Tulsa Law Review

Volume 19 | Number 4

Summer 1984

Gender-Based Determination of Retirement Benefits: Arizona v. Norris

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GENDER-BASED DETERMINATION OF RETIREMENT BENEFITS: *ARIZONA v. NORRIS*

I. INTRODUCTION

In an era of heightened attention to civil rights and discrimination, policies that have long been common are now being challenged. For centuries, insurers have calculated insurance rates based on their anticipated cost of doing business.[1] Employers have generally designed and operated their defined-contribution retirement plans[2] according to this same principle, which determines premiums and benefits found in the individual insurance marketplace. From such a traditional viewpoint, it has been held reasonable, and equitable, to charge more for an annuity which has a longer lifetime than an annuity of equal amount which has a shorter lifetime. Since a woman's risk of outliving depletion of her retirement funds is, according to mortality statistics, greater than a man's,[3] she pays more for protection when she transfers that risk by purchasing an annuity.

In March 1980 this policy was challenged by the United States District Court for the District of Arizona in a decision styled *Norris v. Arizona Governing Committee* [Norris I].[4] A year later an appeal was granted in [Norris II][5] which affirmed the district court's decision.[6] Two years later, the United States Supreme Court granted a petition for rehearing, and delivered a landmark decision in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v.*

1. *See* 43 AM. JUR. 2D *Insurance* § 826 (1982) (defining an insurance premium as "consideration paid an insurer for undertaking to indemnify the insured").

2. "A defined contribution plan . . . is defined by the Internal Revenue Code and ERISA [Employer Retirement Security Act of 1974] as a plan which provides for an individual account for each participant and for benefits based solely on (1) the amount contributed to the participant's account, and (2) any income, expenses, gains and losses, and forfeitures of accounts of other participants which may be allocated to the participant's account." *Pension Planning—Terms and Topics*, TOPICAL LAW REPORT (CCH) No. SD-120 at 9 (May 1981).

3. *See Supreme Court Requires Unisex Annuity Benifits*, Johnson & Higgins Newsletter, July 13, 1983.

4. 486 F. Supp. 645 (D. Ariz. 1980).

5. Norris v. Arizona Governing Comm. for Deferred Annuity, 671 F.2d 330 (9th Cir. 1982) [hereinafter cited as *Norris II*].

6. *Id.* at 336.

Norris [Norris III],[7] when it affirmed in part and reversed in part the decisions of the lower courts.[8] The Court's decision, which has been strongly criticized,[9] may force the several states to re-evaluate the previously autonomous ideals of equality and economy. At a time when most states can ill-afford additional expenditures, *Norris III* could lead to an all-or-nothing scenario in which one sex must be allowed to benefit at the expense of the other, in order to preserve any benefits at all. This Note will examine the legal history leading up to the *Norris* decisions, as well as possible problems created by *Norris III*.

II. THE *NORRIS* DECISIONS

A. *Statement of the Case*

Since 1974[10] the State of Arizona has offered its employees the opportunity to enroll in a deferred compensation plan ("Plan") administered by the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Governing Committee").[11] Employees who participate in the Plan may postpone the receipt of a portion of their wages until retirement; by doing so, they postpone paying federal income tax on the amounts deferred until after retirement, when they receive those amounts and any earnings thereon.[12]

The State initiated the program by inviting private companies to submit bids describing the investment opportunities they would offer state employees. The State then selected several companies to participate in its deferred compensation plan. Most of the companies selected offered three basic retirement options: (1) a single lump-sum payment upon retirement; (2) periodic payments of a fixed sum for a fixed period of time; or (3) monthly annuity payments for the remainder of the employee's life.[13] When an employee decided to take part in the Plan, she had to designate the company chosen to invest her deferred wages. Employees had to choose one of the participating companies selected by the State, they were not free to invest their deferred compensation in any other way. At the time an employee enrolled in the Plan, she could

7. 103 S. Ct. 3492 (1983) (per curiam).
8. *Id.*
9. *See* Bernstein, *The Havoc in Retirement Benefits After Norris*, 70 A.B.A. J. 80 (1984).
10. Arizona's deferred program was approved by the Internal Revenue Service in 1974. *Norris III*, 103 S. Ct. at 3494 n.1; *see* I.R.C. § 457 (1982).
11. ARIZ. REV. STAT. ANN. § 38-871 (Supp. 1975-1983).
12. *See* I.R.C. § 457(a) (1982).
13. *Norris III*, 103 S. Ct. at 3494.

also select one of the pay-out options offered by the chosen company, but was free to switch to one of the company's other options upon retirement.[14]

The State was responsible for withholding the appropriate sums from the employee's wages and channeling those sums to the company designated by the employee. The State compensated its employees when they attended group meetings concerning the Plan, and it bore the cost of administering the payroll deductions; it did not, however, contribute any money to supplement the employees' deferred wages.[15] For an employee who elected to receive a monthly annuity following retirement, the amount of the employee's monthly benefits depended upon the amount of compensation the employee deferred, the employee's age at retirement, and the employee's sex.[16] All of the participating companies selected by the State calculated monthly retirement benefits by using sex-based mortality tables.[17] Because the tables classified annuitants on the basis of sex, and because women, on the average, live longer than men, use of these tables resulted in larger monthly payments for men than for women who deferred the same amount of compensation and retired at the same age. Sex was the only factor that the tables used to classify individuals of the same age; they did not incorporate other factors correlating to longevity such as smoking habits, alcohol consumption, weight, medical, or family history.[18]

On May 3, 1975, Nathalie Norris made application to the Governing Committee to participate in the Plan and requested that her money be invested in Lincoln National Life Insurance Company's fixed annuity contract. Her application was approved on May 9, 1975, and shortly thereafter the State began withholding $199.50 from her salary each month. Assuming Norris did not alter the amount deferred, and all other factors remained constant, the total value of her account at age 65 would have been $53,890.93, entitling her to an annuity payment of $320.11 per month for life, with ten years certain. Had Norris been a male, however, and assuming all other factors remained

14. If she decided to receive a lump-sum payment, she could also purchase any of the options then being offered by the other companies participating in the plan. *Id.*

15. *Norris I*, 486 F. Supp. at 648.

16. *Norris III*, 103 S. Ct. at 3494-95.

