of Public Employees' Retirement System, 34 Cal.3d 114, 120, 665 P.2d

534, 538, 192 Cal.Rptr. 762, 766 (1993), expressed this matter as follows:

> A constitutional bar against the destruction of such vested contractual pension rights, however, does not absolutely prohibit their modification. With respect to active employees, we have held that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages. As to retired employees, the scope of continuing governmental power may be more restricted, the retiree being entitled to the fulfillment of the contract which he already has performed without detrimental modification. (Citations omitted).

Similarly, the Florida Supreme Court in Florida Sheriffs Association v. Department of Administration, 408 So.2d 1033, 1036 (Fla. 1981), made this summary of its pension law:

> Although, by the foregoing decisions, this Court has stated that the legislature can alter retirement benefits of active employees, the Court has also expressly held that, whether in a voluntary or mandatory plan, once a participating member reaches retirement status, the benefits under the terms of the act in effect at the time of the employee's retirement vest. The contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments. (Citations omitted).

See also, Burlington Fire Fighters' Association v. Burlington, 543 A.2d 686 (Vt. 1988).

What emerges from our case law is essentially a two-tier test for modification of a public employees' pension plan. The first and most protected tier includes those public employees who have either retired or have met the eligibility standards for retirement. As to those individuals, any legislative amendment which reduces their retirement rights or benefits is unconstitutional because it violates the impairment of contract clause of both the federal and our state constitution.

In the second tier are those public employees who are in a retirement system but have not met the eligibility standards to actually retire. They still possess a property or contract interest in their pensions system. However, the Legislature may make amendments to the retirement system but such amendments must meet the following standard: It must be shown that a substantial public interest dictates the need for the amendments. Moreover, the amendments must be reasonable in the sense that they will promote

[2]The federal prohibition against impairment of contracts is found in Article 1, Section 10 of the United States Constitution, which states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." In Article III, Section 4 of the West Virginia Constitution, a similar provision is found: "No . . . law impairing the obligation of a contract, shall be passed."

the flexibility and fiscal soundness of the system and will not unduly burden the employees' pension rights.

While both Wagner and Gainer referred to the constitutional impairment of contract principle in discussing the pension questions, they did not attempt any detailed discussion of this doctrine. We made a more thorough analysis in Shell v. Metropolitan Life Insurance Company, 181 W. Va. 16, 380 S.E.2d 183 (1989), where we reiterated this key element of the doctrine of impairment contracts in syllabus point 4:

> In determining whether a Contract Clause violation has occurred, a three-step test is utilized. The initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the pubic purpose justifying the legislation' adoption.

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[3]Syllabus points 2 and 3 of Shell state:

> 2. "The clauses of the Constitution of the United States and the Constitution of West Virginia which forbid the passage of a law impairing the obligation of a contract are not applicable to a statute enacted prior to the making of a contract." Syllabus Point 1, in

It is apparent that the fourth syllabus of Shell is analogous to syllabus point 17 of Dadisman, which has been earlier set out. Dadisman established the standard of when legislative amendments to a public pension system may be constitutionally permissible.

In State ex rel. Dadisman v. Caperton, 186 W. Va. 627, 413 S.E.2d 684 (1991), we relied on syllabus point 4 of Shell to sustain an amendment to PERS (the Public Employees Retirement System) which eliminated, for most accounting purposes, the distinction between the State division of PERS and the non-state division. It was claimed that the removal of this accounting distinction would impair the liquidity of the state component of PERS. We found that this accounting change had not changed the basic structure of PERS and concluded that there had been no substantial impairment of contract rights.

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part, Devon Corp. v. Miller, 167 W. Va. 362, 280 S.E.2d 108 (1981), cert. denied 455 U.S. 993, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982).

3. Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.

[4]Under W. Va. Code, 5-10-2 and 5-10-16, PERS covers not only State employees, but also any political subdivision which elects to participate in PERS.

