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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 —

Congress enacted Title VII of the Civil Rights Act of 1964 as part of a comprehensive national endeavor to correct racial and sexual discrimination in employment opportunities. Title VII prohibits employers from making employment decisions based on an individual's sex. 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. In spite of this legislation designed to prohibit classifications which differentiate between males and females, insurance companies universally use sex-based mortality tables to determine annuity premiums and payouts. Such reliance on group characteristics, though statistically valid and invaluable to the insurance industry, is contrary to the principles of Title VII.

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. These plans are based on actuarial tables which show that the average woman lives longer than the average man. 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. 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).
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
8 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].
9 Note, Sex Discrimination and Sex-Based Mortality Tables, 53 B.U. L. Rev. 624, 625 (1973) [hereinafter cited as Note, Sex Discrimination].
11 Note, Sex Discrimination, supra note 8, at 626.
12 Note, The End of Sex Discrimination, supra note 9, at 683.
13 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.
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. In 1978, in Los Angeles Department of Water and Power v. Manhart, the United States Supreme Court considered for the first time the apparent disparate treatment of men and women under pension plans. 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. 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. In 1983, however, the Court, in Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, employed the reasoning of Manhart and held that such a retirement plan violated Title VII. 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.

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. 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. 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.
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).
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: 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. 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, 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. 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. 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.

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. All of the companies that underwrote the life annuities used sex-based mortality tables to calculate monthly annuity benefits. Because women, on average, live longer than men, 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. 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.

On May 3, 1975, Nathalie Norris, an employee of the Arizona Department of Economic Security, chose to participate in a deferred compensation plan. She elected to invest her deferred compensation in the Lincoln National Life Insurance Company's fixed annuity contract. 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.
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).

Petitioner’s Brief at 6.


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.

Norris, 103 S. Ct. at 3495.

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.

Norris, 486 F. Supp. at 652.

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.

Id. at 652.

Id. at 650.

Id. at 652.

Id.

Id.
of Appeals for the Ninth Circuit. On appeal, Arizona argued that the use of sex-based mortality tables was vital to the insurance business and that Title VII should not be construed to prohibit employers from offering life annuity contracts from private insurers. 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. The court held that the district court had neither construed Title VII to supersede Arizona's laws regulating insurance companies, nor prohibited insurance companies from using sex-segregated annuity payments. Title VII, the appeals court stated, "governs the relationship between employees and their employer, not between employees and third parties." 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. 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. Instead, the court continued, Manhart had focused on whether Title VII prohibited the disparate treatment under the pension fund. 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.

Arizona then filed a petition for certiorari with the United States Supreme Court, which the Court granted. In a five-to-four decision, 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 Id. at 333.
55 Id.
56 Id.
57 Id.
58 Id.
59 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.
60 Id. citing Manhart, 435 U.S. at 718 n.33.
61 Id. at 333. 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.
62 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.
63 Id. at 335. 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.
64 Id. at 333.
65 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.
67 Id.
appeals' decision, holding that the Arizona deferred compensation plan constituted discrimination on the basis of sex in violation of Title VII. 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.

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. 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. 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. Other federal court cases dealing with this conflict will also be surveyed. Next, the second section of the casenote will examine the Supreme Court's opinion in Norris. 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. 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.

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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.

69 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).

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. In addition, this analysis will discuss Arizona's inability to affect conditions in the marketplace for insurance policies. 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. 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. 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. 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, because proof of discriminatory motive is critical in Title VII actions. 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.