17. Different companies participating in the plan use different means of classifying individuals on the basis of sex. Several companies use separate tables for men and women; another company uses a single actuarial table based on male mortality rates, but calculates an annuity for a woman by treating her as if she were six years younger and had the life expectancy of a man that age. *Id.* at 3495 n.2.

18. *Norris III*, 103 S. Ct. at 3495.

the same, the payment would have been $354.07 per month for life, with ten years certain.[19]

B. *The United States District Court Decision:* Norris I

On April 25, 1978, after exhausting administrative remedies, Norris brought suit in the United States District Court for the District of Arizona against the State of Arizona, the Governing Committee, and several individual members of the committee. Norris alleged that Arizona's deferred compensation plan violated Title VII of the Civil Rights Act[20] as well as the equal protection clause of the fourteenth amendment.[21]

In considering the civil rights violation the court first had to determine whether a deferred compensation plan was a benefit or privilege of employment, and, if so, whether the benefit or privilege should apply equally to male and female employees. At both tiers of inquiry the court answered affirmatively,[22] stating that the "theory of deferred compensation is a clear financial benefit to the employees since it results in reduced taxes on present income. That part of the taxes which are not paid by the employee and result in a tax savings is a monetary saving to the employee."[23] The court further held that the voluntariness of employee participation had no bearing on the lawfulness of the Plan;[24] likewise, the fact that employees could select an option other than an annuity payment did nothing to increase its legality.[25]

The district court declined to find for Norris on the alleged violation of the equal protection clause.[26] Since the Arizona statute is gen-

19. This would result in an exact difference of $33.96 per month or a total difference in benefits of $4075.20. *Norris I*, 486 F. Supp. at 648.

20. 42 U.S.C. § 2000e-2(a)(1) (1982). The applicable portion of Title VII provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin. . . ." *Id.*

21. *Norris I*, 486 F. Supp. at 651.

22. *Id.* at 649.

23. *Id.*

24. Specifically, the court stated:

> [D]iscrimination against an employee because of sex is violative of Title VII of the 1974 [sic] Civil Rights Act whether the employee's participation is voluntary or mandatory, if the discrimination results or may result in a financial benefit, more advantageous conditions of employment, or better or additional privileges to the members of one sex and not the other.

Id.

25. *Id.* at 650; *see also* Reilly v. Robertson, 266 Ind. 29, —, 360 N.E.2d 171, 177-78 (1977).

26. *Norris I*, 486 F. Supp. at 651.

der-neutral on its face,[27] the court had to consider whether the classification itself, covert or overt, if not based upon gender, nevertheless resulted in an adverse effect which reflected invidious gender-based discrimination.[28]

The court held that before the Plan could be found offensive to the equal protection clause, a purposeful discrimination had to be found.[29] From the facts stipulated, the court found that the sex-based classifications were not made by the Governing Committee, but rather were results of the insurers' judgment. The court held this to be "somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment,"[30] and held for the Governing Committee. After finding the necessary requirements for certification of a class action, the district court permanently enjoined the Governing Committee from carrying out its Plan with the use of sex-segregated actuarial tables, and ordered that annuity payments to female employees who had retired be made equal to similarly situated male employees.[31]

C. *The United States Court of Appeals Decision:* Norris II

On August 12, 1981, the State of Arizona appealed the decision of the district court.[32] In affirming the district court's decision, the Ninth Circuit Court of Appeals overruled the State's arguments: (1) that in order to violate Title VII Norris had to prove that Arizona intended to discriminate against women;[33] (2) that the decision should be limited to employer-operated funds;[34] and (3) that the Plan did not discriminate because it reflected the limits in the marketplace.[35] It also found the

27. The statute refers to state employees but makes no reference to sex, and is not gender-based. ARIZ. REV. STAT. ANN. § 38-872 (1974).

28. *Norris I*, 486 F. Supp. at 651.

29. *Id.*

30. *Id.*

31. *Id.* at 652.

32. *Norris II*, 671 F.2d 330 (9th Cir. 1982).

33. The court stated that past decisions failed to show a need to prove intent. Instead, the important focus was whether Title VII prohibited the differentials found in the pension fund. *Id.* at 333.

34. "In this case, . . . it is clear that the adoption of the plan constitutes active participation without which the challenged program could not operate." *Id.* at 334.

35. "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." *Id.* at 335.

State's arguments[36] to be without merit,[37] and approved the orders enjoining further use of sex-segregated tables and directing equalization of annuity payments to retired female employees.[38]

D. *The United States Supreme Court Decision:* Norris III

On Arizona's appeal from the decision of the Ninth Circuit Court of Appeals, the Supreme Court granted certiorari. The Court stated the controlling issue as follows:

> whether Title VII of the Civil Rights Act of 1964 prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly retirement benefits than a man who has made the same contributions; and whether, if so, the relief awarded by the District Court was proper.[39]

In a five to four decision, the Court affirmed the district court's finding that the Arizona Plan violated Title VII and held that all retirement benefits derived from contributions made after the Court's decision had to be calculated without regard to the sex of the beneficiary.[40] Further, the Court reversed the district court's decision as to retroactive application and in another five to four split, held that benefits derived from contributions made prior to the decision could be calculated under the existing terms of the Plan.[41]

III. CASE LAW PRIOR TO *NORRIS*

The Court's decision descended directly from its earlier ruling in *City of Los Angeles Department of Water & Power v. Manhart*.[42] In *Manhart*, an employer was found to have violated Title VII by requir-

36. Arizona argued that the award ordering enjoinment and equalization was an abuse of discretion because passive abusers should not have to pay, and because Arizona taxpayers, through their legislators, indicated that they did not want to pay for the Plan. *Id.* at 335-36.

37. The Ninth Circuit Court of Appeals cited cases allowing recovery in substantially similar circumstances, and stated that Arizona was not insulated from making payments to equalize treatment simply because it did not want to pay for the plan. "If this were not the case, a state could insulate itself from Title VII or § 1983 damages merely by saying it did not intend for its taxpayers to be burdened." *Id.* at 336.

38. *Id.*

39. *Norris III*, 103 S. Ct. at 3493 (citation omitted).