The majority mentions the impairment of contract clause of the West Virginia Constitution in its opinion. However, it neither cites Shell nor makes any attempt to discuss the law surrounding the doctrine of impairment of contract. As we pointed out in syllabus point 1 of Shell, our impairment of contract doctrine is patterned after the federal doctrine, which is contained in Article 1, Section 10 of the United States Constitution. Moreover, as we pointed out in syllabus point 3 of Shell, which was based on United States Supreme Court cases, this doctrine is not an absolute bar to legislative modification of a contract. It forbids a substantial modification. The majority completely avoids any analysis of this doctrine although it states this doctrine controls the constitutionality of the legislative amendments in this case.

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[5]Syllabus point 1 of Shell, supra, states:

> In construing our state constitutional provision prohibiting any "law impairing the obligation of a contract," W. Va. Const. art. III, § 4, we have generally accepted the United States Supreme Court's interpretation of the similar provision contained in Article I, Section 10, Clause 1 of the United States Constitution.

[6]For syllabus point 3 of Shell see note 3, supra.

The ultimate paradox in the majority's opinion is that, after endless hortatory discussions of the inviolability of employee pension rights, the majority then proceeds to find constitutional two of the three amendments made to the State Police Pension Fund which reduced the petitioners' benefits. If the majority had followed our existing pension law and applied our doctrine of impairment of contract, it would have had a rational basis to achieve its result. Instead, it has created the illusion of the sanctity of pension rights and in the end found that the rights could be altered by legislative amendments.

Indeed, under our existing pension law, I believe that the four petitioners in this case are entitled to greater protection of their pension rights than the majority extends. The respondents do not dispute that the four petitioners have at least twenty years of actual service with the Department, but less than twenty-five years. We are not informed of their ages. Under W. Va. Code, 15-2-27(b), a State trooper with twenty years of service, but less than twenty-five, can retire. The only proviso under this section is that such individual does not receive a pension check until he reaches age fifty. However, I believe that under our old pension

[7]The applicable provisions of W. Va. Code, 15-2-27(b), are:

law, these individuals were sufficiently vested and that they were protected against any adverse change to their pension. Thus, this amendment which increased their contribution to the pension fund from 6% to 7-1/2% on July 1, 1994, and 9% as of July 1, 1995, would be an unconstitutional impairment of their contract. Even to those members who were not fully vested, I would deem that a 50% increase in contribution levels is a substantial change in the contribution levels. This would violate the standard of reasonableness set out in syllabus point 17 of Dadisman. The Pennsylvania Supreme Court,

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> The retirement board shall retire any member of the division of public safety who has lodged with the secretary of the consolidated public retirement board his or her voluntary petition in writing for retirement, and
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> . . .
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> (3) Being under the age of fifty years has or shall have completed twenty years of service as a member of the division (excluding military service credit granted under section twenty-eight of this article).
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> * * *
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> When a member has or shall have served twenty years or longer but less than twenty-five years as a member of the division and shall be retired under any of the provisions of this section before he or she shall have

attained the age of fifty years, payment of monthly installments of the amount of retirement award to such member shall commence on the date he or she attains the age of fifty years.

in two cases, has found that much more modest increases in employee contributions were an unconstitutional impairment of contract. See Pennsylvania Federation of Teachers v. School District of Philadelphia, 506 Pa. 196, 484 A.2d 751 (1984), and Association of Pennsylvania State College and University Faculties v. State System of Higher Education, 505 Pa. 369, 479 A.2d 962 (1984).

The majority, in apparent defiance of its syllabus point 19, and using what I consider to be a clever ruse, finds that because the Legislature gave all public employees a $1,008.00 pay increase and made some minor adjustments to the trooper pension fund, it has extended a sufficient gain to render the increase in contributions constitutionally permissible.

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[8]The majority's syllabus point 19 states:

> The pension rights of all current state pension plan members who have substantially relied to their detriment cannot be detrimentally altered at all, and any alterations to keep the trust fund solvent must be directed to the infusion of additional money. "Detrimentally alter" means the legislature cannot reduce the existing benefits (including such things as medical coverage) of the pension plan or raise the contribution level without giving the employee sufficient money to pay the higher contribution. Should the legislature seek to reduce certain advantages of a pension plan, it must offer equal benefits in their place as just compensation.

