

Title VII and the Use of Sex-Based Actuarial Tables in Annuity Pension Plans: *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*¹

— Congress enacted Title VII of the Civil Rights Act of 1964² as part of a comprehensive national endeavor to correct racial and sexual discrimination in employment opportunities.³ Title VII prohibits employers from making employment decisions based on an individual's sex.⁴ Under the statute, individual attributes, rather than group characteristics, must be relied upon in deciding when to hire and in determining compensation and other terms and conditions of employment.⁵ In spite of this legislation designed to prohibit classifications which differentiate between males and females,⁶ insurance companies universally use sex-based mortality tables⁷ to determine annuity premiums and payouts.⁸ Such reliance on group characteristics, though statistically valid⁹ and invaluable to the insurance industry,¹⁰ is contrary to the principles of Title VII.¹¹

The conflict between the insurance industry's practices and the policies underlying Title VII is clearly evidenced by the use of annuities in employer-operated pension plans.¹² These plans are based on actuarial tables which show that the average woman lives longer than the average man.¹³ Because of their longer life expectancy, women must either make larger contributions to the annuity fund or receive smaller periodic benefits from the fund than their male counterparts.¹⁴ The justification behind this unequal treatment is that it permits benefits to be paid to women over their longer average life

¹ 103 S. Ct. 3492 (1983).

² 42 U.S.C. § 2000e (1982).

³ *Id.* H.R. REP. NO. 914, 88th Cong., 2d Sess. 9, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401.

⁴ The statute provides in pertinent part: "It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1) (1982).

⁵ "The statute's focus on the individual is unambiguous." *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978).

⁶ The statute provides in pertinent part:

It shall be an unlawful employment practice for an employer — . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(2) (1982).

⁷ A mortality table calculates life expectancy through "a series of estimates based on past experience and adjusted for changes expected in the future as well as for needed safety margins." J. ATHEARN, *RISK AND INSURANCE* 502 (1969) [hereinafter cited as ATHEARN].

⁸ Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U. L. REV. 624, 625 (1973) [hereinafter cited as Note, *Sex Discrimination*].

⁹ Note, *The End of Sex Discrimination in Employer-Operated Pension Plans: The Challenge of the Manhart Case*, 1979 DUKE L.J. 682 (1979) [hereinafter cited as Note, *The End of Sex Discrimination*].

¹⁰ Note, *Sex Discrimination*, *supra* note 8, at 626.

¹¹ Note, *The End of Sex Discrimination*, *supra* note 9, at 683.

¹² A pension plan "is a plan established by an employer which pays predetermined benefits to those of his employees who become eligible on retirement to participate. It may be self-funded or purchased from an insurance company." Note, *Sex Discrimination*, *supra* note 8, at 628 n.23.

¹³ *Id.* at 627.

¹⁴ Note, *The End of Sex Discrimination*, *supra* note 9, at 683. The underlying principle of annuities is that "the fund from which annuitants are paid should not be exhausted until the last annuitant covered by the fund dies." *EEOC v. Colby College*, 439 F. Supp. 631, 634 (S.D. Me. 1977), *rev'd on other grounds*, 589 F.2d 1139, 1146 (1st Cir. 1978).

expectancy without exhausting the annuity fund.¹⁵ In 1978, in *Los Angeles Department of Water and Power v. Manhart*,¹⁶ the United States Supreme Court considered for the first time the apparent disparate treatment of men and women under pension plans.¹⁷ In *Manhart*, the Court held that requiring women to make monthly contributions to an employer-operated retirement plan which were higher than those contributions made by male employees violated Title VII because similarly situated females were treated differently than males.¹⁸ The *Manhart* Court did not reach the question of whether Title VII was violated when female employees received post-retirement annuity payments which were smaller than the payments received by men in the same program.¹⁹ In 1983, however, the Court, in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*,²⁰ employed the reasoning of *Manhart* and held that such a retirement plan violated Title VII.²¹ The *Norris* Court delegated to the employer the responsibility of making sure that annuity plans offered by insurance companies are not run on a sex-distinct basis.²²

Beginning in 1974, the state of Arizona offered a voluntary deferred compensation plan to its employees which allowed them to postpone receipt of a portion of their compensation until retirement.²³ After inviting private insurance companies to submit bids outlining the investment opportunities they were willing to offer Arizona employees, the state selected a number of companies to participate in the retirement plan.²⁴ Several of

¹⁵ Note, *The End of Sex Discrimination*, *supra* note 9, at 683. While life insurance focuses on the needs of others, for instance, a widow and children left behind, pension and annuity plans focus on the future needs of the insured. Note, *Sex Discrimination*, *supra* note 8, at 628. The annuity serves to distribute the insured's money so as to last throughout his or her life. *Id.* at 628 n.27. An individual's knowledge about his or her general health, lifestyle and longevity expectations bear directly on the choice of life insurance. *Id.* at 628-29. "Only those who feel their prospects for long life are good are willing to make the substantial payments necessary for retirement annuities." *Id.* at 629 n.31.

¹⁶ 435 U.S. 702 (1978).

¹⁷ *Id.*

¹⁸ *Id.* at 717. In *Manhart*, female employees were required to contribute 14.84% more than similarly situated male employees. *Id.* at 705. Thus, their take-home pay was less. *Id.*

¹⁹ Nor did the Court discuss the possibility that the retirement plan was only offered by the employer as one of several retirement plans and not operated by him. See generally Hatch, *Calculating Annuity Payments in a Retirement Plan Based on Sex-Distinct Mortality Tables — Norris v. Arizona: Is Manhart Controlling?* 18 FORUM 539 (1983) [hereinafter cited as Hatch] (where the commentator provides a background of the annuity pension plan cases and notes the distinction between those cases in which the employer only offered the plans and those in which the employer operated the discriminatory plans).

²⁰ 103 S. Ct. 3492 (1983).

²¹ *Id.* at 3501.

²² *Id.*

²³ *Id.* at 3494. The deferred compensation plan was administered by the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans. *Id.* Arizona's plan was approved by the Internal Revenue Service in 1974. *Id.* at 3494 n.1. During the accumulation phase of the plan, employees were "free to choose from a wide variety of investments selected by the Governing Committee into which their deferred compensation could be directed, including savings accounts, mutual funds, life insurance, or annuities." Petitioner's Brief at 4, *Arizona v. Norris*, 103 S. Ct. 3492 (1983).

²⁴ *Id.* at 3494. Employees were required to choose one of the companies selected by the state to participate in the plan; they were not free to invest their deferred compensation in any other way. *Id.* The companies chosen by Arizona included Lincoln National Life Insurance Company, National Investors Life Insurance Company, Valley National Bank of America, Variable Annuity Life Insurance Company, the Hartford Insurance Company, ITT Life Insurance Corp., Keystone B4 Mutual Fund, and the Arizona State Employees Credit Union. Petitioner's Brief at 4.

the companies selected allowed employees to elect to receive their retirement benefits in one of three ways:²⁵ a lump-sum payment, periodic payments of a fixed sum for a specific time, or monthly annuity payments paid out over the remainder of the employee's life by an independent insurance company.²⁶ Many employees found the voluntary annuity alternative to be the most attractive option, because the receipt of a lump sum upon retirement required immediate payment of taxes on the entire amount,²⁷ and the receipt of a fixed sum for a specified period required an employee to speculate as to how long he or she would live.²⁸ The purchase of a life annuity solved both of these problems because it reduced an employee's tax liability by spreading the payments out over time, while at the same time guaranteeing that the employee would receive a constant stream of payments for life.²⁹ As the employer, the state bore the costs of making the necessary payroll deductions and was responsible for withholding the appropriate sums from the employee's wages and channeling those sums to an insurance company designated by the employee.³⁰

The amount of the monthly benefits for an employee who elected to receive the retirement annuity depended on the amount of compensation deferred, the employee's age at retirement, and the employee's sex.³¹ All of the companies that underwrote the life annuities³² used sex-based mortality tables to calculate monthly annuity benefits.³³ Because women, on average, live longer than men,³⁴ these pension plans paid out larger monthly payments to men than to women even if the men and women had deferred the same amount of compensation and retired at the same age.³⁵ By making smaller payments to women, the companies were able to satisfy the underlying principles of annuities — to continue distributing the insured's payments for the duration of his or her life.³⁶

On May 3, 1975, Nathalie Norris, an employee of the Arizona Department of Economic Security,³⁷ chose to participate in a deferred compensation plan.³⁸ She elected to invest her deferred compensation in the Lincoln National Life Insurance Company's fixed annuity contract.³⁹ A short time later, Norris filed charges with the Equal Employ-

²⁵ *Norris*, 103 S. Ct. at 3494. Receipt of the annuity benefits is referred to as the "payout" phase. Petitioner's Brief at 5.

²⁶ 103 S. Ct. at 3494. "At the time an employee enrolls in the plan, he may also select one of the payout options offered by the company that he has chosen, but when he reaches retirement age he is free to switch to one of the company's other options." *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 3505 (Powell, J., dissenting). "To achieve tax benefits under federal law, the life annuity must be purchased by a company designated by the retirement plan." *Id.* Out of 681 women participating in the deferred compensation plan 572 chose some form of annuity option. *Id.* at 3495.

³⁰ *Id.* at 3494. The state did not contribute any monies, however, to supplement the employee's deferred wages. *Id.*

³¹ *Id.* at 3494-95.

³² For a list of some of those companies which underwrote the life annuities, see *supra* note 24.

³³ *Norris*, 103 S. Ct. at 3495. "Sex is the only factor that the tables use to classify individuals of the same age; the tables do not incorporate other factors correlating with longevity such as smoking habits, alcohol consumption, weight, medical history, or family history." *Id.* The vast majority of private insurers in the United States use sex-based mortality tables to calculate monthly annuity benefits. *Id.* at 3505 (Powell, J., dissenting).

³⁴ *Id.* at 3495.

³⁵ *Id.*

³⁶ See *supra* notes 14-15.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

ment Opportunity Commission ("EEOC" or "Commission"),⁴⁰ complaining that the plan was not administered equally to male and female employees.⁴¹ She received no redress, however, from administrative remedies.⁴² On April 25, 1978, Norris⁴³ filed suit in the United States District Court for the District of Arizona against the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Arizona").⁴⁴ The complaint alleged that the differentiation in monthly benefits received by men and women under the state-offered annuity plan was a violation of Title VII and of the fourteenth amendment to the United States Constitution.⁴⁵

The district court granted summary judgment for Norris.⁴⁶ The court began its analysis by holding that the employees' participation in the plan was a benefit and privilege of employment under the Civil Rights Act, even though the participation was voluntary.⁴⁷ Relying extensively on the Supreme Court's decision in *Manhart*, the court further held that the state's deferred compensation plan was sexually discriminatory and, therefore, violated Title VII.⁴⁸ The court reiterated *Manhart's* premise that employers could not avoid their responsibilities by delegating discriminatory programs to corporate shells.⁴⁹ Accordingly, because "male and female employees must be treated equally by an employer,"⁵⁰ the court stated that pension plans based on discriminatory mortality tables were impermissible.⁵¹ The district court permanently enjoined Arizona from carrying out its obligations under the deferred compensation plan by using sex-based actuarial tables and directed that the amount of future annuity payments to retired female employees be equal to the sum received by similarly situated male employees.⁵²

Arizona appealed the district court's summary judgment to the United States Court

⁴⁰ The EEOC is an administrative agency responsible for ensuring compliance with Title VII. 29 C.F.R. §§ 1604.8(b) and (c) (1984). See generally Note, *The End of Sex Discrimination*, *supra* note 9 (for a good description of the EEOC's responsibilities).

⁴¹ Petitioner's Brief at 6.

⁴² *Norris v. Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans*, 486 F. Supp. 645, 647 (D. Ariz. 1980), *aff'd*, 671 F.2d 330 (9th Cir. 1982), *aff'd*, 103 S. Ct. 3492 (1983).

⁴³ Plaintiff Norris filed suit on behalf of herself and the class of females now or in the future enrolled in the deferred compensation plan. *Norris*, 486 F. Supp. at 647. The district court approved this action as meeting all the requirements for certification of a class action pursuant to Fed. R. Civ. P. 23. *Id.* at 651.

⁴⁴ *Norris*, 103 S. Ct. at 3495.

⁴⁵ Petitioner's Brief at 6. The district court relied on *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), in dismissing Norris' fourteenth amendment equal protection claim. *Norris*, 486 F. Supp. at 651. The court stated, "there must be a purposeful discrimination shown before the statute or the program would be found to be offensive to the equal protection clause [I]t is clear that [the] classification [treating females differently than similarly situated males] was not made by the defendants but rather are the results of the insurers' judgment." *Id.* at 651. Respondent did not cross-appeal from this ruling. *Norris*, 103 S. Ct. at 3495 n.4.

⁴⁶ *Norris*, 486 F. Supp. at 652.

⁴⁷ *Id.* at 649. The *Norris* district court stated that "[i]t is unrealistic and illogical to accept the proposition that because a female has the option not to participate that she is not being discriminated against." *Id.*

⁴⁸ *Id.* at 652.

⁴⁹ *Id.* at 650.

⁵⁰ *Id.* at 652.