40. This position is expressed in parts I, II, and III of the opinion by Justice Marshall, joined by Justices Brennan, White, Stevens, and O'Connor. *Id.*

41. This position is expressed in part III of the opinion by Justice Powell, which is joined by the Chief Justice and Justices Blackmun, Rehnquist, and O'Connor. *Id.*

42. 435 U.S. 702 (1978).

ing female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits. In that case the Court said that "[e]ven though it is true that women as a class outlive men, that generalization cannot justify disqualifying an individual to whom it does not apply."[43] Though the water and power department contended that the different contributions exacted from men and women were based on the factor of longevity rather than sex, and thus constituted a statutory exemption authorized by the Equal Pay Act,[44] the Court in *Manhart* found no evidence that any factor other than the employee's sex accounted for the differential there.[45]

The Court was careful to distinguish its *Manhart* ruling from its earlier decision in *General Electric Co. v. Gilbert*.[46] In *Gilbert*, the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII.[47] Relying on the reasoning in *Geduldig v. Aiello*,[48] the Court first held that the General Electric plan did not involve discrimination based upon gender as such. The two groups of potential recipients which that case concerned were pregnant women and nonpregnant persons. "While the first group is exclusively female, the second includes members of both sexes."[49] In contrast, the two groups of employees involved in *Manhart* were composed entirely and exclusively of members of the same sex. The Court held that on its face, the plan in *Manhart* discriminated on the basis of sex, whereas the General Electric plan discriminated on the basis of a special physical disability.[50]

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43. *Id.*

44. The Equal Pay Act provides, in part, that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, 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: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1982) (emphasis in original).

45. *Manhart*, 435 U.S. at 702-03.

46. 429 U.S. 125 (1976).

47. *Id.* at 136.

48. 417 U.S. 484 (1974).

49. 429 U.S. at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974)).

50. 435 U.S. at 715.

The Court, however, refused to order a retroactive recovery in *Manhart*, and reversed the district court order allowing retroactive relief. It held that although a presumption favors retroactive relief where a Title VII violation has been committed,[51] the appropriateness of such relief to the individual case had to be assessed.[52] Focusing on the potential impact that changes in the rules affecting insurance and pensions could have on the economy,[53] Justice Stevens concluded that retroactive liability could be devastating for a pension fund, with the harm falling in large part on innocent third parties, and held that the district court errored in granting retroactive relief in *Manhart*.[54]

Subsequent to *Manhart*, and prior to *Norris III*, the validity of sex-segregated actuarial tables to calculate pension benefits has been considered by at least eight lower courts.[55] All but one of these courts have held the use of such tables to be violative of Title VII.[56] On the issue of retroactive relief, however, the courts have been more divided. The Second Circuit Court of Appeals was the only court willing to order complete retroactive relief,[57] stating that "none of the factors that influenced the *Manhart* Court is [sic] present to render 'inappropriate'

51. *Id.* at 723; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) ("backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination").

52. 435 U.S. at 703. The Court felt that because this was the first litigation challenging pension fund contribution differences based on actuarial tables, the fund administrators may have validly assumed that the differential was justified. *Id.*

53. Justice Stevens stated:

> The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

Id. at 721. Congress underlined the importance of making gradual and prospective changes in the rules that govern pension plans when it passed the Employee Retirement Income Security Act of 1974. *Id.* n.40. That bill specifically applied to the problem of retroactivity; it set a wide variety of effective dates for provisions of the new law, some of which would not be fully effective until 1984. *Id.*

54. *Id.* at 722-23.

55. *See* Peters v. Wayne State Univ., 691 F.2d 235, 237 (6th Cir. 1982); Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1056 (2d Cir. 1982); Retired Public Employees' Ass'n v. California, 677 F.2d 733, 735 (9th Cir. 1982); EEOC v. Colby College, 589 F.2d 1139, 1141 (1st Cir. 1978); Women in City Gov't United v. City of New York, 515 F. Supp. 295, 297 (S.D.N.Y. 1981); Hannahs v. New York State Teachers' Retirement Sys., 26 Fair Empl. Prac. Cas. (BNA) 527, 529 (S.D.N.Y. 1981); Probe v. State Teachers' Retirement Sys., 27 Fair Empl. Prac. Cas. (BNA) 1306, 1309 (C.D. Cal. 1981); Shaw v. International Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995, 996 (C.D. Cal. 1980).

56. Only the Sixth Circuit Court of Appeals has reached the opposite conclusion. *See Peters*, 691 F.2d at 238.

57. Neither of the courts in EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978), nor Shaw

an order of relief that affects the value of contributions paid to the pension fund prior to the entry of judgment below."[58] The Ninth Circuit Court of Appeals ordered retroactive relief for those employees retiring after the date that Title VII became applicable to public employees,[59] but refused to allow recovery by employees retiring prior to that date.[60] The United States District Court for the Southern District of New York refused to order retroactive relief without more information as to the consequences of such an order,[61] and the United States District Court for the Central District of California, relying on *Manhart*, rejected retroactive relief entirely.[62]

Thus, *Norris III* follows the precedential majority in holding that the use of sex-segregated actuarial tables violates Title VII. The Court's refusal to order retroactive relief settles the split of opinion among the circuit courts in support of the majority rule. Although the Court in *Norris III* agreed with the majority of prior case law in its result, it often differed in its reasoning.[63]

IV. THEORIES OF THE CASE

The arguments enumerated in *Norris III* are not new; they have all been considered at one time or another in lower court decisions since *Manhart*. Nevertheless, *Norris III* is recognized as a landmark decision since the Court has finally dealt with all of these theories in one opinion, laying down one final, definitive statement of their resolution.

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v. International Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980), had occasion to consider this issue.

58. *Spirt*, 691 F.2d at 1067. The court gave two reasons for departing from the *Manhart* decision: (1) *Manhart* had been decided four years prior to *Spirt*, and since that time, a number of federal district courts and courts of appeal had declared plans like those in *Spirt* to be unlawful. These decisions were felt to be sufficient to put the defendants on notice as to the questionability of their practices, and gave defendants "ample time to 'voluntarily' revise their mortality tables," *Id.* at 1067-68; and (2) the court recognized that the retroactive relief awarded in *Spirt* was not nearly as drastic as that sought in *Manhart*. In *Manhart*, the district court ordered that all female employees and retirees receive refunds of all excess contributions made to the plan prior to the date on which Title VII became applicable to governmental employees. 435 U.S. at 702. In *Spirt*, the retroactive award did not require the wholesale removal of monies from the pension reserves, but an equalization of monthly payments to be calculated so as not to change the total anticipated obligations of the funds. 691 F.2d at 1068.