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. One exception to this legislation, the Bennett Amendment, provides that a compensation differential based on sex is lawful under Title VII if it is authorized by the Equal Pay Act. The Equal Pay Act, which requires equal pay to men and women for equal work, permits a wage differential in four excepted instances. The fourth exception authorizes the employer to establish a procedure for

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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).
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."\textsuperscript{89}

A number of judicial decisions have considered whether the use of sex-based annuities in employer-operated pension plans violates Title VII.\textsuperscript{89} 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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{93} is undermined.\textsuperscript{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.\textsuperscript{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.\textsuperscript{96} The Court held that those larger contributions could no longer be required.\textsuperscript{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,\textsuperscript{98} and thereby draw annuity benefits for longer periods, the Court noted that Title VII’s "focus on the individual is unambiguous."\textsuperscript{99} According to the Court, the statute precludes treatment of employees as mere members of a sexual class.\textsuperscript{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.\textsuperscript{90}

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.

\textsuperscript{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 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).

\textsuperscript{90} See infra text accompanying notes 95-157.

\textsuperscript{91} Note, The End of Sex Discrimination, supra note 9, at 684-85.

\textsuperscript{92} See, e.g., Manhart, 435 U.S. at 712.

\textsuperscript{93} Id. at 728. 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).

\textsuperscript{94} Note, The End of Sex Discrimination, supra note 9, at 683.

\textsuperscript{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.

\textsuperscript{96} Id. at 706.

\textsuperscript{97} Id. at 711.

\textsuperscript{98} Id. at 707.

\textsuperscript{99} Id. at 708.

\textsuperscript{100} Id.
women to make higher payments, had precisely that effect.\textsuperscript{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.\textsuperscript{102} The 	extit{Manhart} Court concluded that a sex-based classification deprived women of compensation and, therefore, violated Title VII.\textsuperscript{103}

The 	extit{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.\textsuperscript{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.”\textsuperscript{105} An additional limit on the Supreme Court’s holding in 	extit{Manhart} was the “open-market exception” articulated by the Court in that case.\textsuperscript{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.”\textsuperscript{107} The 	extit{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.\textsuperscript{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.\textsuperscript{109}

\textsuperscript{101} Id.

\textsuperscript{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 	extit{Manhart v. City of Los Angeles, Department of Water and Power}, 553 F.2d 581, 588 (9th Cir. 1976)).

The 	extit{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. 	extit{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 	extit{Manhart} majority stated that his “isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself.” Id.

\textsuperscript{103} Id. at 711.

\textsuperscript{104} Id. at 717.

\textsuperscript{105} Id. The 	extit{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 	extit{Manhart}. 691 F.2d at 240-41.

\textsuperscript{106} See 	extit{Manhart}, 435 U.S. at 717-18.

\textsuperscript{107} Id. at 717-18.

\textsuperscript{108} Id. at 718 n.33.

\textsuperscript{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. 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.

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. 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. 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. 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.

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. There, Colby College, a private employer, made equal contributions for its employees to an employing 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 that 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).

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 720. 435 U.S. at 720.

Id. at 721.

See infra text accompanying notes 113-45.

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.

See infra notes 115-43 and accompanying text.

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 720 n.23.

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

Employee participation in the college's contributory pension plan with the Teachers Insurance Annuity Association ("TIAA") was mandatory. The insurer issued individual annuity contracts in different amounts for men than for women directly to each employee. 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. 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, the District Court for the Southern District of Maine granted summary judgment for defendant Colby College. 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. 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. The Commission appealed the district court's finding to the Court of Appeals for the First Circuit. 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. 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.

The court repeated Manhart's statement that the focus of Title VII is on the individual and stated that the thrust of Manhart envisaged a single, unisex rate that would pay for annuities for both men and women employees. 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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{134}

In a concurring opinion, Chief Judge Coffin recognized that Manhart might not prohibit every employer-offered benefit plan from using sex-based tables.\textsuperscript{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.\textsuperscript{136} Judge Coffin stated that Manhart should not be read restrictively, because such an approach would "foreclose creative approaches to the problem."\textsuperscript{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.\textsuperscript{138} For example, the United States District Court for the Southern District of New York in Spirt v. Teachers Insurance and Annuity Association of America,\textsuperscript{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."\textsuperscript{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.\textsuperscript{141} The court maintained that "no mean-

\begin{itemize}
\item Id. at 1143.
\item Id. at 1144.
\item Id.
\item Id. at 1146 (Coffin, C.J., concurring).
\item 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).
\item Id. (Coffin, C.J., concurring).
\item Id. at 1022.
\item Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054, 1061 (2d Cir. 1982), vacated and remanded, 103 S. Ct. 3565 (1983).
\item The Supreme Court vacated and remanded the Spirt 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." Spirt 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 Spirt, 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.
\end{itemize}
ingful distinction” existed between the disparate treatment accorded the female employ-
ees 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. 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.