⁵¹ *Id.*

⁵² *Id.*

of Appeals for the Ninth Circuit.⁵³ On appeal, Arizona argued that the use of sex-based mortality tables was vital to the insurance business⁵⁴ and that Title VII should not be construed to prohibit employers from offering life annuity contracts from private insurers.⁵⁵ Rejecting the state's claim that the lower court had interfered with the insurance business, the court of appeals affirmed the judgment of the district court.⁵⁶ The court held that the district court had neither construed Title VII to supersede Arizona's laws regulating insurance companies,⁵⁷ nor prohibited insurance companies from using sex-segregated annuity payments.⁵⁸ Title VII, the appeals court stated, "governs the relationship between employees and their employer, not between employees and third parties."⁵⁹ The court rejected Arizona's claim that Norris' recovery should be precluded because the employer did not take an active role in discriminating against women.⁶⁰ Relying on *Manhart*, the court of appeals stated that Norris was not required to prove that Arizona intended to discriminate against women to be successful in her Title VII action.⁶¹ The court explained that the Supreme Court in *Manhart* had required no affirmative showing of intent when it held that Title VII was violated because similarly situated females were treated differently than males in an employer-operated retirement plan.⁶² Instead, the court continued, *Manhart* had focused on whether Title VII prohibited the disparate treatment under the pension fund.⁶³ According to the court of appeals, the state of Arizona specifically adopted the discriminatory plan as one of the options available to its employees, and, therefore, the state violated Title VII.⁶⁴

Arizona then filed a petition for certiorari with the United States Supreme Court,⁶⁵ which the Court granted.⁶⁶ In a five-to-four decision,⁶⁷ the Court affirmed the court of

⁵³ *Norris v. Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans*, 671 F.2d 330, 331 (9th Cir. 1982), *aff'd*, 103 S. Ct. 3492 (1983).

⁵⁴ 671 F.2d at 333.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* The appeals court commented on the district court's opinion: "All the court has done is tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man. As *Manhart* noted, Title VII says nothing about the situation in which a woman takes her money and chooses to purchase an annuity plan using sex-based tables." *Id.*

⁵⁹ *Id.* (citing *Manhart*, 435 U.S. at 718 n.33).

⁶⁰ *Id.* at 334. The Court held that this "control" aspect of the pension plan was "illusory." *Id.* The Court stated: "[The] adoption of the plan constitutes active participation without which the challenged program could not operate." *Id.*

⁶¹ *Id.* at 333. Arizona argued that "it did not intend to discriminate because it offered the plan in spite of, not because of, the actuarial difference for women." *Id.*

⁶² *Id.* The court of appeals also relied on *Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973), and *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), to dismiss the alleged intent requirement. *Id.* at 334. The appeals court said, "this circuit has held that facially discriminatory practices are intentional discrimination for the purposes of Title VII regardless of the subjective motivation." *Id.*

⁶³ *Id.* at 333.

⁶⁴ *Id.* at 335. The court rejected Arizona's argument that the plan fell within *Manhart*'s open-market exception because the limits existing in the marketplace and the availability of nondiscriminatory options did not justify Arizona's affirmative action in offering the discriminatory plan. *Id.* The appeals court also found the district court award of retroactive relief to be proper as authorized by *Manhart*. *Id.* at 336. The court stated that *Manhart* "allowed recovery in substantially similar circumstances." *Id.*

⁶⁵ 103 S. Ct. 3493 (1983).

⁶⁶ *Id.*

⁶⁷ *Id.* Justice Marshall delivered the opinion of the Court as to the substantive question of a Title

appeals' decision, holding that the Arizona deferred compensation plan constituted discrimination on the basis of sex in violation of Title VII.⁶⁸ The Court held that since the state was ultimately responsible for privileges of employment provided to employees, its adoption of an annuity scheme that discriminated on the basis of sex was illegal.⁶⁹

The significance of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris* lies in the Supreme Court's application of the standard it articulated in *Los Angeles Department of Water and Power v. Manhart* to optional annuity pension plans and in its apparent challenge to basic, standardized principles of the independent insurance industry. The majority decision upheld Norris' argument that the differential in monthly payments constituted illegal discrimination by her employer, even though the payments were made by independent insurance carriers and not the state.⁷⁰ From the majority opinion it follows that the real wrong committed in *Norris* was the use of allegedly discriminatory actuarial tables. It is submitted that the employer was held responsible because Title VII only applies to the relationship between employer and employee and, more importantly, because the employer offered the option of annuity benefits. But the *Norris* decision is really an attack on the insurance industry practice of using sex-based mortality tables which, though statistically sound, treat similarly situated men and women differently. Because Title VII did not reach independent insurers, the Supreme Court did not consider whether a woman purchasing her own annuities in the open market, subject to the same sex-distinct tables, was the victim of unlawful discrimination. The *Norris* majority used Title VII to imply that the real wrongdoers were the insurance companies and that changes in their mortality tables were imperative to the preservation of a "sex-neutral" society.

This casenote will consider the Supreme Court's decision in *Norris* in the context of lower federal court pension plan decisions which preceded *Norris* and the goals of Title VII. The first section of the casenote will discuss the background of Title VII of the Civil Rights Act and the purposes behind this legislation.⁷¹ The Supreme Court's decision in *Manhart*, the first case to evaluate the validity of a pension plan using as a standard the Title VII emphasis on the individual, will be examined.⁷² Other federal court cases dealing with this conflict will also be surveyed.⁷³ Next, the second section of the casenote will examine the Supreme Court's opinion in *Norris*.⁷⁴ The third part of the casenote will then discuss the Supreme Court's analysis in *Norris* by considering three major weaknesses in the Court's opinion which caused it to apply *Manhart*, a limited decision, to the facts of *Norris*.⁷⁵ First, the analysis will examine Arizona's lack of control over the independent insurers who administered the annuity plans and made use of sex-based actuarial tables.⁷⁶

VII violation in which Justices Brennan, White, and Stevens joined and Justice O'Connor concurred. *Id.* Justice Powell wrote a dissenting opinion, in which Chief Justice Burger, and Justices Blackmun and Rehnquist joined. *Id.* As to the issue of remedy, Justice O'Connor concurred with Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist, to form a plurality denying retroactive relief. *Id.*

⁶⁸ *Id.* at 3501-02. The Supreme Court rejected respondent's request for retroactive relief and granted prospective relief only. *Id.* at 3509-10 (Powell, J., dissenting).

⁶⁹ *Id.*

⁷⁰ *Id.* at 3501.

⁷¹ See *infra* text accompanying notes 85-94.

⁷² See *infra* text accompanying notes 95-111.

⁷³ See *infra* text accompanying notes 112-57.

⁷⁴ See *infra* text accompanying notes 158-275.

⁷⁵ See *infra* text accompanying notes 276-377.

⁷⁶ See *infra* text accompanying notes 285-328.

It will be submitted that the Court was in error in implying an agency relationship between the employer and the insurance companies to hold the employer responsible under Title VII.⁷⁷ In addition, this analysis will discuss Arizona's inability to affect conditions in the marketplace for insurance policies.⁷⁸ This section of the casenote will assert that the *Norris* pension plan falls squarely within the "open-market" exception created in *Manhart*, which lawfully permitted employees to purchase the largest benefit their pension contributions could command on the open market, and should, therefore, have precluded respondent *Norris*' recovery.⁷⁹ The second part of the casenote analysis will demonstrate that the *Norris* Court was wrong to disregard Arizona's contention that the freedom of choice the state offered in its pension plan should have been a critical factor in determining the state's liability.⁸⁰ It is submitted that the Court dismissed that contention in an inapplicable footnote and inappropriately relied on *Manhart*, where the employer had much more control over the employees' choice of a pension plan than the *Norris* employer.⁸¹ The third part of the analysis section will contend that the *Norris* Court erred in relying on *Manhart* by not requiring Title VII plaintiffs to prove discriminatory intent,⁸² because proof of discriminatory motive is critical in Title VII actions.⁸³ Finally, the discussion shows that the effect of the Supreme Court's opinion in *Norris* is to suggest a complete restructuring of insurance industry practices. Since the Court used Title VII as a crutch to hold an employer liable for discriminatory practices of private insurance companies, it is submitted that the Court's analysis implies that sex-based annuity plans are, by themselves, illegal.⁸⁴

I. BACKGROUND AND DEVELOPMENT OF TITLE VII CHALLENGES TO PENSION PLANS

Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities and to do away with employment practices which have disadvantaged both minorities and women.⁸⁵ One exception to this legislation, the Bennett Amendment,⁸⁶ provides that a compensation differential based on sex is lawful under Title VII if it is authorized by the Equal Pay Act.⁸⁷ The Equal Pay Act, which requires equal pay to men and women for equal work, permits a wage differential in four excepted instances.⁸⁸ The fourth exception authorizes the employer to establish a procedure for

⁷⁷ See *infra* text accompanying notes 289-306.

⁷⁸ See *infra* text accompanying notes 307-28.

⁷⁹ See *infra* text accompanying notes 324-28.

⁸⁰ See *infra* text accompanying notes 329-50.

⁸¹ See *infra* text accompanying notes 329-50.

⁸² See *infra* text accompanying notes 351-77.

⁸³ See *infra* text accompanying notes 351-77.

⁸⁴ See *infra* text following note 377.

⁸⁵ Note, *The End of Sex Discrimination*, *supra* note 9, at 684.

⁸⁶ The Bennett Amendment provides in pertinent part:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 (The Fair Labor Standards Act of 1938).

42 U.S.C. § 2000e-2(h) (1982).

⁸⁷ 29 U.S.C. § 206(d)(1) (1982).

⁸⁸ *Id.* The Equal Pay Act provides in pertinent part:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying

unequal pay if the differential in wages is based "on any other factor other than sex."⁸⁹

A number of judicial decisions have considered whether the use of sex-based annuities in employer-operated pension plans violates Title VII.⁹⁰ The issue in pension plan cases is whether sex-based actuarial tables are factors "other than sex" for the purpose of the Equal Pay Act and, therefore, nondiscriminatory under Title VII.⁹¹ Defendant-employers have argued that longevity is a factor based on sound statistical evidence of the relative life expectancies of men and women and takes into account not only sex but other social factors.⁹² Plaintiff-employees, however, have contended that when an employer offers a pension plan incorporating sex-based mortality tables, the language of Title VII, which focuses on the individual employee,⁹³ is undermined.⁹⁴

The Supreme Court first considered the conflict between Title VII's attention to the individual and the insurance industry's practice of grouping by sex in *City of Los Angeles Department of Water and Power v. Manhart*.⁹⁵ In *Manhart*, female employees attacked the city's pension plan requirement that females contribute more money during their employment than their male counterparts to receive equal periodic benefits upon retirement.⁹⁶ The Court held that those larger contributions could no longer be required.⁹⁷ Although the Court recognized that the classification at issue was based on an accurate generalization that women, as a class, do live longer than men,⁹⁸ and thereby draw annuity benefits for longer periods, the Court noted that Title VII's "focus on the individual is unambiguous."⁹⁹ According to the Court, the statute precludes treatment of employees as mere members of a sexual class.¹⁰⁰ The Court stated that the pension plan, by requiring

wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex

Id.

⁸⁹ *Id.* One example where the Supreme Court permitted a compensation differential due to a "factor other than sex" was in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Supreme Court held that pregnancy was a physical condition that constituted a factor other than sex for the purposes of Title VII and the Equal Pay Act. *Id.* at 145. Hence, the non-inclusion of pregnancy in the employee's disability plan was nondiscriminatory. *Id.* at 145-46.

See also *Geldulig v. Aiello*, 417 U.S. 484 (1974) (no sex discrimination where employer offered a disability benefits plan which excluded pregnancy as a disability under the equal protection clause). *Id.* For a good discussion of the *Gilbert* decision as distinguished from *Manhart*, see Note, *The End of Sex Discrimination*, *supra* note 9.

⁹⁰ See *infra* text accompanying notes 95-157.

⁹¹ Note, *The End of Sex Discrimination*, *supra* note 9, at 684-85.

⁹² See, e.g., *Manhart*, 435 U.S. at 712.

⁹³ *Manhart*, 435 U.S. at 708. See *supra* notes 4-5 and accompanying text. It is unlawful under Title VII "to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1982)(emphasis added).

⁹⁴ Note, *The End of Sex Discrimination*, *supra* note 9, at 683.

⁹⁵ 435 U.S. at 710. Justice Stevens wrote the opinion of the Court. *Id.* at 704. He was joined by Justices Powell, Stewart, and White. *Id.* at 703. Justice Blackmun concurred in a separate opinion. *Id.* at 723. Justice Marshall concurred in part and dissented in part in a separate opinion. *Id.* at 728. Chief Justice Burger also concurred in part and dissented in part in an opinion joined by Justice Rehnquist. *Id.* at 725. Justice Brennan did not participate in the Court's decision. *Id.* at 723.

⁹⁶ *Id.* at 706.

⁹⁷ *Id.* at 711.

⁹⁸ *Id.* at 707.

⁹⁹ *Id.* at 708.