59. Title VII became applicable to public employees on March 24, 1972. *Retired Public Employees*, 677 F.2d at 736.

60. *Id.* at 738.

61. *See Women in City Gov't United*, 515 F. Supp. at 306-07; *Hannahs*, 26 Fair Empl. Prac. Cas. (BNA) at 534.

62. *See Probe*, 27 Fair Empl. Prac. Cas. (BNA) at 1311.

63. *See infra* notes 68-70.

The Court set forth two issues in its consideration of *Norris III*: whether the Governing Committee would have violated Title VII if it had run the entire deferred compensation plan itself, without the participation of any insurance companies;[64] and whether the conduct of the Governing Committee was beyond the reach of Title VII because the insurance companies, and not the Governing Committee, calculated and paid the retirement benefits.[65] In resolving these major issues the Court also took the opportunity to deal with several sub-issues.

A. *Governmental Liability for an Employer-Operated Program*

The Court found that the opportunity to participate in a deferred compensation plan is a condition or privilege of employment, and that retirement benefits are a form of compensation[66] so as to come under the protection of Title VII. Thus, the next question was whether it was sex-based discrimination to pay lower monthly benefits to a retired woman than to a retired man who deferred the same amount of income.[67]

In *Manhart*, the Court held that an employer had violated Title VII by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits. In *Norris III*, female employees made the same contributions as male employees, only to receive smaller monthly payments upon retirement. The *Norris* Court, however, did not find this difference dispositive of the Plan's validity.[68] Noting that Title VII's "focus on the individual is unambiguous,"[69] the Court held that the classification of employees on the basis of sex was no more permissible at the pay-out stage of the Plan than at the pay-in stage.[70]

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64. *Norris III*, 103 S. Ct. at 3496.

65. *Id.* at 3499.

66. *Id.* at 3496.

67. *Id.*

68. The Court likewise found it irrelevant that the Arizona plan included two options that were provided on equal terms: a lump-sum option, and a fixed-sum-for-a-fixed-term option, and refused to let an employer who offered one fringe benefit on a discriminatory basis to escape liability because he offered other benefits on a non-discriminatory basis. *Id.* at 3497 n.10. *Women in City Gov't United* supports this finding, stating that "[t]he fact that in some instances women may derive greater benefits, or that there are options available that allow rates for some to be reduced, does not constitute a defense to a *prima facie* violation of Title VII." 515 F. Supp. at 301-02.

69. *Norris III*, 103 S. Ct. at 3496 (quoting *Manhart*, 435 U.S. at 708).

70. *Id.* at 3497. The Court found it irrelevant that the female employees in *Manhart* were required to participate in the pension plan, whereas participation in the Arizona plan was voluntary. *Id.* at n.10. It held that "Title VII forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." *Id.* This view is a slight

This sentiment had been voiced by lower courts in prior federal decisions. The First Circuit Court of Appeals in *EEOC v. Colby College*[71] refused to accept the argument that equal contributions meant no discrimination. The court instead found the controlling element to be the fact that women were not offered non-discriminatory alternatives at the pay-out stage.[72] Similarly, the district court in *Hannahs v. New York State Teachers' Retirement System*,[73] found the rationale of *Manhart* to be equally applicable where unequal benefits rather than unequal contributions were challenged.[74] The Second Circuit Court of Appeals in *Spirt v. Teachers Insurance & Annuity Association*[75] found no legally significant difference between unequal contributions for equal payments and equal contributions for unequal payments.[76] In fact, the *Spirt* court felt that if any meaningful distinction could be discerned between the two types of sex-based plans, it was the latter type of unequal benefit plan that was in greater conflict with the spirit and purposes of Title VII.[77] It reasoned that the lesser benefit would be received at a time when the recipient would probably be living on a fixed income, unable to increase her benefits as she might increase her salary during her working years, and at a time when the amount of

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departure from prior decisions in which the lower courts have only dealt with plans making participation mandatory. *See Spirt*, 691 F.2d at 1057; *Colby College* 589 F.2d at 1141; *Women in City Gov't United*, 515 F. Supp. at 297. The effect of the plan, however, was to make participation mandatory in order for the employee to take advantage of the tax-saving: to achieve the tax benefits under federal law, the life annuity had to be purchased from a company designated by the Arizona plan. *See Norris III*, 103 S. Ct. 3505-06 (Powell, J., dissenting).

71. 589 F.2d 1139 (1st Cir. 1978).

72. The contributions [were] not made in the form of a payment with which the employee [could] do whatever he or she desire[d]. Rather, the contributions [could] be used only to buy an annuity or life insurance policy with the foreknowledge that the woman's dollar [could] buy a different amount in those markets than [could] a man's.

Colby College, 589 F.2d at 1144. The court was not oblivious to the greater difficulty of determining the discrimination in *Colby College*:

> Whether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were. The female employees, obliged to suffer larger payroll deductions, and hence receive less take-home pay than their male counterparts, could point to an immediate and obvious disparity of treatment, and indeed did so, at great length, by affidavits and brief.

Id. at 1143.

73. 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981).

74. *Id.* at 530. "In the case of unequal contributions, women receive lower take home pay; in the case of unequal benefits, they receive lower annuity checks. In both situations, they receive less compensation than men, as that term is described by Title VII." *Id.*

75. 691 F.2d 1054 (2d Cir. 1982).

76. *Id.* at 1061.

77. *Id.* Each female participant in the *Spirt* plan was maintained at a lower economic level than her male counterpart for as long or short a time as she was alive to receive benefits, regardless of whether she was ultimately one of the few who outlived the average male participant.

dollars available to her is apt to critically affect her ability to meet her basic needs.[78]

Only one court found the unequal contribution/unequal benefits difference to be significant. In *Peters v. Wayne State University*,[79] the Sixth Circuit interpreted *Manhart*'s primary concern to be that women received smaller paychecks for the same work. Since male and female employees contributed the same amount to the Wayne State plan, the court held this concern not to be a factor in *Peters*.[80] In doing so, however, the court paid little attention to other language in *Manhart* requiring a focus on fairness to individuals rather than fairness to classes.[81]

The Court in *Norris III* also considered and rejected the Governing Committee's argument that the Arizona Plan did not discriminate on the basis of sex because a man and a woman who defer the same amount of compensation will obtain upon retirement annuity policies having approximately the same present actuarial value.[82] The Courts of Appeal for the First and Second Circuit supported this position.[83] The Second Circuit in *Spirt* found the argument for actuarial equivalency unconvincing:

> because it is only by virtue of defining an individual in terms of the prohibited classification that the actuarially equal result is reached. It is this very act of classification that results in unfairness to individual members of the class in violation of the clear mandate that compensation, conditions and benefits

78. *Id. But see* Bernstein, *supra* note 9, at 82 ("The concerns of the women plaintiffs in *Norris*[III] that they would receive less retirement income than would men in their later years will certainly not be alleviated.").