[9]See the majority's note 24.

In this same vein, I find the majority's syllabus point 22 to be fraught with the potential for abuse, as it allows the Legislature to virtually annul every pay raise by diverting it into the employees pension fund by increasing the employee's percent of contributions to the fund.

There are other syllabus points which are equally troublesome to me. For example, syllabus point 20 suggests that ". . . the State may buy out the employee's contract property rights." This can be done on a unilateral basis unless the employee

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[10]Syllabus point 22 states:

> The legislature may increase a public employee's salary contribution to a pension plan if it gives a corresponding raise in salary or other benefits [sic] that offsets the public employee's increased contributions to the system. To be valid under W. Va. Const. Art. III, § 4, the additional salary or other benefits must at least cover the public employee's extra contribution to the system.

[11]I have no quarrel with the majority's analysis of the judges' pay increase and increased pension contributions. There was a substantial increase beyond the amount taken for the increased contributions with an appropriate legislative funding in the pay bill. The $1,008.00 general pay increase had no such finding, and if a trooper earns $30,000.00 or more a year, there is really no pay increase.

[12]Syllabus point 20 states:

> Until an employee becomes eligible to

has reached some level of reliance interest in the pension. However, the syllabus concludes that this "can be determined only on a case-by-case basis by the legislature and the courts." It is obvious to me that such a nebulous right, if exercised by the State on a unilateral basis, would incur an immediate constitutional challenge as violating the impairment of contract clause. The case-by-case determinations would obviously entangle the courts in endless pension litigation. I do not believe that the scheme proposed in syllabus point 20 does anything for those "who work for this State as troopers, secretaries and janitors and whose expertise is not in the law", of whom the majority is so solicitous. I suggest it

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> draw a pension, his or her benefits can be determined on an actuarial basis, and until such time as the employee's reliance interest is so strong as effectively to preclude all other options, the State may buy out the employee's contract property rights. At some point, however, the worker has chosen to remain in public employment for such a substantial part of his or her life that the State can no longer purchase the employee's pension rights without the acquiescence of the employee. At what point in an employee's career it is no longer equitable for the State to buy back the employee's contract rights on a sound actuarial basis without confounding principles forbidding the impairment of contracts can be determined only on a case-by- case basis by the legislature and the courts.

would confound and confuse these people and result in their incurring needless legal expenses.

This same concern exists with regard to the majority's syllabus point 21, where ". . . the employee acquiesces in the change to the pension plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits." Who will be the great vizier that will make this decision for employees?

What the majority's opinion has done is to create a vast Gordian knot in our pension law which will confound our public officials and our courts. If ever there was a reason for the doctrine of stare decisis, this case is a shining example for its application.

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[13]Syllabus point 21 states:

> Although the legislature may augment pension property rights, the legislature cannot simply reduce a participating employee's pension property rights once it establishes the system unless the employee acquiesces in the change to the pension plan or unless the employee has so few years in the system that he or she has not detrimentally relied on promised pension benefits.

[14]The doctrine of stare decisis was discussed at some length in In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113, 118 (1947):

Not only has the majority confounded our existing pension law, but in the process has enabled the State to obtain greater flexibility to alter employee pension rights.

For the reasons stated, I dissent in part and concur in part.

> The doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.
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> [W]e are of the opinion that, where property or other substantial rights have been acquired on the strength of court decisions, and where to overrule such decisions would create confusion and lead to litigation . . . the doctrine should be applied. (Emphasis added.)

See also, Oakley v. Gainer, 175 W. Va. 115, 123, 331 S.E.2d 846, 854 (1985).

[15]My only concurrence with the majority is its holding that application of the accrued vacation and sick leave provision under the Public Employees Insurance Act, W. Va. Code, 5-16-13(e), to enhance a retiree's credited service under W. Va. Code, 15-2-27, was improper.