¹⁰⁰ *Id.*

women to make higher payments, had precisely that effect.¹⁰¹ In addition, the Court found that the actuarial distinctions used by the city were based entirely on sex and, therefore, did not qualify under the fourth exception to the Equal Pay Act.¹⁰² The *Manhart* Court concluded that a sex-based classification deprived women of compensation and, therefore, violated Title VII.¹⁰³

The *Manhart* Court expressly limited its holding in two ways. First, the Court stated that all that was at issue in the matter before it was whether "a requirement that men and women make unequal contributions to an employer-operated pension fund" was permissible.¹⁰⁴ While holding that this requirement violated Title VII, the Court qualified its holding by emphasizing that it was not suggesting that Title VII was "intended to revolutionize the insurance and pension industries."¹⁰⁵ An additional limit on the Supreme Court's holding in *Manhart* was the "open-market exception" articulated by the Court in that case.¹⁰⁶ Under Title VII, the Court stated, an employer could lawfully set aside equal retirement contributions for each employee and, following an employee's retirement, allow each retiree to "purchase the largest benefit which his or her accumulated contributions could command in the open market."¹⁰⁷ The *Manhart* Court did not expand on this open-market limitation by defining either the benefit that could be purchased by an employee or the contributions that would be set aside for each employee by the employer. In a footnote, however, the Court did reaffirm that Title VII applies only to the employer-employee relationship.¹⁰⁸ The Court suggested, therefore, that under its open-market exception, if an employee uses the pension benefits set aside by his or her employer to deal directly with a third-party insurer and purchase the best policy available on the open market, no Title VII problem arises.¹⁰⁹

¹⁰¹ *Id.*

¹⁰² *Id.* at 712-13. The Court stated: "The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84% differential between the respective contribution by men and women . . . 'Sex is exactly what it is based on.'" *Id.* at 713-14 (quoting *Manhart v. City of Los Angeles, Department of Water and Power*, 553 F.2d 581, 588 (9th Cir. 1976)).

The *Manhart* Court rejected petitioner's argument that Senator Humphrey's comments on the Bennett Amendment during the debate on the Civil Rights Act of 1964 expressly allowed differences in the treatment of men and women in retirement options. *Manhart*, 435 U.S. at 713-14. Although the Court accepted the premise that Senator Humphrey "apparently assumed that the 1964 Act would have little, if any, impact on pension plans," *Id.* at 714, the *Manhart* majority stated that his "isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself." *Id.*

¹⁰³ *Id.* at 711.

¹⁰⁴ *Id.* at 717.

¹⁰⁵ *Id.* The *Manhart* decision has been construed to include only employer-operated plans with unequal contribution requirements as violative of Title VII. Hatch, *supra* note 19, at 542-43. "It is hardly possible to make a limitation any clearer. The decision means no more than that the Supreme Court has interpreted the Civil Rights Act of 1964 to forbid employee contribution schedules in employer-operated defined benefit plans that produce unequal take-home pay for similarly situated males and females." *Id.* In *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3566 (1983), the Sixth Circuit held that unequal receipt of payments spread over time or non-employer controlled pension plans do not violate the statute under *Manhart*. 691 F.2d at 240-41.

¹⁰⁶ See *Manhart*, 435 U.S. at 717-18.

¹⁰⁷ *Id.* at 717-18.

¹⁰⁸ *Id.* at 718 n.33.

¹⁰⁹ *Id.* The Court asserted, however, that an employer cannot avoid his responsibilities by

In denying retroactive relief to the plaintiffs in *Manhart*, the Court noted that since the case at bar was the first litigation challenging pension fund contribution differences based on valid actuarial tables, administrators of the program could have reasonably assumed that the tables justified the differentiation.¹¹⁰ Unless plainly commanded by legislative action, said the Court, the "drastic changes" that its decision could have on pension funds was enough to preclude retroactive recovery.¹¹¹

A majority of the federal courts considering attacks on pension plans subsequent to *Manhart* have given a broad application to the Supreme Court's reasoning in that case.¹¹² These courts did not view the *Manhart* Court's express language, restricting its holding only to the case of unequal contributions to an employer-operated pension fund, or the unsettled open-market exception articulated in that case, as limiting.¹¹³ Instead, these courts interpreted the *Manhart* decision as implying a strict requirement of equal periodic benefits for employees in a "defined-contribution" plan as well as equal contributions in a "defined-benefit" plan.¹¹⁴ The lower courts have interpreted *Manhart* as prohibiting sexual classification for all employment purposes under Title VII so that the extent of an employer's control over the administration of the pension plans has no bearing on the employer's responsibility of treating employees fairly and equally.¹¹⁵

The first federal court decision after *Manhart* to consider the duties of an employer under Title VII was the First Circuit Court of Appeals, in *EEOC v. Colby College*.¹¹⁶ There, Colby College, a private employer, made equal contributions for its employees¹¹⁷ to an

delegating discriminatory programs to corporate shells. *Id.* Other commentators have disagreed with the "open-market exception" interpretation that an employee may use his set-aside contributions to purchase sex-based annuities. Instead, commentators have stated the the *Manhart* Court adopted the EEOC position that sex-based mortality tables are "highly suspect" and "do not predict the length of any individual's life." Sher, *Sex Discrimination in Retirement Programs*, 16 FORUM 1174, 1179 (1981) (citing EEOC Decision No. 74-118). The EEOC position echoes the contrast between the Title VII emphasis on the individual and the group classifications inherent in the insurance system. The argument is that the tension is resolved in *Manhart* in favor of the focus on the individual but that the Court goes even further by condemning the entire actuarial system's use of sex-distinct standards. See, Note, *The End of Sex Discrimination*, *supra* note 9, at 683. Yet, a strong argument can be made that actuarial tables are risk-spreading devices that arise from an "economic recognition that it costs insurers more to accept that risk for females than it does for males." Hatch, *supra* note 19, at 545 (emphasis in original).

¹¹⁰ 435 U.S. at 720.

¹¹¹ *Id.* at 721.

¹¹² See *infra* text accompanying notes 113-45.

¹¹³ See *infra* text accompanying notes 129-33 and 141-43. See, e.g., *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978). There, the Court rejected the defendant-employer's contention that *Manhart's* language limited its holding to defined-benefit, employer-operated pension funds. *Id.* at 1145.

¹¹⁴ See *infra* notes 115-43 and accompanying text.

¹¹⁵ Commentators have also interpreted *Manhart* as condemning both defined-benefit plans (women make higher contributions than men but periodic post-retirement benefits are equal) as well as defined-contribution plans (equal contributions but men receive higher periodic benefits). See, e.g., Note, *The End of Sex Discrimination*, *supra* note 9, at 703; Bernstein & Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum*, 78 COLUM. L. REV. 1241, 1242 (1978). Because the *Manhart* Court "characterized both 'pension benefits, and the contributions that maintain them,' as compensation under Title VII . . . Title VII's condemnation of sex discrimination in an individual's compensation seems clearly to condemn disparate benefits." Bernstein & Williams at 1242, citing *Manhart* 435 U.S. at 712 n.23.

¹¹⁶ *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978).

¹¹⁷ *EEOC v. Colby College*, 439 F. Supp. 631, 633 (D. Me. 1977), *rev'd*, 589 F.2d 1139 (1st Cir. 1978).

independent third party insurer.¹¹⁸ Employee participation in the college's contributory pension plan with the Teachers Insurance Annuity Association ("TIAA")¹¹⁹ was mandatory.¹²⁰ The insurer issued individual annuity contracts in different amounts for men than for women directly to each employee.¹²¹ The Commission brought a Title VII suit against the college, alleging that the pension plan Colby College used was unlawful because women faculty members were discriminated against when they received lower annuity payments following their retirement.¹²² Holding that annuity plans utilizing statistically valid life expectancy tables are "factors other than sex" pursuant to the Equal Pay Act, which permits a differential in wages in that excepted instance,¹²³ the District Court for the Southern District of Maine granted summary judgment for defendant Colby College.¹²⁴ According to the court, since all similarly situated participants in the Colby College program paid an equal percentage of their salaries into the annuity fund, unlike the plaintiff-employees in *Manhart*, and Colby's contribution was identical for each employee, all employees received coverage having the same actuarial value.¹²⁵ The court asserted that *Manhart* was distinguishable both factually and as a matter of law from the Colby College situation, and the reasoning in that case was inapplicable.¹²⁶ The Commission appealed the district court's finding to the Court of Appeals for the First Circuit.¹²⁷ In reversing the district court's judgment, the circuit court held that Colby College had violated Title VII and could not be relieved of responsibility for TIAA's discriminatory program because the college required employee participation in the plan.¹²⁸ Further, the court rejected the lower court's assertion that the issues in *Manhart* were distinct from those in the *Colby College* case and instead found that the situations were comparable.¹²⁹ The court repeated *Manhart*'s statement that the focus of Title VII is on the individual¹³⁰ and stated that the thrust of *Manhart* envisaged a single, unisex rate that would pay for annuities for both men and women employees.¹³¹ In applying the *Manhart* reasoning to the pension plan under attack in *Colby College*, the court rejected the view that statistically valid sex-based actuarial tables are "factors other than sex" which should relieve Colby of liability, because no evidence was presented, according to the court, that any factor other

¹¹⁸ 439 F. Supp. at 633. The private insurers were the Teachers Insurance and Annuity Association ("TIAA") and the College Retirement Equities Fund ("CREF"). *Id.* Those corporations provide insurance and retirement plans for faculty and staff employed by institutions of higher education. *Peters*, 476 F. Supp. 1346.

¹¹⁹ *Colby College*, 589 F.2d at 1141. TIAA/CREF, as well as Colby College, were named as defendants in the suit. *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Colby College*, 439 F. Supp. 631, 636-37 (1977).

¹²⁴ *Id.* The district court relied on the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in determining that the Equal Pay Act must take precedence over the Commission's conflicting interpretation of Title VII because of the Bennett Amendment. *See supra* notes 85-89 and accompanying text.

¹²⁵ 439 F. Supp. at 634.

¹²⁶ *Id.* at 638.

¹²⁷ *Colby College*, 589 F.2d at 1142.

¹²⁸ *Id.* at 1144.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1145.

than employee's sex was taken into account in calculating the differentials in benefits.¹³² The *Colby College* court also noted, however, that it foresaw difficulties not addressed in *Manhart* because of the Court's caveat that Title VII was not intended to revolutionize the insurance industry.¹³³ Although the circuit court interpreted the *Manhart* opinion as advocating unisex rates in all instances, the court concluded that it could not understand how this parity could be achieved without revolutionizing the insurance industry.¹³⁴

In a concurring opinion, Chief Judge Coffin recognized that *Manhart* might not prohibit every employer-offered benefit plan from using sex-based tables.¹³⁵ For example, he suggested that, if a set of employee options or other features were offered along with an annuity, the plan might legally permit unequal, yet actuarially sound, pension benefits to be offered to participating men and women.¹³⁶ Judge Coffin stated that *Manhart* should not be read restrictively, because such an approach would "foreclose creative approaches to the problem."¹³⁷

A number of other lower courts have also held pension retirement plans with unequal benefits for men and women to be violative of Title VII. These plans, however, like the plan struck down in *Colby College*, were restrictive because they offered only one option to the employees.¹³⁸ For example, the United States District Court for the Southern District of New York in *Spirit v. Teachers Insurance and Annuity Association of America*,¹³⁹ stated that Long Island University's ("LIU") adoption of the TIAA plan in which all employees were required to participate, constituted affirmative participation in the sex-based actuarial tables without which "the challenged program could not operate."¹⁴⁰ On appeal, the Second Circuit held that as an employer, LIU had violated Title VII by offering TIAA's annuity plans to its employees.¹⁴¹ The court maintained that "no mean-

¹³² *Id.* at 1143.

¹³³ *Id.* at 1144.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1146 (Coffin, C.J., concurring).

¹³⁶ *Id.* Chief Judge Coffin stated: "Perhaps . . . once they turn their attention to the problem, the parties could work out a system permissible under *Manhart* that would eliminate the chit-like nature of the contributions through a set of genuine employee options or other features." *Id.* (Coffin, C.J., concurring).

¹³⁷ *Id.* (Coffin, C.J., concurring).

¹³⁸ Similarly, participation in retirement plans was mandatory in several other pension plan cases following *Manhart*. *E.g.*, *Women in City Government United v. City of New York*, 515 F. Supp. 295, 297 (S.D.N.Y. 1981); *Hannahs v. Teachers Retirement System*, 26 FEP Cases 527, 528 (S.D.N.Y. 1981); *Henderson v. State of Oregon*, 405 F. Supp. 1271, 1273 (D. Ore. 1975).

¹³⁹ 416 F. Supp. 1019 (S.D.N.Y. 1976), *aff'd*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded*, 103 S. Ct. 3565 (1983).

¹⁴⁰ *Id.* at 1022.

¹⁴¹ *Spirit v. Teachers Insurance and Annuity Association*, 691 F.2d 1054, 1061 (2d Cir. 1982), *vacated and remanded*, 103 S. Ct. 3565 (1983).

The Supreme Court vacated and remanded the *Spirit* decision "in light of" the *Norris* decision. 103 S. Ct. at 3565. On remand, the Second Circuit reinstated the operative terms of its 1982 decision and noted that "there does not appear to be any reconsideration of liability issues required by *Norris*." *Spirit v. Teachers Insurance and Annuity Association*, 735 F.2d 23, 25 (1984) (citing Brief of TIAA-CREF at 4 n.*). Upon reconsideration of the retroactivity issue, however, the Second Circuit held that retroactive relief would be granted to the plaintiffs in *Spirit*, regardless of the *Norris* holding that retroactive relief was an inappropriate remedy. 735 F.2d at 27. See *infra* text accompanying notes 219-24 and 271-75 for a discussion of the *Norris* Court's denial of retroactive relief.