79. 691 F.2d 235 (6th Cir. 1982).

80. *Id.* at 240. The Sixth Circuit held the factual differences to be significant because of the court's narrow construction of the *Manhart* holding, "[a]ll that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." 435 U.S. at 717 (emphasis added). The *Peters* court refused to recognize a disparate impact on women because of unequal benefits, holding instead that Wayne State's retirement plan was based on a legitimate nondiscriminatory reason for treating female and male annuitants differently, i.e., longevity. 691 F.2d at 239.

81. "Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." 435 U.S. at 709.

82. To determine the present actuarial value of an annuity policy, the present value of each promised monthly payment is multiplied by the probability that the annuitant will live to receive that payment (a figure supplied by an actuarial table). Under a sex-based retirement plan, an annuity policy issued to a retired female will have roughly the same present actuarial value as a policy issued to a similarly situated man, since the lower value of each promised monthly payment is offset by the likelihood she will live longer and receive more payments. *Norris III*, 103 S. Ct. 3497 n.11.

83. *See Spirt*, 691 F.2d at 1061-62; *Colby College*, 589 F.2d at 1143.

> of employment are to be tested by their disparate effect on *individuals* rather than *groups*.[84]

The First Circuit, in a case decided four years earlier, also held that it was not enough that individual female employees received the same annuity as comparable men: "their contributions, too, must be equal even though it was clear that the women employees, as a class, would receive more for their money."[85]

The concern that women would receive greater compensation if annuities were calculated on gender neutral tables attributed in part to the Sixth Circuit's decision in *Peters* that the retirement package offering female and male annuitants benefits of equal value did not violate Title VII.[86] Because there was no proof that the package was in fact worth more to men than to women, the *Peters* court held that it was impossible to find a gender-based discriminatory effect in the scheme.[87] The *Norris III* Court, however, refused to deal with the actuarial question on its short-term basis, instead focusing on long-term payments and the use of sex to predict longevity:

> In asserting that the Arizona plan is nondiscriminatory because a man and a woman who have made equal contributions will obtain annuity policies of roughly equal present actuarial value, petitioners incorrectly assume that Title VII permits an employer to classify employees on the basis of sex in predicting their longevity . . . . This underlying assumption . . . is flatly inconsistent with the basic teaching of *Manhart*: that Title VII requires employers to treat their employees as *individuals*, not "as simply components of a racial, religious, sexual, or national class."[88]

In refusing to penalize an individual woman by paying her lower monthly benefits simply because, as a class, women live longer than men, the Court took the next logical step in the progression of decisions

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84. 691 F.2d at 1061-62 (emphasis added).

85. 589 F.2d at 1143.

86. *See* 691 F.2d at 241. The Sixth Circuit refused to acknowledge that gender-neutral tables would equalize the treatment of men and women. The court postulated that, while men and women would receive equal payments if annuities were calculated on gender-neutral tables, the employer would have to contribute more to a woman's retirement fund than to a man's; consequently, men would receive less immediate compensation. Furthermore, women living to the predicted statistical age for women would receive greater total benefits than men living to the predicted statistical age for men. *Id.* at 241.

87. *Id.*

88. *Norris III*, 103 S. Ct. 3497-98 (emphasis in original). The Court held that the use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables accurately predict the longevity of women as a class, because "under the statute '[e]ven a true generalization about [a] class' cannot justify class-based treatment." *Id.* at 3498.

since *Manhart*.[89] While merely affirming what had been decided earlier in cases such as *Spirt*,[90] *Colby College*,[91] and *Women in City Government United v. New York*,[92] the Court gave added emphasis to Title VII's focus on the individual, while minimizing factual differences which failed to affect its impact. By holding that the Governing Committee would have violated Title VII had it run the entire Plan itself, the Court gave further credibility to earlier decisions.[93]

B. *State Liability for a Privately Operated Program*

After determining that the Arizona Plan would have violated Title VII had the Governing Committee run the program, the Court had to decide whether the Governing Committee's conduct was beyond the reach of Title VII because it was the insurance companies chosen by the Committee, and not the Committee itself, that calculated and paid the retirement benefits.

Title VII primarily governs relations between employees and their employer, not between employees and third parties.[94] Recognizing this limitation on the reach of the statute, the Court noted in *Manhart* that "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market."[95] Relying on this language, the Governing Committee contended that it had not violated Title VII because the life annuities offered by the companies participating in the Arizona Plan reflected what was available on the open market.[96] The Court, however, rejected this defense since the employees were limited to the alternatives made available by the state selected insurance companies.[97]

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89. *But see* Bernstein, *supra* note 9, at 80-81 (Regarding sex-based discrimination legislation: "It is not surprising that when laws ignore the different life expectancies of men and women, the legislation is likely to backfire, and women, the intended beneficiaries, are the losers.").

90. 691 F.2d 1054 (2d Cir. 1982).

91. 589 F.2d 1139 (1st Cir. 1978).

92. 515 F. Supp. 295 (S.D.N.Y. 1981); *see supra* note 68.

93. *See Spirt*, 691 F.2d at 1063; *Colby College*, 589 F.2d at 1141; *Hannahs*, 26 Fair Empl. Prac. Cas. (BNA) at 532; *Shaw*, 24 Fair Empl. Prac. Cas. (BNA) at 997.

94. *Manhart*, 435 U.S. at 718 n.33.

95. *Id.* at 717-18.

96. *Norris III*, 103 S. Ct. at 3500.

97. *Id.* at 3501.