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 employ-
ment 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. According to the court, the employer was liable for TIAA/CREF’s prac-
tices because, in effect, those insurers existed solely to enable universities to delegate their
responsibility of providing retirement benefits for their employees.” In 1982, however,
the Sixth Circuit, in Peters v. Wayne State University, held that the employer, Wayne State,
was not liable for TIAA because the university exercised no control over the plan’s
administration. According to the court, the insurer, therefore, could not be considered
an employer subject to the provisions of Title VII. 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.” 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. Therefore, according to the Spirt
court on remand, the employer or TIAA-CREF Would not be burdened with additional financial obliga-
tions if a retroactive remedy were granted. Consequently, the Second Circuit reinstated its earlier
decision on the merits and granted a modified form of retroactive relief to the Spirt plaintiffs.

142 691 F.2d at 1061.
143 Id. at 1063.
144 691 F.2d 1054, 1065 (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 accom-
panying 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.\textsuperscript{149} In Peters, the university employees were not required to participate in the retirement plan.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{153} Consequently, the court ruled that employer Wayne State was not subject to Title VII liability.\textsuperscript{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.\textsuperscript{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.\textsuperscript{156} Significantly, however, most of the decisions involved plans where the employees' options were quite restrictive.\textsuperscript{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.\textsuperscript{158} The majority opinion, written by Justice Marshall,\textsuperscript{159} was divided into three

\textsuperscript{149} Id. at 240-41.
\textsuperscript{150} Id. at 237.
\textsuperscript{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).
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 239.
\textsuperscript{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).
\textsuperscript{155} See supra notes 112-43 and accompanying text.
\textsuperscript{156} See supra notes 112-43 and accompanying text.
\textsuperscript{157} See supra notes 138-43 and accompanying text.
\textsuperscript{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.
\textsuperscript{159} Id.
areas of analysis: first, whether the plan at issue would violate Title VII if run entirely by
the petitioner-employer;\textsuperscript{160} second, whether the plan was beyond the reach of Title VII
because the insurance companies actually calculated and paid the retirement benefits;\textsuperscript{161}
and third, whether retroactive relief to compensate for past violations of Title VII was
appropriate.\textsuperscript{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.\textsuperscript{163} The Court then reiterated both of Manhart's basic
premises.\textsuperscript{164} First, the Court stated that Title VII's "focus on the individual is unambigu-
ous."\textsuperscript{165} Second, the Court declared that longevity was not a "factor other than sex" under
the Equal Pay Act.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{169} The Court recognized that the plan in Manhart also
required greater contributions from females than it did from males.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{174} According to the Court, the petitioners "incorrectly assume[d]"\textsuperscript{175} that