The *Spirit* court, on remand, distinguished the *Norris* ruling against retroactivity, which the Second Circuit interpreted as premised upon the unfair burden placed on employers to pay out

ingful distinction" existed between the disparate treatment accorded the female employees in *Manhart*, who contributed larger percentages of their salaries for the same amount of benefits, and the treatment given to *Spirt* female employees, who derived unequal benefits following retirement.¹⁴² According to the court, LIU significantly affected the access of its employees to sex-neutral annuity plans by requiring participation in a sex-distinct annuity plan, and LIU was, therefore, liable for a Title VII violation.¹⁴³

The circuits have split as to whether a private insurer is deemed an employer and therefore violates Title VII when an employer is held liable for discriminatory employment practices under the statute. The Second Circuit in *Spirt* held that insurers Teachers Insurance and Annuity Association and College Retirement Equities Fund ("CREF") were "so closely intertwined" with LIU that they had to be deemed employers for the purposes of Title VII.¹⁴⁴ According to the court, the employer was liable for TIAA/CREF's practices because, in effect, those insurers existed solely to enable universities to delegate their responsibility of providing retirement benefits for their employees.¹⁴⁵ In 1982, however, the Sixth Circuit, in *Peters v. Wayne State University*,¹⁴⁶ held that the employer, Wayne State, was not liable for TIAA because the university exercised no control over the plan's administration.¹⁴⁷ According to the court, the insurer, therefore, could not be considered an employer subject to the provisions of Title VII.¹⁴⁸ Moreover, the *Peters* court held that Wayne State did not violate Title VII when, to compensate for women's longevity, female

extra sums of money to equalize women's benefits, from the type of plan offered by the TIAA-CREF insurers. 735 F.2d at 26-27. According to the *Spirt* court, Arizona's plan "provided sufficient certainty concerning the amount of annuity payments to enable the District Court to calculate, long before the plaintiff's retirement, the amount of her monthly annuity, [and it was this] expectation of a determinable benefit that the Supreme Court majority in *Norris* did not wish to have jeopardized by imposing added financial burdens on the plan." *Id.* By contrast, stated the Second Circuit, the plans offered by TIAA-CREF challenged by the *Spirt* plaintiffs "do not guarantee retirees 'a certain stream of income'" and the benefits are not ascertainable. *Id.* at 27. Therefore, according to the *Spirt* court on remand, the employer or TIAA-CREF would not be burdened with additional financial obligations if a retroactive remedy were granted. *Id.* Consequently, the Second Circuit reinstated its earlier decision on the merits and granted a modified form of retroactive relief to the *Spirt* plaintiffs. *Id.* at 29.

¹⁴² 691 F.2d at 1061.

¹⁴³ *Id.* at 1063.

¹⁴⁴ 691 F.2d 1054, 1063 (2d Cir. 1982).

¹⁴⁵ *Id.*

¹⁴⁶ 691 F.2d 235 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3566 (1983).

The *Peters* decision, like the *Spirt* decision, was vacated and remanded to the circuit court "in light of" the Supreme Court's decision in *Norris*. 103 S. Ct. at 3566. Unlike the Second Circuit, however, (see *supra* note 141) the Sixth Circuit has not yet reconsidered its earlier decision. The *Peters* decision was the only discriminatory retirement plan challenge where a court held for the defendant-employer. 691 F.2d at 238. The Sixth Circuit's decision focused heavily, however, on the absence of the employer's control over TIAA's annuity plan, which the Supreme Court in *Norris*, as this casenote contends, overlooked as a crucial factor in determining liability. See *infra* text accompanying notes 289-328.

Presumably, the Second Circuit's reconsideration of the retroactivity issue may be applicable to the *Peters* case since TIAA was the insurance company which offered the annuities in both cases. But because the employer-employee issue was insufficiently addressed in the *Norris* decision, this casenote contends that the Sixth Circuit's original ruling that Wayne State had no control over the insurers and was therefore not liable for the allegedly discriminatory annuity plan should be upheld upon remand.

¹⁴⁷ *Id.* at 238.

¹⁴⁸ *Id.*

employees received smaller monthly payments following retirement than their male counterparts under the Teachers Annuity Retirement plan.¹⁴⁹ In *Peters*, the university employees were not required to participate in the retirement plan.¹⁵⁰ The Sixth Circuit stated that the actuarial value of the annuities provided by the private insurer was equal for similarly situated men and women.¹⁵¹ According to the court, the compensation received by women, even though calculated through different disbursement rates, was equal in value to benefits received by male employees.¹⁵² The court also found no evidence of intent by the university to discriminate and no evidence of a disparate impact upon the plaintiff class.¹⁵³ Consequently, the court ruled that employer Wayne State was not subject to Title VII liability.¹⁵⁴

Thus, prior to the *Norris* decision, the majority of lower federal courts had extended the *Manhart* analysis to a variety of pension plan cases, which included both defined-contribution and defined-benefit plans.¹⁵⁵ In most cases, the *Manhart* reasoning was applied to hold that employers violate Title VII even when they have minimal control over the use of actuarial tables by insurance companies.¹⁵⁶ Significantly, however, most of the decisions involved plans where the employees' options were quite restrictive.¹⁵⁷ The pension plan at issue in *Norris* provided greater freedom of choice to the plaintiff-employees than had other litigated pension cases and, therefore, presented the first major application for the open-market exception articulated in *Manhart*.

II. THE REASONING OF *NORRIS*

In a five-to-four decision, the Supreme Court affirmed the Ninth Circuit's ruling that an employer's offer of an option to receive retirement benefits from one of several companies which pay women a lower monthly retirement benefit than men who had made the same contribution under a plan constitutes sex discrimination in violation of Title VII.¹⁵⁸ The majority opinion, written by Justice Marshall,¹⁵⁹ was divided into three

¹⁴⁹ *Id.* at 240-41.

¹⁵⁰ *Id.* at 237.

¹⁵¹ *Id.* at 241. The Sixth Circuit overruled the earlier district court holding, *Peters v. Wayne State University*, 476 F. Supp. 1343, 1348 (E.D. Mich. 1979), asserting that the district court holding had erroneously "relied solely on the holdings and dicta of *Manhart*." *Peters*, 691 F.2d at 239 (emphasis in original).

¹⁵² *Id.*

¹⁵³ *Id.* at 239.

¹⁵⁴ *Id.* For claims of employment discrimination under Title VII, the plaintiff must show either "disparate treatment" or "disparate impact." *Id.* at 238. The *Wayne State* plaintiff failed to show that the employer's practices "otherwise unexplained, [were] more likely than not" impermissibly motivated. *Id.* at 239. Consequently, no disparate treatment was proven. *Id.* Disparate impact occurs when an employer's facially neutral policy burdens one class more than another. *Id.* To defend against this claim, employers must show that the practice is necessary and closely related to its business purpose. *Id.* at 239-40. The appellate court found no evidence of either disparate treatment or a disparate impact on women participating in the Wayne State policy. *Id.* at 239. "[T]here is no evidence that Wayne State treats women less favorably than men because of their sex." *Id.* (emphasis in original).

¹⁵⁵ See *supra* notes 112-43 and accompanying text.

¹⁵⁶ See *supra* notes 112-43 and accompanying text.

¹⁵⁷ See *supra* notes 138-43 and accompanying text.

¹⁵⁸ 103 S. Ct. at 3493. The Court also held that retroactive relief was not appropriate upon finding that Arizona's voluntary pension plan violated Title VII; rather, liability would be prospective only. *Id.*

¹⁵⁹ *Id.*

areas of analysis: first, whether the plan at issue would violate Title VII if run entirely by the petitioner-employer;¹⁶⁰ second, whether the plan was beyond the reach of Title VII because the insurance companies actually calculated and paid the retirement benefits;¹⁶¹ and third, whether retroactive relief to compensate for past violations of Title VII was appropriate.¹⁶²

The *Norris* Court began its analysis of the essential validity of the plan by stating that the deferred compensation was a benefit of employment, and, therefore, was directly within the scope of Title VII.¹⁶³ The Court then reiterated both of *Manhart*'s basic premises.¹⁶⁴ First, the Court stated that Title VII's "focus on the individual is unambiguous."¹⁶⁵ Second, the Court declared that longevity was not a "factor other than sex" under the Equal Pay Act.¹⁶⁶ Relying on language in *Manhart*, the *Norris* Court explained that a plan discriminates "because of sex" when a woman is treated "in a manner which but for [her] sex would [have been] different."¹⁶⁷ Adopting the position of the majority of the lower courts, the Court stated that a classification of employees on the basis of sex is no more permissible at the payout stage of a retirement plan than it is at the contribution stage.¹⁶⁸ The *Norris* Court likened the Arizona defined-contribution plan to the defined-benefit plan struck down in *Manhart* because Arizona's plan would require a woman to make greater monthly contributions than a man if she wished to receive equal monthly benefits following retirement.¹⁶⁹ The Court recognized that the plan in *Manhart* also required greater contributions from females than it did from males.¹⁷⁰ In a footnote, the Court stated that it was irrelevant that Arizona employees were not required to participate in the pension plan because Title VII forbids all discrimination concerning conditions of employment, not just discrimination concerning aspects of the employment relationship as to which the employee has no choice.¹⁷¹ According to the Court, it was irrelevant that the Arizona plan included two other options for payout benefits provided on equal terms to men and women.¹⁷² The Court stated that an employer who offers one fringe benefit on a discriminatory basis cannot escape liability because it also offers other benefits on a nondiscriminatory basis.¹⁷³

Dismissing Arizona's contention that its plan was nondiscriminatory, the *Norris* Court ruled that the male and female employees' annuity policies were of roughly equal actuarial value.¹⁷⁴ According to the Court, the petitioners "incorrectly assume[d]"¹⁷⁵ that

¹⁶⁰ *Id.* at 3496.

¹⁶¹ *Id.* at 3499.

¹⁶² *Id.* at 3502.

¹⁶³ *Id.* at 3496. Title VII prohibits discrimination in employment against any individual regarding "compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1) (1982).

¹⁶⁴ 103 S. Ct. at 3496 (citing *Manhart*, 435 U.S. at 708).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *Manhart*, 435 U.S. at 712-13).

¹⁶⁷ *Id.* at 3496-97 (citing *Manhart*, 435 U.S. at 711).

¹⁶⁸ *Id.* at 3497.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 3497 n.10.

¹⁷² *Id.*

¹⁷³ *Id.* (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24 n.8 (1982)).

¹⁷⁴ *Id.* at 3497.

¹⁷⁵ *Id.*

Title VII permits a classification of employees on the basis of sex in predicting their longevity.¹⁷⁶ This premise, the Court found, is totally inconsistent with the *Manhart* Court's basic tenet that Title VII requires employers to treat their employees as individuals, and not simply as constituents of a sexual class.¹⁷⁷ In support of this finding, the Court restated dicta appearing in the *Manhart* decision that "[e]ven a true generalization about [a] class' cannot justify class-based treatment."¹⁷⁸ Discriminatory impact, the Court stated, occurs even if the class of which an individual is a member has not been treated unfairly as a result of the disproportionate standard.¹⁷⁹ Consequently, the Court explained that an individual female employee may not be paid lower monthly benefits simply because the class to which she belongs lives longer than the class consisting of men.¹⁸⁰ *Manhart*, the Court stated, made clear that requiring female employees to make higher contributions than males in defined-benefit plans is impermissible under Title VII.¹⁸¹ The *Norris* Court reasoned that discriminatory defined-contribution plans¹⁸² should also be struck down¹⁸³ and concluded in its first section of analysis that Arizona plainly would have violated Title VII had it operated the deferred compensation plan itself.¹⁸⁴

Turning to the second part of its analysis, the Court considered whether Title VII applied to a retirement plan structured like the plan Arizona had made available to its employees. The majority began by examining the extent of the state's liability.¹⁸⁵ The Court recognized that although Arizona offered the option of annuities to its employees, the insurance companies actually calculated and disbursed the annuity plans.¹⁸⁶ Despite this fact, the Court determined that the state had still discriminated against its female employees and had violated Title VII,¹⁸⁷ relying on its statement in *Manhart* that Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties."¹⁸⁸ In a footnote, the Court emphasized that Title VII applies to

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 3498 (citing *Manhart*, 435 U.S. at 708). The *Norris* Court stated "*Manhart* squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement plan that treats every individual woman less favorably than every individual man." *Id.*

¹⁷⁸ *Id.* (citing *Manhart*, 435 U.S. at 708). In a footnote, the Court responded to Justice Blackmun's doubt that *Manhart* could be reconciled with the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Id.* at 3498 n.14. There, the exclusion of pregnancy from an employer's disability benefit plan did not constitute discrimination "because of . . . sex" within the meaning of Title VII [because] the special treatment of pregnancy distinguished not between men and women, but between pregnant women and non-pregnant persons . . ." *Id.* See *supra* note 89. The dissent in *Gilbert* asserted that pregnancy was strongly "sex-related." 429 U.S. at 149. This tension between the two cases was resolved, the *Norris* Court stated, by the passage of the Pregnancy Discrimination Act of 1978, in which Congress overruled *Gilbert* by amending Title VII to establish that the terms "because of sex" included pregnancy. The *Norris* Court asserted that Congress' decision to forbid special treatment of pregnancy provided further support for the *Manhart* conclusion that "the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan." *Norris*, 103 S. Ct. at 3499 n.14.