> It is irrelevant whether any other insurers offered annuities on a sex-neutral basis, since the State did not simply set aside retirement contributions and let employees purchase annuities on the open market. On the contrary, the State provided the opportunity to

Because the companies were selected by the State, the Court found the Governing Committee to be legally responsible for the discriminatory terms on which annuities were offered.[98] Having created the Plan, whereby employees could obtain the advantages of using deferred compensation to purchase an annuity only if they invested in one of the companies selected by the State, the Court refused to permit the State to disclaim responsibility for the discriminatory features of the insurers' options. Instead, it held that an employer that adopts a fringe benefit scheme that discriminates among its employees on the basis of sex violates Title VII regardless of whether third parties are also involved:[99]

> it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains,[100] regardless of which party initially suggested inclusion of the discriminatory provisions. It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis.[101]

This reasoning was supported by the Second Circuit in *Spirt*, which held that "delegation of responsibility for employee benefits cannot insulate a discriminatory plan from attack under Title VII."[102] The Second Circuit went beyond *Norris III*, however, holding that the insurer was so closely intertwined with the employer as to be deemed an "employer" itself for purposes of Title VII.[103] Factual differences, in part, account for this variation: under the Arizona Plan, employees were allowed to choose between general private insurers;[104] the insurer in

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> obtain an annuity as part of its own deferred compensation plan. . . . Employees enrolling in the plan could obtain retirement benefits only from one of those companies, and no employee could be contacted by a company except as permitted by the State.

Id.

98. *Id.*

99. *Id.*

100. *See* Williams v. New Orleans Steamship Ass'n, 673 F.2d 742, 750 (5th Cir. 1982) ("The rights assured by Title VII cannot be bargained away—either by a union, by an employer, or by both acting in concert."); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 926 (9th Cir. 1982) ("An employer-union agreement permitting the employer to discriminate is not immune to race discrimination claims."); Farmer v. ARA Services, Inc., 660 F.2d 1096, 1104 (6th Cir. 1981) (labor organization held jointly and severally liable under Title VII for acquiescing in discriminatory practices of employer); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2d Cir. 1980) (employer-union agreement permitting employer to discriminate held no defense).

101. *Norris III*, 103 S. Ct. at 3501-02.

102. 691 F.2d at 1063.

103. *Id.*

104. *Norris III*, 103 S. Ct. at 3494.

Spirt, however, had been organized solely to provide retirement benefits for faculty and staff members at private four-year colleges and universities.[105]

In *Peters* the Sixth Circuit rejected the reasoning in *Spirt* and refused to hold the insurer liable as an "employer," even though the insurance company had been created solely to serve the retirement needs of academic employees.[106] The court did, however, acknowledge that a Title VII employer could not avoid its liabilities by claiming it had selected services which "happened" to discriminate against women.[107] It held that Wayne State would have been liable under Title VII if the insurer's plan had discriminated against female annuitants, but failed to find that the use of sex-segregated mortality tables to calculate retirement benefits violated Title VII.[108] In principle, then, if not in fact, *Peters* supports *Norris III*'s finding of liability on the part of the non-insurer employer; however, they differ as to what they construe as discrimination.

V. THE IMPACT OF *NORRIS III* ON THE McCARRAN-FERGUSON ACT

In their oral arguments before the Ninth Circuit Court of Appeals the Governing Committee contended that their conduct was exempted from the reach of Title VII by the McCarran-Ferguson Act[109] ("McCarran Act"), however, they made no mention of the McCarran Act in either their petition for certiorari or their brief on the merits.[110] Acknowledging that "only in the most exceptional cases will we consider issues not raised in the petition,"[111] the Court still thought it pertinent to deal with the McCarran Act since it had been relied on by the dissent.[112]

The McCarran Act was enacted in 1945 in direct reaction to the Supreme Court's decision in *United States v. South-Eastern Underwriters Association*[113] a year earlier. In *South-Eastern Underwriters*, the

105. *Spirt*, 691 F.2d at 1063.
106. *Peters*, 691 F.2d at 235.
107. *Id.* at 238.
108. *Id.*
109. 15 U.S.C. §§ 1011-1015 (1982).
110. *Norris III*, 103 S. Ct. at 3500 n.17.
111. *Id.* (citing Stone v. Powell, 428 U.S. 465, 481 n.15 (1976)).
112. *Id.*
113. 322 U.S. 533 (1944). Before the decision in *South-Eastern Underwriters*, both the Congress and the courts had assumed that the insurance business did not constitute interstate commerce, and, therefore, that state regulation of insurance companies doing business within the

Court held that insurance companies involved in insurance transactions across state lines were engaged in interstate commerce and subject to federal regulation under the commerce clause.[114] Therefore, the Court found the price-fixing activities of such insurance companies subject to attack under the Sherman Antitrust Act.[115] This holding created the fear that traditional forms of state regulation and taxation of insurance companies doing business within the state could be invalidated on commerce clause grounds, and that the insurance industry would be thrown into chaos as a result.[116] Congress adopted the McCarran Act to ensure that the states would be permitted to fulfill their traditional role in relation to insurance regulation. The Act states, in pertinent part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."[117]

The Court in *Norris III* held that the application of Title VII did not supercede the application of any state law regulating the business of insurance. In *Norris III*, Norris had not challenged the conduct of the business of insurance; no insurance company was joined as defendant, and the court did not preclude any insurance company from offering annuity benefits calculated on the basis of sex-segregated actuarial tables.

All that was at issue in *Norris III* was the "*employment practice* . . . of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee. It is this conduct of the employer that is prohibited by Title VII."[118] The Court further held that, by its own terms, the McCarran Act applied only to the business of insurance and had no application to employment practices.[119]

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state's boundaries did not burden interstate commerce. EEOC v. Wooster, 523 F. Supp. 1256, 1264 (N.D. Ohio 1981).

114. 322 U.S. at 553.

115. *Id.*; 15 U.S.C. §§ 1011-15 (1982).

116. *Spirt*, 691 F.2d at 1064-65.

117. 15 U.S.C. § 1012(b) (1982).

> The purpose of the bill is twofold: (1) to declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts. . . .

1945 U.S. CODE CONG. & AD. NEWS 670, 672.

118. *Norris III*, 103 S. Ct. at 3500 n.17 (emphasis in original).

119. *Id.* The Court felt that Arizona "plainly" had not involved itself in the business of insur-

The *Manhart* Court neither raised nor addressed the issue of the effect of the McCarran Act on Title VII, perhaps because the defendant was an employer acting without the aid of an insurer. Those lower courts which have confronted the issue have done so with similar results, but differing rationales. In *Spirt*[120] the Second Circuit reversed the ruling of the district court and held that, while the defendant was in the business of insurance, the McCarran Act did not affect the Title VII violation because Title VII explicitly preempted New York insurance law to the extent that it required or permitted a method of calculating pension benefits found to be an unlawful employment practice under Title VII.[121]

In *Women in City Government United*,[122] the court took a more esoteric approach, examining legislative history and weighing the competing federal policies embodied in Title VII and the McCarran Act. It found that "Congress did not intend the McCarran-Ferguson Act as a limitation on its power to enact civil rights legislation that might incidentally affect the business of insurance."[123] The court in *Hannahs*[124] also found the McCarran Act inapplicable, and adopted the reasoning of the district courts in *Women in City Government United*,[125] and *Peters*.[126] While the rationale of *Norris III* is less clear, probably because the Court was not confronted with McCarran Act issues, it does focus

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ance, "since it [had] not underwritten any risks." *Id.*; *see also* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979) (McCarran Ferguson Act intended to protect "intra-industry cooperation" in the underwriting of risks); SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 65 (1959) ("the issuer of a 'variable annuity' contract that has no element of fixed return does not assume any investment risk, which is inherent in the concepts of 'insurance' and 'annuity' ").

120. 691 F.2d 1054 (2d Cir. 1982).

121. *Id.* at 1066. Title VII contains a broad and explicit pre-emptive provision. It provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7 (1982).

122. 515 F. Supp. 295 (S.D.N.Y. 1981).

123. *Id.* at 303. The court found further support for their view in the debates surrounding the enactment of the Employer Retirement Income Security Act of 1974: "The legislative debates surrounding . . . ERISA make it clear that the federal policy against employment discrimination, embodied in Title VII, was intended to extend to employee retirement, pension, death and other benefit plans, and that Title VII was incorporated by reference into ERISA." *Id.* at 304.

124. 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981).

125. 515 F. Supp. 295; *see* 26 Fair Empl. Prac. Cas. (BNA) at 533.

126. 476 F. Supp. 1343 (E.D. Mich. 1979); *see* 26 Fair Empl. Prac. Cas. (BNA) at 533. The district court in *Peters* had found that the insurer's annuity business was not in the business of insurance because the insurer was "so intertwined with the institutions it serves that it more resembles an employer rather than a company engaged in the 'business of insurance.' " 476 F.

on many of the issues considered by other courts (*e.g.*, preemption of state law and the "business of insurance") and is clearly in harmony in its result.

VI. IMPLICATIONS OF *NORRIS III* AND POSSIBLE DIFFICULTIES

A. *Retroactive Application*

Because of the economic problems inherent in the retroactive application of *Norris III*,[127] the trend, beginning with *Manhart*, has been away from retroactive application, except in circumstances where the "drastic effect" of retroactive application could be avoided.[128]

The Court in *Norris III* felt that the same considerations that were important in *Manhart* were present in *Norris III*[129] and thus approved a two-tier pension system with August 1, 1983, as the cut-off point.[130] The district court's holding, which would have applied to all employer-sponsored pension plans, would have meant a cost of compliance ranging from $817 to $1,200 million annually for the next fifteen to thirty years.[131] In this case, the cost would have fallen primarily on the State of Arizona, at a time when states and local governments are struggling to meet substantial deficits.[132] Had *Norris III* been applied nationwide, the annual cost to public and private pension plans would have been $1.7 billion.[133] Retroactivity would also have caused large losses to the investment portfolios of pension plans that include the stock of

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Supp. at 1351. On appeal, the Sixth Circuit failed to deal with the McCarran Act issue completely, and simply reversed. 691 F.2d at 241.

127. *See supra* notes 50-53.

128. *See Spirt*, 691 F.2d at 1068.

129. 103 S. Ct. at 3510. While acknowledging that *Manhart* put all employer-operated pension funds on notice that they could not require males and females to make unequal pension contributions, "it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the 'open market'. . . ." *Id.* Given this limitation, the Court felt that "an employer 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.*

130. Bernstein, *supra* note 9, at 82.

131. 103 S. Ct. at 3510 (Powell, J., concurring). The cost to employers of equalizing benefits [would vary] according to three factors: (i) whether the plan is a defined-contribution or defined-benefit plan; (ii) whether benefits [were] to be equalized retroactively or prospectively; and (iii) whether the insurer may reallocate resources between men and women by applying unisex rates to existing reserves or must top up women's benefits.

Id. at n.11.

132. In New York state alone, added unfunded liabilities would have amounted to $2 billion. Bernstein, *supra* note 9, at 83.

133. *Id.* at 82. Other estimates have doubled this figure, but even lower estimates "could have wreaked havoc with the economy." *Id.*

other companies likely to be hurt by the ruling.[134] Given these factors, the Court could find no justification for retroactively imposing a burden of this magnitude.[135]

In her concurring opinion, Justice O'Connor analyzed the problem of retroactive application in light of the decision in *Chevron Oil Co. v. Huson*.[136] *Chevron* set forth three criteria for determining when to apply a decision of statutory interpretation prospectively. The first criterion is that the decision 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.[137] In light of the prior decision in *Manhart*, Justice O'Connor found it debatable that the first criterion did not compel retroactivity here.

The second criterion under *Chevron* is whether retroactivity will further or retard operation of the statute.[138] While Justice O'Connor could not see how retroactive application would retard achievement of the central purpose of Title VII, neither could she see that the goal required retroactivity. In her opinion, however, the third criterion—whether retroactive application would impose inequitable results[139]—compelled a prospective application only.[140] Fearing that should a pension fund not be able to meet its obligations "[t]he harm would fall in large part on innocent third parties,"[141] she felt a prospective application to be the appropriate remedy.[142]

The potential fiscal impact of a retroactive award on the pension fund and the sovereign city/state was also a concern of the district

134. *Id.* at 83.

135. 103 S. Ct. at 3510 (Powell, J., concurring). It is somewhat ironic that approximately 80% of these added costs are attributable to added payments to men that would have been required in the survivor options. Bernstein, *supra* note 9, at 82. The balance of these costs would have been in defined contribution plans, where lifetime annuity payments would have required adjustment by topping up the benefits to the most favorable level. *Id.*

136. 404 U.S. 97 (1971).

137. *Id.* at 106.