¹⁷⁹ *Id.* at 3498.

¹⁸⁰ *Id.* at 3498-99.

¹⁸¹ See *supra* note 105.

¹⁸² See *supra* note 105.

¹⁸³ *Norris*, 103 S. Ct. at 3499.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 3501.

¹⁸⁸ *Id.* at 3499 (citing *Manhart*, 435 U.S. at 718 n.33).

discrimination committed by both employers and "any agent" of an employer.¹⁸⁹ The Court then restated *Manhart's* open-market exception, which made it lawful under Title VII for an employer to set aside equal retirement contributions for each employee and allow each retiree to purchase the largest benefits available in the open market.¹⁹⁰ Considering the petitioner's contention that it had not violated Title VII because its plan reflected what was available in the open market,¹⁹¹ the Court held that it was no defense that all annuities available in the open market were based on sex-based mortality tables.¹⁹² Whether any other insurers offered sex-neutral annuities was irrelevant, the Court stated, since Arizona did not simply set aside retirement contributions and let employees purchase annuities on the open market.¹⁹³ Instead, the Court emphasized that Arizona had actively provided the opportunity to obtain an annuity as part of its own deferred compensation plan.¹⁹⁴ According to the Court, the state's provision of that option, its invitation to insurance companies to submit bids outlining their plans, and its selection of those companies who would participate in the plan was enough affirmative action by the state to justify a finding of a Title VII violation.¹⁹⁵ Specifically, the Court recognized that each of these actions involved a contract between the state and the companies governing the terms on which benefits were to be provided to employees.¹⁹⁶ These contracts, the Court determined, restricted the number of companies among which the employees could choose to make an annuity contract.¹⁹⁷ In effect, the Court stated, the state's decision to enter into contracts with a limited number of insurance companies prevented a true "open-market."¹⁹⁸

In a lengthy footnote, the Court rejected Arizona's argument that the lump-sum payment option open to all employees enabled them to purchase the largest benefit his or her accumulated contributions could command in the open market.¹⁹⁹ This option for open-market purchase, the state contended, should have allowed it to escape Title VII liability.²⁰⁰ The Court rejected this argument by restating its premise that even when another fringe benefit is provided on a nondiscriminatory basis, an employer still violates Title VII by offering any option that discriminates.²⁰¹ In the same footnote, the Court reluctantly addressed the contention that Arizona's conduct was exempted from the reach of Title VII by the McCarran-Ferguson Act (the "Act").²⁰² That statute prohibits any congressional act from invalidating, impairing, or superseding any law enacted to regulate the business of insurance, unless the law specifically relates to insurance.²⁰³ The *Norris*

¹⁸⁹ *Id.* at 3499 n.16.

¹⁹⁰ *Id.* at 3499.

¹⁹¹ *Id.* at 3499-3500.

¹⁹² *Id.* at 3500.

¹⁹³ *Id.* at 3501.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 3500 n.17.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* The *Norris* Court did not want to discuss the McCarran-Ferguson Act's reach, 15 U.S.C. §§ 1011-1015 (1982), because the state had made no mention of it in its brief. *Id.* Because the majority viewed the dissenting opinion in *Norris* as relying on the McCarran-Ferguson Act, however, the Court did address the issue. *Id.*

²⁰³ *Id.*

Court rejected the state's contention that Title VII was unlawfully interfering with the McCarran-Ferguson Act.²⁰⁴ In reaching this conclusion, the Court relied on the court of appeals' explanation that, because the plaintiffs did not challenge the conduct of the business of insurance, and the Court's judgment would not preclude any insurance company from offering annuity benefits on the basis of sex-segregated actuarial tables, all that was at issue in *Norris* was an employment practice.²⁰⁵ The McCarran-Ferguson Act was inapplicable to the Arizona plan, the Court held, because the case involved a challenge to an employer, rather than an insurance company.²⁰⁶ Accordingly, the Court determined that it did not need to decide whether Title VII specifically related to the business of insurance within the meaning of the Act.²⁰⁷

The Court concluded that Arizona could not disclaim responsibility for discriminatory features of the insurer's options when the state specifically selected which insurance company would participate in the pension plan.²⁰⁸ In holding that Arizona violated Title VII regardless of whether third parties were also involved in the discrimination,²⁰⁹ the Court determined that "employers are ultimately responsible"²¹⁰ for the fringe benefit schemes they adopt under Title VII's "compensation, terms, conditions and privileges of employment" clause.²¹¹ The Court then moved directly to a discussion of the third part of its analysis and considered whether retroactive relief was appropriate to compensate the plaintiff for the Title VII violation.

In the final section of the *Norris* Court's analysis, Justice Marshall stated that retroactive relief should be granted to the employees because *Norris* "was clearly foreshadowed by *Manhart*."²¹² The Court opined that the *Manhart* Court had not awarded refunds to female employees for excessive past contributions because before that decision, no precedent existed on the pension plan issue.²¹³ According to the *Norris* opinion, the *Manhart* Court had noted that the administrators of the pension plans had acted conscientiously and intelligently and had believed that their programs were lawful.²¹⁴ In the *Norris* Court's view, these good faith actions were enough to deny a retroactive remedy to *Manhart* employees.²¹⁵ The *Manhart* decision, the Court stated, should have put Arizona on notice that paying unequal monthly benefits in a pension plan was a Title VII violation.²¹⁶ To support this conclusion, the Court cited *Albemarle Paper Co. v. Moody*,²¹⁷ a 1975 decision emphasizing that a central purpose of Title VII was to compensate persons who are injured because of employment discrimination.²¹⁸

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* The Court stated that the applicability of Title VII to *Norris* did not supersede any state law governing the business of insurance because "Arizona plainly is not itself involved in the business of insurance, since it has not underwritten any risks." *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 3501.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 3503.

²¹³ *Id.* at 3502-03.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 3503.

²¹⁷ 422 U.S. 405 (1975).

²¹⁸ *Norris*, 103 S. Ct. at 3502 (citing *Albemarle*, 422 U.S. at 413).

Although Justice O'Connor concurred with the majority opinion on the merits of the case,²¹⁹ she disagreed with Justice Marshall on the retroactivity issue.²²⁰ Specifically, Justice O'Connor questioned whether the *Manhart* decision had clearly foreshadowed the *Norris* finding that defined-contribution plans were as violative of Title VII as defined-benefit plans.²²¹ According to Justice O'Connor, sufficient uncertainty existed as to *Manhart*'s precedential value, making retroactive relief inappropriate.²²² In addition, Justice O'Connor stated that the economically inequitable results imposed by a retroactive application of the Court's holding also compelled a prospective remedy.²²³ Justice O'Connor, therefore, held that retroactive relief was inappropriate.²²⁴

Justice Powell wrote a dissenting opinion in *Norris* and was joined by three other Justices.²²⁵ The dissent began its analysis by suggesting that the *Norris* decision was contrary to the *Manhart* Court's restrictive statement that Title VII "was [not] intended to revolutionize the insurance and pension industries."²²⁶ According to the dissent, the majority's opinion would force employers to discontinue annuity plans and cause disruptive changes in long-established methods of calculating insurance and pension plans.²²⁷ Moreover, the dissent noted that the high costs of equalizing benefits for men and women would be passed on to the annuity beneficiaries and to the public.²²⁸

The dissent then discussed the terms of the Arizona plan at issue and the relative advantages of the life annuity option of that plan.²²⁹ The Court's view, the dissent maintained, left an employer wishing to provide the favored annuity option to its employees with just three choices that satisfy a strict Title VII analysis.²³⁰ First, an employer could provide the unisex annuities itself, without using independent insurance companies to manage the policies.²³¹ This option, according to the dissent, would be both too expensive to operate and too difficult to administer for an employer to accomplish alone.²³² Second,

²¹⁹ *Id.* at 3510-12 (O'Connor, J., concurring). Addressing Congress' intent in constructing Title VII, Justice O'Connor examined *Manhart*'s focus on the language, structure, and legislative history of Title VII. *Id.* at 3511 (O'Connor, J., concurring). Justice O'Connor asserted that the *Norris* decision ignored any potential impact on all insurance plans, including individual purchases of all insurance, because Title VII only applies to employment, not independent insurance companies. *Id.* Justice O'Connor agreed with the majority that the pension plan offered was a privilege of employment, making the plan itself employment related. *Id.*

²²⁰ *Id.* at 3512 (O'Connor, J., concurring).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* Justice O'Connor relied on the Supreme Court decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97, which "set forth three criteria for determining when to apply a decision of statutory interpretation prospectively. First, the decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . [S]econd, . . . whether retroactivity will further or retard the operation of the statute . . . [and] third . . . whether retroactive application would impose inequitable results" *Norris*, 103 S. Ct. at 3512 (O'Connor, J., concurring).

²²⁴ *Id.* at 3493.

²²⁵ *Id.* at 3504 (Powell, J., dissenting). See *supra* note 67.

²²⁶ *Norris*, 103 S. Ct. at 3505 (Powell, J., dissenting) (citing *Manhart*, 435 U.S. at 717).

²²⁷ *Id.* at 3504 (Powell, J., dissenting).

²²⁸ *Id.* at 3504-05 n.1 (Powell, J., dissenting).

²²⁹ *Id.* at 3505 (Powell, J., dissenting).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 3505-06 (Powell, J., dissenting).

the employer could choose to contract with companies using only unisex tables.²³³ In the dissent's view, this option would be difficult to implement, however, because most insurance companies use sex-based tables because state law prevents unisex tables or because unisex tables are found to be unsound actuarially.²³⁴ Third, the employer could elect not to provide the advantageous life annuity option at all.²³⁵ According to the dissent, this third option was precisely what happened in the *Norris* case when the state of Arizona discontinued making life annuities available to its employees.²³⁶ The dissent explained that any employee of Arizona who now wished to have the security provided by a life annuity must withdraw his or her accrued retirement savings, pay income tax on that amount, and then use the remainder to purchase an annuity at rates that will be sex-based on the open market.²³⁷ The *Norris* dissent indicated that none of the choices remaining open to the employer were likely to benefit the employee.²³⁸ First, stated the dissent, since employers will avoid higher costs of unprohibited options by not offering attractive annuity plans, employees will be denied the opportunity to buy lifetime annuities at a lower cost.²³⁹ Second, if employers do choose to offer the plans, the dissent asserted that the heavy costs of equalizing benefits will probably be passed on to current employees.²⁴⁰ The dissent suggested that such a sweeping change in insurance practices was surely not intended either by the Court's decision in *Manhart* or by Congress' enactment of Title VII.²⁴¹

After criticizing the *Norris* Court's effect on employees, the *Norris* dissent turned to a consideration of Title VII's legislative history and the policies underlying that statute. This examination, the Court stated, demonstrated that Title VII's policies were inapplicable to the insurance industry.²⁴² According to the dissent, the *Manhart* Court had been careful to limit its holding to the precise issue before it, unequal employer contributions to an employer-operated pension fund.²⁴³ The dissent asserted that its conclusion that Congress intended that Title VII have a narrow reach was supported by the existence of the McCarran-Ferguson Act, adopted by Congress in 1945.²⁴⁴ Under that legislation, the regulation of the insurance industry was presumptively committed to the states.²⁴⁵ The statute provided that, unless a congressional act "specifically relates to the business of insurance," no act by Congress should be construed to supersede state laws regulating the insurance industry.²⁴⁶ According to the dissent, the *Norris* majority was wrong to assert that, because Title VII applies only to employers, it did not affect the business of insurance.²⁴⁷ This interpretation of Title VII, in the dissent's view, would prohibit employers from purchasing any annuities for their employees.²⁴⁸ The dissent explained that

²³³ *Id.* at 3505 (Powell, J., dissenting).

²³⁴ *Id.* at 3506 (Powell, J., dissenting).

²³⁵ *Id.*

²³⁶ *Id.* at 3506 n.4 (Powell, J., dissenting).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 3506 (Powell, J., dissenting).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 3507 n.5 (Powell, J., dissenting).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 3507 n.6 (Powell, J., dissenting).