138. *Id.* at 106-07; *see also Albemarle Paper Co.*, 422 U.S. at 422 (backpay should be denied only for reasons which would not frustrate the central statutory purposes).

139. 404 U.S. at 107.

140. 103 S. Ct. at 3512 (O'Connor, J., concurring).

141. *Id.* (quoting *Manhart*, 435 U.S. at 722-23).

142. *Id.* A proposal by the Financial Accounting Standards Board (FASB), a private nonprofit organization which sets standards for the accounting profession, would further compound the impact of a requirement of retroactivity for private employers. The FASB proposal would require that pension plan liabilities be carried on the balance sheet of the parent employer. Even without this requirement, a number of corporations would have been unable to meet the added pension obligations incurred by the retroactive requirement; but when the FASB requirement takes effect, retroactivity "would cause numerous corporate insolvencies." Bernstein, *supra* note 9, at 82-83.

court in *Women in City Government United*.[143] The Second Circuit nevertheless rejected an argument against retroactivity in *Spirt*,[144] claiming that the defendants had been put on notice by *Manhart*, and had ample opportunity to " 'voluntarily' revise their mortality tables."[145] But the Second Circuit also admitted that the relief asked for in *Spirt* was "not nearly so drastic as that sought by plaintiffs . . . in *Manhart*."[146] In view of the potentially disastrous effects of retroactive application in *Norris III*, the Court, while admittedly cautious, made the most prudent decision with regard to the situation at hand.

B. *Further Problems and Future Impact*

At least two courts were concerned with the effect that equalization of benefits would have on male retirees' benefits. The court in *Hannahs*[147] pondered the effect of a retroactive order on monthly payments to men: Should a man's future check be equalized with that of a woman, or should it be garnished to the extent that past benefits have been unequal?[148] *Hannahs*, along with the court in *Spirt*,[149] also considered the impact that retroactive relief would have on male employees' expectations. *Hannahs* found a downward adjustment in male annuitants' payments unconscionable given their reasonable expectation to receive a set monthly income,[150] while *Spirt* rejected such an argument, holding that "the amounts guaranteed are so low . . . that there is no danger that the male participants' expectation . . . will be jeopardized by the relatively minor changes in the value of past benefits . . . ."[151]

The thrust of the *Manhart* opinion envisioned a single, unisex rate.[152] The Court found it would be fair that women as a class be subsidized, to some extent, by the class of male employees.[153] In fact, as

143. 515 F. Supp. at 306-07.
144. 691 F.2d 1054.
145. *Id.* at 1067.
146. *Id.* at 1068.
147. 26 Fair Empl. Prac. Cas. (BNA) 527.
148. *Id.* at 534.
149. 691 F.2d at 1068.
150. 26 Fair Empl. Prac. Cas. (BNA) at 534.
151. 691 F.2d at 1068.
152. The Court in *Norris III* held it appropriate for employers, in order to implement the requirements of unisex pensions and options, to utilize a "mid-point" approach. Under this method, the benefit level of the higher paid sex is reduced, while that of the lower paid sex is increased. Thus, a female retiree eligible for benefits of $950 a month, and a male retiree eligible for benefits of $1000 a month, would both receive monthly payments of $975 a month under the new plan. Berstein, *supra* note 9, at 83.
153. 435 U.S. at 708-11. Many authorities, however, do not believe that male participants, faced with higher rates and decreased monthly benefits, will continue to elect annuities as their

Manhart points out, it is inevitable that one class of risk will subsidize another: "[h]ealthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate."[154] While it has been suggested that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees,[155] this suggestion has no force in a context of sex discrimination, because each retiree's total benefits are ultimately determined by his actual life span; any differential paid in the aggregate is thus based on a "factor other than sex" and is immune from challenge under the Equal Pay Act.[156]

A further problem, envisioned in *Colby College* concerns situations in which employers will have to make larger contributions to the accounts of female employees.[157] Concededly, each female employee ends up with a pension contract actuarially worth more than the one received by her male counterpart.[158] But applying the essence of *Manhart*, the court in *Colby College* did not find this discriminatory, since what the female receives in dollars will depend upon her *actual* longevity, and not her actuarial expectancy.[159] The real concern here lies in whether employers will be able to afford to retain defined contribution plans or whether, because of the added cost, they will be forced to drop them. Just as Arizona dropped the lifetime annuity after the district court held it violated Title VII, other employers can be expected to drop the lifetime annuity, such that only the largest plans, in which the gender mix of prospective annuitants is predictable enough to avoid financial risk, can be expected to retain these options.[160]

VII. CONCLUSION

Many insurance companies see *Norris III* as likely to influence

pension option. Instead, it has been forecast that "men will elect lump-sum benefits," and "use the proceeds to purchase privately available, actuarially sound annuities or otherwise to invest the proceeds." Berstein, *supra* note 9, at 82. As male retirees elect out of the annuity pool, the body of insureds remaining would be reduced to women only, and the benefit level would ultimately return to the female level that existed prior to *Norris III*. *Id.*

154. 435 U.S. at 710.
155. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).
156. 435 U.S. at 711-10 n.20.
157. 589 F.2d at 1145-46.
158. *Id.* at 1146.
159. *Id.*
160. Bernstein, *supra* note 9, at 82.

Congressional efforts to legislate uniformity in all insurance rates.[161] Legislation is already pending in Washington to impose the retroactivity and topping up rejected by the Court in *Norris III*.[162] As that case has shown, the questions surrounding those legislative debates will not be easy to answer. The capacity of the insurance industry to deal with change, the employers' willingness to absorb extra cost, and the ability of employees to insure themselves should companies discontinue contributory plans, are issues to be given careful consideration.

It is evident that if change is to be made, it must begin now. Since courts are reluctant to compensate benefit inequities retroactively, equality will be attained only if adjustments are made gradually. Fortunately, *Norris III* and supporting authority show equalization to be the trend. If court recognition of civil rights violations continues to increase, disproportionate compensation may soon become illegal in all phases of employee benefits.

Pamela S. Anderson

161. *Supreme Court Requires Unisex Annuity Benefits, supra* note 3.

162. S.372 and H.R.100 would apply to all individual policies of life, health and auto insurance, as well as annuities and pensions. Bernstein, *supra* note 9, at 83. Even in its prospective application, the legislation could far exceed Title VII in its cost impact. *Id.*