²⁴⁸ *Id.*

most states, including Arizona, allow employers to purchase sex-based annuities for their employees.²⁴⁹ Those states, the dissent asserted, have determined that the use of sex-based mortality tables comports with state-proscribed definitions of employment discrimination and is not unfair discrimination between individuals.²⁵⁰ The dissent stated that the majority offered no satisfactory reason for concluding that Congress intended Title VII to preempt the state regulation of the insurance industry.²⁵¹ Under the majority holding, the dissent reasoned, Title VII is a federal law denying employers the right to do what state insurance law allows, thereby invalidating or superseding that state law.²⁵² The dissent argued that the commands of the McCarran-Ferguson Act were "directly relevant" to interpreting Congress' intent in enacting Title VII.²⁵³ Accordingly, the dissent concluded that the applicability of that legislation compelled the narrow reading of Title VII adopted by the Supreme Court in *Manhart*.²⁵⁴

Following its discussion of the applicability of the McCarran-Ferguson Act, the dissent examined further legislative history of Title VII.²⁵⁵ The dissent considered Senator Humphrey's remarks on the Senate floor during the debate on the Civil Rights Act.²⁵⁶ Specifically, the dissent looked to Humphrey's statement that it was "unmistakably clear" that Title VII did not prohibit different treatment of men and women under industrial benefit plans.²⁵⁷ The dissent interpreted this statement as demonstrating that Congress perceived Title VII to "have little, if any, impact on existing pension plans."²⁵⁸ Although the *Manhart* Court had stated that this statement was not sufficient to preclude the application of Title VII to an employer-operated plan,²⁵⁹ the *Norris* dissent asserted that Humphrey's statement provided strong support for *Manhart*'s assertion that Congress intended Title VII to have only an indirect effect on the private insurance industry.²⁶⁰ According to the dissent, Title VII would not, therefore, be applicable to insurer-operated pension plans.²⁶¹ The dissent concluded that neither the language of the statute nor its legislative history supported the *Norris* majority's holding that Arizona, as an employer, had violated Title VII.²⁶²

Next, the dissenting opinion stated that the policy set forth in Title VII was to proscribe discrimination in employment practices.²⁶³ According to the dissent, Title VII's specific focus on the individual had little relevance to the business of insurance, because

²⁴⁹ *Id.*

²⁵⁰ *Id.* The dissent noted that, "most state laws regulating insurance and annuities explicitly proscribe 'unfair discrimination between persons in the same class.'" *Id.* (citing Bailey, Hutchinson & Narber, *The Regulatory Challenge to Life Insurance Classification*, 25 DRAKE L. REV. 779, 783 (1976)). The dissent went on to say, "Arizona insurance law similarly provides that there should be 'no unfair discrimination between individuals of the same class.'" *Norris*, 103 S. Ct. at 3507 n.6 (Powell, J., dissenting)(citing ARIZ. REV. STAT. ANN. § 20-448 (1983)).

²⁵¹ *Norris*, 103 S. Ct. at 3507 (Powell, J., dissenting).

²⁵² *Id.* at 3507 n.6 (Powell, J., dissenting).

²⁵³ *Id.*

²⁵⁴ *Id.* at 3506-08 (Powell, J., dissenting).

²⁵⁵ *Id.* at 3508-09 (Powell, J., dissenting).

²⁵⁶ *Id.* at 3508 (Powell, J., dissenting).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 3508 n.7 (Powell, J., dissenting) (citing *Manhart*, 435 U.S. at 714). See *supra* note 102 for a discussion of how the *Manhart* Court dealt with this argument.

²⁵⁹ *Manhart*, 435 U.S. at 714.

²⁶⁰ *Norris*, 103 S. Ct. at 3508 (Powell, J., dissenting).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

the basic mechanics of insurance and annuities involve determinations of the life expectancies of identifiable groups, rather than determinations of how long any one individual will live.²⁶⁴ The dissent determined that although the *Norris* Court held Arizona responsible for unlawful discrimination, the Court actually condemned the entire insurance industry's use of sex-based classification.²⁶⁵ The *Norris* dissent asserted that none of the policy considerations underlying the enactment of Title VII suggested that Congress, by adopting that legislation, intended to reach the independent insurance industry.²⁶⁶ According to the dissent, the basic purpose behind Title VII, to eradicate employment discrimination, implies that the statute is directed against discrimination, or "disparate treatment . . . that intentionally or arbitrarily affects an individual."²⁶⁷ Because life expectancy is a "nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis,"²⁶⁸ the dissent found nothing arbitrary, irrational, or discriminatory about recognizing the objective actuarial disparity in sex-based mortality tables.²⁶⁹ According to the dissent, therefore, the *Norris* majority was wrong to invalidate the long-approved insurance practice of using sex-distinct tables "on the basis of its own policy judgment."²⁷⁰

Finally, the dissent discussed the availability of retroactive relief.²⁷¹ The dissent's reasons for not granting retroactive relief were similar to Justice O'Connor's argument against that remedy outlined in her concurring opinion.²⁷² The dissent noted that, like the employer in *Manhart*, Arizona may well have assumed that its pension plans were lawful.²⁷³ In addition, the dissent recognized that a retroactive remedy would not only disrupt the operation of an employer's pension plan, but because reserves normally are sufficient to cover only the cost of funding and administering the plan, the insurer's solvency and the insured's benefits would also be jeopardized.²⁷⁴ Accordingly, the dissen-

²⁶⁴ *Id.* The dissent noted that:

The accuracy with which an insurance company predicts the rate of mortality depends on its ability to identify groups with similar mortality rates. The writing of annuities thus requires that an insurance company group individuals according to attributes that have a significant correlation with mortality Instead of identifying all relevant attributes, most insurance companies classify individuals according to criteria that provide both an accurate and efficient measure of longevity, including a person's age and sex. These particular criteria are readily identifiable, stable, and easily verifiable.

Id. at 3509 (Powell, J., dissenting).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* (citing *Manhart*, 435 U.S. at 724 (Blackmun, J., concurring in part)).

²⁶⁹ *Id.* Justice Powell noted: "Indeed, if employers and insurance carriers offer annuities based on unisex mortality tables, men as a class will receive less aggregate benefits than similarly situated women." *Id.* at 3509 n.9 (Powell, J., dissenting).

²⁷⁰ *Id.* at 3509 (Powell, J., dissenting).

²⁷¹ *Id.* at 3509-10 (Powell, J., dissenting). Justice O'Connor joined in the final section of the dissenting opinion which resulted in a plurality disapproval of retroactive relief as both "unprecedented and manifestly unjust." *Id.*

²⁷² See *supra* notes 221-24 and accompanying text.

²⁷³ *Norris*, 103 S. Ct. at 3510 (Powell, J., dissenting). Justice Powell noted that given the explicit limitation in *Manhart* confirming that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contribution could command on the open market, Arizona "reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." *Id.*

²⁷⁴ *Id.* Justice Powell stated that "the cost of complying with the District Court's award of

ters, along with Justice O'Connor, constituted a majority of the *Norris* Court, holding that even if Arizona had violated Title VII, the employer's liability for a violation in pension plans such as Arizona's should be prospective only.²⁷⁵

III. THE WEAKNESSES IN THE SUPREME COURT ANALYSIS IN *NORRIS*

In *Norris*, the Court held that Arizona had violated Title VII by discriminating against women in an employment setting.²⁷⁶ The Court determined that where an employer offered an annuity option to employees participating in a pension plan, and the annuities were calculated and disbursed by a private insurer based on sex-distinct mortality tables, the employer violated Title VII by providing unequal benefits to men and women.²⁷⁷ In holding that Title VII's focus on the individual prohibited an employer, even indirectly, from using group characteristics to distribute annuities, the *Norris* Court relied on the *Manhart* opinion.²⁷⁸ This section of the casenote will demonstrate that the Court reached this conclusion due to three errors in judgment. First, the Court implied that an agency relationship existed between Arizona and the insurance companies using the sex-based actuarial tables.²⁷⁹ The Court made this implication even though the state had little control over either the administration of annuities or the conditions in the marketplace causing women to receive smaller periodic payments.²⁸⁰ Second, the Court determined that the state was liable even though Arizona's annuity plan gave employees an option of whether or not to participate.²⁸¹ The greater freedom of choice offered to Arizona's employees was a critical difference between that pension plan and other litigated pension cases relied on by the *Norris* Court.²⁸² Third, the Court disregarded *Norris*' failure to prove that Arizona had intended to discriminate against female employees.²⁸³ Previous Supreme Court decisions have established that discriminatory intent must be shown to state a successful Title VII complaint.²⁸⁴ It will be submitted that the weaknesses in the *Norris* Court's analysis enabled the Court to use Title VII as a crutch to reach the allegedly wrongful acts of private insurers. In effect, the Court has extended Title VII beyond its intended scope, the regulation of activities of employers, and into the regulation of private industry.

A. Arizona's Lack of Control Over the Independent Insurers and the Marketplace

The *Norris* Court held that Arizona was responsible for the "discriminatory" actions of private insurance companies.²⁸⁵ To reach this holding, the Court was forced to impute

retroactive relief would range from \$817 to \$1260 million annually for the next 15 to 30 years." *Id.* These figures assume that employers would be required to "top up" women's benefits to allocate resources between men and women. *Id.* at 3510 n.11 (Powell, J., dissenting).

²⁷⁵ *Id.* at 3510 (Powell, J., dissenting). Justice Powell agreed with Justice O'Connor that "only benefits derived from contributions collected after the effective date of the judgment need be calculated without regard to the sex of the employee." *Id.* at 3510 n.12 (Powell, J., dissenting).

²⁷⁶ *Id.* at 3499.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See *infra* text accompanying notes 289-306.

²⁸⁰ See *infra* text accompanying notes 298 and 307-28.

²⁸¹ See *infra* text accompanying notes 329-50.

²⁸² See *infra* text accompanying notes 329-50.

²⁸³ See *infra* text accompanying notes 351-77.

²⁸⁴ See *infra* text accompanying notes 351-77.

²⁸⁵ *Norris*, 103 S. Ct. at 3501.

the allegedly wrongful acts of the insurers to the state, because Title VII's broad policy prohibiting sex discrimination in the employment sphere only applies to the relationship between employer and employee.²⁸⁶ Although the Court perceived the use of sex-based mortality tables by private insurers as a discriminatory practice, it was unable to attack that practice directly because Norris' claim of a Title VII violation was brought against her employer, Arizona.²⁸⁷ Instead, the Court used Title VII to define the use of actuarial tables as employment discrimination by claiming that Arizona's "affirmative action" in offering the pension plan was enough to constitute control over the plan's discriminatory features.²⁸⁸

The *Norris* majority misapplied Title VII to fix liability for an alleged discriminatory act. In the court of appeals' opinion in *Norris*, the Ninth Circuit cited *Manhart* for the proposition that "an employer cannot avoid his responsibilities by delegating discriminatory programs to corporate shells," because Title VII applies to any agent of a covered employee.²⁸⁹ The Supreme Court, in deciding *Norris*, adopted this agency argument by holding Arizona, as the employer, "ultimately responsible" for the privileges it provided to state employees.²⁹⁰ Although it was actually the use of sex-based mortality tables that the Court found offensive, the Court held Arizona responsible under Title VII. To reach this conclusion, the *Norris* majority must have presumed that Arizona had attempted to delegate its discriminatory programs to a corporate shell, the insurance company, in an attempt to pass on the responsibility for discriminatory actions to a better-protected corporate entity. *Norris* failed to argue in her complaint, however, that the independent insurance carriers selected by Arizona were either corporate shells or agents of the state.²⁹¹ Although the discriminatory features of the insurers' annuity programs were entirely within the control of those insurance companies, the *Norris* Court emphasized in a footnote that Title VII applies to "any agent of an employer."²⁹² The Court's statement in that footnote, with no further explanation, suggests that the *Norris* majority considered the insurers to be agents of Arizona. Similarly, the Court's characterization of the relationship between the insurer and employer as a contractual one,²⁹³ rather than the more realistic interpretation that the annuity contract was made between the employee and the insurer, also implies that the Court assumed that an agency relationship existed between Arizona and the insurers. The Court's use of agency principles is totally inconsistent with the essence of the principal-agency relationship, the principal's power to control the activities of the agent.²⁹⁴ In any agency relationship, the principal consents to have an agent act on his behalf and subject to his control, and the agent consents to do so.²⁹⁵ The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time he acts, or at both times.²⁹⁶ A relationship in which one acts for the benefit of another, however, does not inherently contain the requisite element of control.²⁹⁷

²⁸⁶ *Id.* at 3499 (citing *Manhart*, 435 U.S. at 718 n.33).

²⁸⁷ See *supra* text accompanying notes 37-45.

²⁸⁸ 103 S. Ct. at 3501. See *supra* text accompanying note 195.

²⁸⁹ *Norris*, 671 F.2d at 334 (citing *Manhart*, 435 U.S. at 718 n.33).

²⁹⁰ *Norris*, 103 S. Ct. at 3501.

²⁹¹ Petitioner's Brief at 12.

²⁹² *Norris*, 103 S. Ct. at 3499 n.16.

²⁹³ *Id.* at 3501.

²⁹⁴ RESTATEMENT OF THE LAW OF AGENCY § 2(1) (1933).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at § 14 comment a.

²⁹⁷ *Id.* at § 14 comment e.

In *Norris*, the plaintiffs made no showing that Arizona exercised control over independent insurance companies.²⁹⁸ Arizona could not control the companies' use of sex-based actuarial tables. The state's inability to determine the provisions of the benefit plans was illustrated by a showing in the record that the state was unaware of any private insurance company in Arizona offering an annuity plan that did not calculate benefits according to sex-specific tables.²⁹⁹ Furthermore, Arizona was required to comply with a number of specific provisions in a state statute to obtain group policies for its employees at all.³⁰⁰ This "licensing" requirement also reduced Arizona's control over the acts of insurers.

Other courts have recognized that employers do not control every party whose actions benefit the employee. For example, the Sixth Circuit, in *Peters v. Wayne State University*, in holding that the university had not violated Title VII when its insurer used sex-based tables to calculate annuities, asserted that TIAA was not an agent of the university.³⁰¹ The court recognized that since Wayne State did not have control over either the insurer's calculation of benefits or disbursement of unequal payments to employees, no agency relationship existed between the two parties and, therefore, TIAA was not an employer for purposes of Title VII.³⁰² Similarly, in *General Building Contractors Ass'n, Inc. v. Pennsylvania*,³⁰³ the Supreme Court held that a union operating a discriminatory hiring hall, created through an agreement with the employers' trade associations, was not the agent of the associations or the employers.³⁰⁴ The Court stated that no agency relationship existed because the employers did not have the right to control the physical activities of the union, nor was the employers' power to oppose the union tantamount to the right to control it.³⁰⁵ In *Norris*, the state did not control the insurance companies' calculation of annuities. The employer only wished to offer its employees a highly attractive pension option, but each insurer that submitted a bid for Arizona's policy used sex-based mortality tables.³⁰⁶ The *Norris* Court should have recognized that the control element, necessary for a finding of an agency relationship between Arizona and the independent insurer, was missing and thus precluded the assumption that the insurer was an agent to whom Arizona had delegated its discriminatory actions.

Arizona's lack of control over its annuity plan is demonstrated not just by the absence of an insurer pool using unisex tables, but also by its inability to affect conditions in the marketplace.³⁰⁷ Recent decisions of the Supreme Court have held that a defendant will not be found to have discriminated against women because of conditions or obstacles existing in the marketplace not created by the defendant and over which the defendant has no control.³⁰⁸ For example, in 1980, in *Harris v. McRae*,³⁰⁹ the Court held that, while the state itself may not impose obstacles in the exercise of a woman's freedom to choose to have an abortion, it need not remove those obstacles not of its own creation, such as

²⁹⁸ Petitioner's Reply Brief at 13.

²⁹⁹ *Id.* at 6.

³⁰⁰ ARIZ. REV. STAT. ANN., v.7 § 20-1252 (1975).

³⁰¹ *Peters*, 691 F.2d at 238.

³⁰² *Id.*

³⁰³ 458 U.S. 375 (1982).

³⁰⁴ *Id.* at 392-93.

³⁰⁵ *Id.* at 393. See Petitioner's Brief at 12 (citing *General Building Contractors*, 73 L.Ed 2d at 851).

³⁰⁶ Petitioner's Brief at 12.

³⁰⁷ See *infra* text accompanying notes 324-28.

³⁰⁸ See *infra* text accompanying notes 309-23.

³⁰⁹ 448 U.S. 297 (1980).

indigency, by providing funding for an abortion for women unable to pay themselves.³¹⁰ Furthermore, the Supreme Court has held that an employer has no obligation to provide additional compensation to women because of conditions the employer could not change.³¹¹ In *Nashville Gas Co. v. Satty*,³¹² the Court recognized that, although Title VII prohibited employers from placing a burden on female employees because of their differing biological role in life,³¹³ they are not required under Title VII to provide greater economic benefits, such as sick pay for pregnant employees, to one sex over the other because of those differing biological roles.³¹⁴ Although Congress recently amended Title VII to require employers to provide disability benefits for pregnant employees,³¹⁵ the Court's reasoning in these decisions remains significant. Both the *McRae* and *Nashville Gas* Courts distinguished between the imposition of burdens or obstacles specifically caused by an employer which discriminated against a group, and an employer's mere failure to take affirmative action to eliminate discrimination not of its own making.³¹⁶ Only the first scenario constituted a violation of Title VII.

Based on the reasoning of the *McRae* and *Nashville Gas* decisions, the *Norris* Court should not have found a Title VII violation. In *Norris*, Arizona did not impose any burdens or place any obstacles in the way of its female employees. Contributions for similarly situated employees were equal and the actuarial value of their deferred compensation at the payout stage of the plan was the same. The mere failure of the state to provide additional compensation for females to make up for the smaller periodic payments received from the insurer-operated plan should not have constituted sex discrimination by Arizona. As the Supreme Court stated in *Nashville Gas*, Title VII does not require the employer to pay the "incremental amount" necessary for a female to obtain as full a benefit as her male counterpart in the open market.³¹⁷ Moreover, other lower courts deciding Title VII cases have applied this general reasoning that employers are not responsible for curing market inequality for men and women.³¹⁸ For instance, in 1982, in *Briggs v. City of Madison*,³¹⁹ the United States District Court for the Western District of Wisconsin ruled that, under Title VII, an employer's liability extends only to its own acts of discrimination.³²⁰ In *Briggs*, women employees claimed that the defendant city had violated Title VII by upgrading the pay ranges of the all-male public health sanitarians while not raising the pay of public health nurses.³²¹ The district court rejected this contention, stating that for the employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants was not improper.³²² The court concluded that

³¹⁰ *Id.* at 316.

³¹¹ See *infra* text accompanying notes 317-23.

³¹² 434 U.S. 136 (1977).

³¹³ The differing biological role at issue in *Satty* was women's ability to bear children. *Id.* at 138.

³¹⁴ *Id.* at 143.

³¹⁵ In 1976, Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e (k) (1982). See *supra* note 178.

³¹⁶ See *supra* text accompanying notes 308-14.

³¹⁷ 435 U.S. 136 (1977). See Petitioner's Brief at 20.

³¹⁸ E.g., *Christensen v. State of Iowa*, 563 F.2d 353, 356 (8th Cir. 1977); *Barone v. Hackett*, 28 FEP Cases 1765, 1770 (D. R.I. 1982); *Air Line Pilots Ass'n, Int'l v. Western Airlines, Inc.*, 23 FEP Cases 1042, 1045 (N.D. Cal. 1979).

³¹⁹ *Briggs v. City of Madison*, 536 F. Supp. 435, 445 (W.D. Wis. 1982).

³²⁰ *Id.* at 447.

³²¹ *Id.* at 440.

³²² *Id.* at 449.

nothing in Title VII indicates that an employer's liability extends to conditions of the marketplace it did not create.³²³

The *Norris* Court erred in holding Arizona liable under Title VII for practices in the marketplace over which it had no control.³²⁴ The deferred compensation plan offered by Arizona falls squarely within the open-market exception created by the Supreme Court in *Manhart*. Under that exception, an employer may set aside equal retirement contributions for each of its employees and let each retiree purchase the largest benefit his or her accumulated contributions could command in the open market without violating Title VII.³²⁵ Arizona's pension plan comes under the open-market exception in two ways. First, the pension plan allows employees to select a lump-sum payment upon retirement³²⁶ so that they can purchase the largest benefits possible in the open market. Second, even if an employee does not choose to exercise the right to receive the lump-sum payment, the life annuities offered by the insurance carriers exactly reflect the annuity plans available in the open market. As the *Norris* dissent noted, a female employee who did choose the lump-sum payment and then desired to purchase an annuity plan on her own from an independent insurer would still be subject to sex-based mortality tables.³²⁷ The employee would not, therefore, be purchasing any greater benefit on the open market than she could through Arizona's plan. The *Norris* majority was wrong to conclude that Arizona's deferred compensation plan did not fit under the open-market exception simply because Arizona had "affirmatively" offered a benefit favoring men. If Arizona's plan did not meet the plain language of the *Manhart* exception, it is difficult to imagine how any pension plan offering annuities ever will. As the *Norris* dissent pointed out, the Court's holding implies that the open-market exception can only be fulfilled if an employer subjects its employees to the harsh tax consequences of receiving their contributions in a lump-sum payment which reduced amount is then used to purchase benefits on the open market.³²⁸ Nothing in the *Manhart* opinion suggested that meeting such a requirement was necessary in order to fall under the open-market exception. In effect, the harsh result imposed by the *Norris* Court's decision disregards the policies expressed in *Manhart* that Title VII was not intended to revolutionize the insurance industry.

B. Freedom of Choice as a Factor in Determining the State's Liability

The *Norris* Court not only failed to demonstrate how the agency requirement of control was present in the Arizona-insurer relationship, but the Court also neglected to recognize the importance of the Arizona employees' freedom to choose different pension options in determining the state's liability. The Court was wrong to apply the Supreme Court analysis in *Manhart* to Arizona's deferred compensation plan because in *Manhart*, no private insurance company was involved in the administration of benefits.³²⁹ In

³²³ *Id.*

³²⁴ See *supra* notes 307-23 and accompanying text.

³²⁵ *Manhart*, 435 U.S. at 717-18.

³²⁶ *Norris*, 103 S. Ct. at 3494.

³²⁷ *Id.* at 3505 (Powell, J., dissenting). Justice Powell stated that "[t]he companies that underwrite the life annuities, as do the vast majority of private insurance companies in the United States, use sex-based mortality tables. Thus, the only effect of Arizona's [annuity option] is to allow its employees to purchase at a tax saving the same annuities they would otherwise purchase on the open market." *Id.*

³²⁸ See *id.* at 3506 n.4 (Powell, J., dissenting).

³²⁹ *Manhart*, 435 U.S. at 705.

Manhart, the employer not only exercised complete control over all aspects of the pension fund but also required its employees to participate in the plan.³³⁰ Arizona's deferred compensation plan was readily distinguishable from the pension plan considered in *Manhart* because the state relinquished nearly all control of the annuities aspect of its pension plan to private insurers.³³¹ While in other post-*Manhart* pension cases finding Title VII violations, such as *Spirit v. Teachers Insurance and Annuity Association*³³² and *EEOC v. Colby College*,³³³ the employers' annuity plans were mandatory for all employees, Arizona employees were not required to participate in the "discriminatory" annuity plan.³³⁴ The Arizona employees were also given three different options to choose from in their retirement plans: the annuities, the periodic payments, and the lump-sum plan. The *Spirit* employees, however, entered into an annuity plan automatically upon employment with Long Island University.³³⁵ Thus, Arizona employees were given considerable freedom to choose what type of plan, if any, they wished to participate in through their employer.

When a woman employee of Arizona reached the age of retirement, she was free to choose the alternative best suited to her needs.³³⁶ If she were in good health, she was free to gamble, just as any individual man was, by taking the life annuity contract, hoping that she would live beyond the actuarial date set by the tables. If the female employee succeeded and lived beyond this date, she would probably have received more compensation from the state than most similarly situated males. If, on the other hand, an individual woman were in poor health or felt that it was likely that she would die before the actuarial age calculated for women, she was free to choose, even following retirement, the lump-sum plan and, thus, take all her accumulated assets from the pension fund at the beginning of her retirement.

In a brief footnote, the *Norris* majority rejected the state's argument that Arizona's decision to offer two other pension plan options, both provided on equal terms to men and women, relieved the state of liability.³³⁷ Relying on a footnote from the Supreme Court's decision in 1982, in *Mississippi University for Women v. Hogan*,³³⁸ the Court dis-

³³⁰ *Manhart*, 553 F.2d at 583.

³³¹ *Norris*, 103 S. Ct. at 3494-95.

³³² 691 F.2d 1054 (2d Cir. 1982). See *supra* notes 139-43 and accompanying text.

³³³ 589 F.2d 1139 (1st Cir. 1978). See *supra* notes 116-37 and accompanying text.

³³⁴ *Norris*, 103 S. Ct. at 3505 (Powell, J., dissenting).

³³⁵ *Spirit*, 475 F. Supp. at 1300.

³³⁶ *Norris*, 103 S. Ct. at 3494.

³³⁷ *Id.* at 3497 n.10. The Court stated: "An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis." *Id.*

³³⁸ *Id.* The *Norris* Court cited *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24 n.8 (1982). The footnote relied on from that case stated:

Without question, MUW's admissions policy worked to Hogan's disadvantage. Although Hogan could have attended classes and received credit in one of Mississippi's state-supported coeducational nursing programs, none of which was located in Columbus, he could attend only by driving a considerable distance from his home. A similarly situated female would not have been required to choose between foregoing credit and bearing that inconvenience. Moreover, since many students enrolled in the School of Nursing hold full-time jobs, . . . Hogan's female colleagues had available an opportunity, not open to Hogan, to obtain credit for additional training. The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan "a burden he would not bear were he female."

Hogan, 458 U.S. 718, 723-24 n.8 (quoting *Orr v. Orr*, 440 U.S. 268, 273 (1979)).

missed Arizona's contention that the greater freedom of choice offered by the state could be a critical difference in determining liability.³³⁹ The *Hogan* Court held that a state statute excluding males from enrolling in a state-supported professional nursing school violated the equal protection clause of the fourteenth amendment.³⁴⁰ The *Norris* majority's reliance on *Hogan*, however, was misplaced. In the *Hogan* footnote the Court stated that the other options available to plaintiff Hogan, such as attendance at another of Mississippi's state-supported, co-educational nursing programs, did not alleviate the disadvantages that he had suffered when he was denied admission to an all-female school.³⁴¹ Presumably, the *Norris* majority likened the situation in *Hogan* to the fringe benefit scheme offered by Arizona and concluded that a female employee was still disadvantaged by the annuity plan, even if she had the choice of two other plans offered on an equal basis. In making this analogy, the *Norris* Court ignored the major premise behind the *Hogan* footnote. Justice O'Connor, who wrote the decision for the majority of the *Hogan* Court, acknowledged in the footnote several facts specific to the *Hogan* plaintiff's complaint.³⁴² For instance, Justice O'Connor recognized that Hogan was considerably inconvenienced because the school to which he was denied admission was in his hometown.³⁴³ According to Justice O'Connor, Hogan would have had to travel long distances to attend other state-supported nursing schools in that state.³⁴⁴ The *Hogan* Court ultimately held, in a five-to-four decision, that Hogan was denied equal protection under the fourteenth amendment.³⁴⁵ In the dissent to *Hogan*, Justice Powell criticized the *Hogan* majority's characterization of Hogan's injury as one of "inconvenience" and expressed embarrassment at the "constitutional right to attend a state-supported university in one's hometown" proposed by a majority of the Court in *Hogan*.³⁴⁶

The *Norris* Court's reliance on a controversial footnote is tenuous. First, the issue in *Hogan* was educational discrimination under an equal protection analysis,³⁴⁷ while the *Norris* case involved a Title VII violation of employment discrimination.³⁴⁸ In prohibiting calculations based on group characteristics in employer pension plans, the *Norris* Court relied on statutory interpretation to assert that the focus of Title VII is on the individual. In dismissing Arizona's contention that its freedom of choice plan was critical in determining liability, however, the Court cited, in a footnote, the *Hogan* footnote, which was from a case decided on constitutional equal protection grounds. The authority relied on by the *Norris* Court to dismiss Arizona's option argument as "irrelevant"³⁴⁹ was itself misplaced. Justice O'Connor's purpose in writing the *Hogan* footnote was to illustrate that the school's denial of admission to Hogan subjected the challenged policy to scrutiny under

³³⁹ Petitioner's Brief at 16. Petitioner Arizona relied on Chief Judge Coffin's concurring opinion in *Colby College* to support its freedom of choice argument. *Id.* (citing *Colby College*, 589 F.2d at 1146 (Coffin, C.J., dissenting)).

³⁴⁰ *Hogan*, 458 U.S. at 733.

³⁴¹ *Id.* at 723-24 n.8.

³⁴² See *supra* note 338.

³⁴³ See *supra* note 338.

³⁴⁴ See *supra* note 338.

³⁴⁵ *Hogan*, 458 U.S. at 733.

³⁴⁶ *Id.* at 736 (Powell, J., dissenting). Justice Powell asserted that the "heightened equal protection standard" used by the majority frustrates the liberating spirit of the clause. *Id.* at 741 (Powell, J., dissenting).

³⁴⁷ *Id.* at 733.

³⁴⁸ *Norris*, 103 S. Ct. at 3501.

³⁴⁹ *Id.* at 3497 n.10.

the equal protection clause, even though the alleged discrimination was against males.³⁵⁰ The footnote, therefore, contained facts specific to the issue analyzed in that case. For instance, Hogan's only other option, if he wished to receive an educational benefit equal to the benefit denied to him by Mississippi University for Women, was to drive long distances to other state-supported nursing schools. It is submitted that the *Hogan* facts are completely unrelated to the Title VII issue in *Norris*. Further, the facts detailed in the *Hogan* footnote should not have been relied on by the *Norris* majority to dismiss Arizona's contention that the options in its plan favorably distinguished it from previously litigated pension cases where the employer was held liable. The *Norris* majority overlooked those critical differences in Arizona's deferred compensation plan and unquestioningly applied the general *Manhart* analysis to *Norris*, just as other post-*Manhart* decisions, such as *Spirt* and *Colby College*, applied *Manhart* to pension cases without carefully examining the unique aspects of each plan being considered.

C. Liability Under Title VII Where State Did Not Intend to Discriminate

It is well-settled law that a Title VII plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination before the burden shifts to the defendant to articulate some nondiscriminatory reason for the challenged action.³⁵¹ A plaintiff must then have an opportunity to prove by a preponderance of the evidence that the "legitimate" reasons offered by the defendant were really a pretext for discrimination.³⁵² On numerous occasions, the Supreme Court has held that, when an employee alleges unfavorable treatment on the basis of sex or race under Title VII, proof of discriminatory motive is "critical."³⁵³ For example, in *International Brotherhood of Teamsters v. United States*,³⁵⁴ the United States instituted a Title VII suit alleging that the Teamsters Union had engaged in discrimination by hiring only minority workers for less desirable, lower-paying jobs.³⁵⁵ In that case, the Supreme Court held that the government had sustained its burden of showing that the company had engaged in a system-wide pattern of employment discrimination by purposefully treating minorities less favorably than white employees.³⁵⁶ The *Teamsters* Court emphasized that an allegation of disparate treatment in a Title VII complaint requires the plaintiff to prove that the employer intentionally discriminated.³⁵⁷ The Supreme Court has reasoned that by imposing the ultimate burden of

³⁵⁰ *Hogan*, 458 U.S. at 723.

³⁵¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

³⁵² *Id.*

³⁵³ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

³⁵⁴ *Teamsters*, 431 U.S. 324 (1977).

³⁵⁵ *Id.* at 329.

³⁵⁶ *Id.* at 337.

³⁵⁷ *Id.* at 335 n.15. The *Teamsters* Court also noted, however, that discriminatory motive can, in some situations, be inferred from the mere fact of differences in treatment. *Id.* (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66). The Court stated: "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.* Proof of intent is also not required where "the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Id.* at 335-36 n.15. The *Norris* case does not involve a facially neutral practice since the use of sex-based actuarial tables is not facially neutral. See Petitioner's Brief at 24 n.14. Plaintiff *Norris* alleged that she received disparate treatment from Arizona on account of her sex, and both the *Manhart* and *Norris* decisions analyzed the use of sex-based tables in terms of disparate treatment, not impact. *Id.* The respondents in their brief agreed that *Norris* is a disparate treatment case. Respondent's Brief at 18-24.

proving intentional discrimination on the plaintiff-employee,³⁵⁸ the Title VII plaintiff's prima facie case serves an important function in eliminating the most common nondiscriminatory reasons for the employer's rejection of the plaintiff, such as a job applicant's lack of qualifications or the absence of a vacancy in the job sought.³⁵⁹ In *Norris*, the district court, in its review of the employee's equal protection claim, expressly found that Arizona did not intend to discriminate by offering its pension plan to its employees.³⁶⁰ Because of this finding, prior Supreme Court cases required that the *Norris* Court reject, rather than sustain, the plaintiff's Title VII action.

Despite the Supreme Court's consistent emphasis on the intent requirement in Title VII cases, the Court in *Norris* adopted the court of appeals' rejection of the intent requirement.³⁶¹ The appeals court had reasoned that *Manhart* had required no affirmative showing of intent in Title VII pension plan cases, because that Court had not discussed the issue.³⁶² According to the court, *Norris* did not have to prove intent to discriminate under *Manhart*.³⁶³ In the alternative, the court of appeals asserted that because facially discriminatory practices are intentional for the purposes of Title VII regardless of the subjective motivation,³⁶⁴ *Norris* was not required to show Arizona's discriminatory motive in adopting the annuity plan.³⁶⁵ The presence of an intent to discriminate could be presumed, the court stated, because the "practices in question" treat men and women differently.³⁶⁶ The Supreme Court in *Norris* did not address the issue of intent, presumably, because the court of appeals had concluded that proof of intent was unnecessary. The Court, however, should not have ignored the issue, because this failure makes determining with which of the lower court's alternative arguments the Court agreed impossible. If the Court accepted the appeals court's assertion that *Manhart* had abolished the intent requirement for pension cases, it is submitted that this reliance on *Manhart* is unfounded. *Manhart* is distinguishable from *Norris* because, in *Manhart*, the employer's intent to discriminate against its employees could fairly be implied from the structure of the retirement plan.³⁶⁷ The employer was the controlling party who decided that women should make larger contributions to the retirement fund.³⁶⁸ Consequently, the *Manhart* Court's failure to address the issue of intent expressly should be viewed within the context of the facts of that opinion, where the employer's intent to discriminate was clear. In contrast, Arizona was not responsible for any practices resulting in disparate treatment of women because the insurers controlled the annuity portion of the pension plan. Any disparate impact was a result of the use of sex-based actuarial tables by the private insurance carriers, rather than any action taken by the state.

If the *Norris* Court's failure to address the intent issue was an acceptance of the appeals court's alternative theory that facial discrimination satisfies the Title VII intent requirement, the Court again dealt improperly with the issue. Even if the plan were facially discriminatory, the Court failed to recognize that the employer must still be the

³⁵⁸ *Texas Department of Community Affairs*, 450 U.S. at 253.

³⁵⁹ *Teamsters*, 431 U.S. at 358 n.44.

³⁶⁰ *Norris*, 486 F. Supp. at 651.

³⁶¹ 671 F.2d at 333-34.

³⁶² *Id.* at 333.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 334.

³⁶⁶ *Id.*

³⁶⁷ Petitioner's Brief at 25.

³⁶⁸ *Manhart*, 435 U.S. at 705.

party performing the discriminatory activity to be liable for that conduct.³⁶⁹ Arizona did not calculate and disburse the allegedly sex-discriminatory annuities. In *Personnel Administrator of Massachusetts v. Feeney*,³⁷⁰ a case construing the fourteenth amendment, the Supreme Court stated that discriminatory purpose implies more than intent as volition or intent as awareness of consequences.³⁷¹ The Court ruled that the concept of discrimination implied that the decisionmaker select a particular course of action "because of" and not merely "in spite of" its adverse effects upon an identifiable group.³⁷² This widely applied test is applicable to *Norris* because, as the Supreme Court has recognized, the basic standard for proving intent in a discrimination claim under the equal protection clause and in a disparate treatment claim under Title VII is the same.³⁷³ In *Norris*, Arizona's decision to make lifetime annuities available to its employees as one alternative for receiving their deferred compensation was not made "because of" any alleged adverse effects on females. Instead, the option was given "in spite of" any such effects, because the state had no choice but to use sex-based mortality tables as sex-based tables were the only type used in the private insurance industry.³⁷⁴

The Court's failure to discuss the appeals court's theories of why *Norris* did not need to show intent in her Title VII action leaves the issue of the intent requirement in pension cases unresolved. It is submitted that the Supreme Court erred not only in implicitly accepting the contention that a showing of intent is unnecessary, by not discussing the issue, but also in failing to adopt the district court's finding that Arizona did not intend to discriminate. The district court expressly found that, under the facts of *Norris*, the classification providing females with lower benefits was not made by the state but was a result of the insurers' judgments.³⁷⁵ The district court noted that under *Feeney*, Arizona's inability to affect the use of sex-based tables in calculating annuities was "somewhat less" than the purposeful discrimination necessary for a finding of a violation.³⁷⁶ Accordingly, under Rule 52(a) of the Federal Rules of Civil Procedure, the district court's finding of fact that Arizona was not motivated by any discriminatory intent should not have been set aside unless clearly erroneous.³⁷⁷ Neither the *Norris* court of appeals nor the Supreme Court made a showing that this difficult standard was met. Consequently, the Court should not have held that Arizona violated Title VII because the district court had found that there was no intent to discriminate, an essential prerequisite to a Title VII violation.

CONCLUSION

Before the Supreme Court's decision in *Norris*, Title VII actions brought against employers requiring their employees to participate in retirement plans, where insurance companies used sex-based mortality tables to calculate annuities, generally favored the employee and found employers responsible for discriminatory employment practices. The Supreme Court in *Norris* held that an employer violated Title VII by simply offering

³⁶⁹ See Petitioner's Brief at 26.

³⁷⁰ 422 U.S. 256 (1979). See *supra* note 45.

³⁷¹ 422 U.S. at 279.

³⁷² *Id.*

³⁷³ *Teamsters*, 431 U.S. 324, 335-36 n.15. See *supra* note 357.

³⁷⁴ See *supra* note 299 and accompanying text.

³⁷⁵ *Norris*, 486 F. Supp. at 651.

³⁷⁶ *Id.*

³⁷⁷ FED. R. CIV. P. 52(a) (1983).

a retirement plan to its employees which included an option to receive benefits in the form of an annuity. In *Norris*, the employees could choose among two types of sex-neutral annuities. Additionally, the employees could choose not to participate in the Arizona retirement plan at all. Given the flexibility of the Arizona plan, the Court's ruling in *Norris* means that even when the most unrestrictive pension annuity plan is offered to employees, the use of sex-based annuities still violates Title VII and employers are liable for the discrimination. Even though it had relinquished control over the calculation and disbursement of the annuities to private insurance companies, the employer in *Norris* was held responsible. The employer had absolutely no control over the use of sex-based mortality tables to calculate the annuity payouts and had no realistic opportunity to change those marketplace practices which treated women differently if it wished to offer the advantageous annuity option. In holding Arizona liable, the *Norris* Court relied extensively on *Manhart* but it failed to take notice of the factual differences distinguishing Arizona's deferred compensation plan and the plan at issue in *Manhart*. The Court dismissed the critical freedom of choice factor in the Arizona plan in a superficial footnote and it completely neglected the absence of discriminatory intent in Arizona's creation of its pension plan.

The Court's opinion implies that the real wrong committed in *Norris* was the use of sex-based mortality tables. But the Court erred in holding an employer responsible under Title VII for the perceived discriminatory practices of private insurers. This underlying aspect of the decision suggests that a complete restructuring of the insurance industry is necessary to make men and women equal. The basic principle underlying insurance policies is an attempt to predict accurately regarding a large group of similar risks, and the task of equalizing annuity tables would not only be administratively and financially difficult, but that solution would undermine the purpose of annuities: to distribute the insured's money so as to last throughout his or her life. Title VII was not intended to result in the restructuring of insurance industry practices and the statute is ill-equipped to bring about the major changes suggested by the Supreme Court's decision in *Norris*.

JENNIFER L. JORGENSEN