\textsuperscript{160} Id. at 3496.
\textsuperscript{161} Id. at 3499.
\textsuperscript{162} Id. at 3502.
\textsuperscript{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).
\textsuperscript{164} 103 S. Ct. at 3496 (citing Manhart, 435 U.S. at 708).
\textsuperscript{165} Id.
\textsuperscript{166} Id. (citing Manhart, 435 U.S. at 712-13).
\textsuperscript{167} Id. at 3496-97 (citing Manhart, 435 U.S. at 711).
\textsuperscript{168} Id. at 3497.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 3497 n.10.
\textsuperscript{172} Id.
\textsuperscript{173} Id. (citing Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24 n.8 (1982)).
\textsuperscript{174} Id. at 3497.
\textsuperscript{175} Id.
Title VII permits a classification of employees on the basis of sex in predicting their longevity.\(^\text{176}\) This premise, the Court found, is totally inconsistent with the \textit{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.\(^\text{177}\) In support of this finding, the Court restated dicta appearing in the \textit{Manhart} decision that "even a true generalization about [a] class' cannot justify class-based treatment,"\(^\text{178}\) 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.\(^\text{179}\) 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.\(^\text{180}\) \textit{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.\(^\text{81}\) The \textit{Norris} Court reasoned that discriminatory defined-contribution plans\(^\text{182}\) should also be struck down\(^\text{143}\) and concluded in its first section of analysis that Arizona plainly would have violated Title VII had it operated the deferred compensation plan itself.\(^\text{184}\)

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.\(^\text{185}\) The Court recognized that although Arizona offered the option of annuities to its employees, the insurance companies actually calculated and disbursed the annuity plans.\(^\text{186}\) Despite this fact, the Court determined that the state had still discriminated against its female employees and had violated Title VII,\(^\text{187}\) relying on its statement in \textit{Manhart} that Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties."\(^\text{188}\) In a footnote, the Court emphasized that Title VII applies to

\(^{176}\) Id. at 3498 (citing \textit{Manhart}, 435 U.S. at 708). The Norris Court stated "\textit{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." \textit{Id.}

\(^{177}\) Id. (citing \textit{Manhart}, 435 U.S. at 708). In a footnote, the Court responded to Justice Blackmun's doubt that \textit{Manhart} could be reconciled with the decision in \textit{General Electric Co. v. Gilbert}, 429 U.S. 125 (1976). \textit{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 . . . ." \textit{Id.} See supra note 89. The dissent in \textit{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 \textit{Pregnancy Discrimination Act of 1978}, in which Congress overruled \textit{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 \textit{Manhart} conclusion that "the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan." \textit{Norris}, 103 S. Ct. at 3499 n.14.

\(^{178}\) Id. at 3498.

\(^{179}\) Id. at 3498-99.

\(^{180}\) See supra note 105.

\(^{181}\) See supra note 105.

\(^{182}\) \textit{Norris}, 103 S. Ct. at 3499.

\(^{183}\) Id.

\(^{184}\) Id.

\(^{185}\) Id.

\(^{186}\) Id. at 3501.

\(^{187}\) Id. at 3499 (citing \textit{Manhart}, 435 U.S. at 718 n.33).
discrimination committed by both employers and "any agent" of an employer.\textsuperscript{189} The Court then restated \textit{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.\textsuperscript{190} Considering the petitioner's contention that it had not violated Title VII because its plan reflected what was available in the open market,\textsuperscript{191} the Court held that it was no defense that all annuities available in the open market were based on sex-based mortality tables.\textsuperscript{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.\textsuperscript{193} Instead, the Court emphasized that Arizona had actively provided the opportunity to obtain an annuity as part of its own deferred compensation plan.\textsuperscript{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.\textsuperscript{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.\textsuperscript{196} These contracts, the Court determined, restricted the number of companies among which the employees could choose to make an annuity contract.\textsuperscript{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."\textsuperscript{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.\textsuperscript{199} This option for open-market purchase, the state contended, should have allowed it to escape Title VII liability.\textsuperscript{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.\textsuperscript{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").\textsuperscript{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.\textsuperscript{203} The \textit{Norris}

\textsuperscript{189} \textit{Id.} at 3499 n.16.
\textsuperscript{190} \textit{Id.} at 3499.
\textsuperscript{191} \textit{Id.} at 3499-3500.
\textsuperscript{192} \textit{Id.} at 3500.
\textsuperscript{193} \textit{Id.} at 3501.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 3500 n.17.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.} The \textit{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. \textit{Id.} Because the majority viewed the dissenting opinion in \textit{Norris} as relying on the McCarran-Ferguson Act, however, the Court did address the issue. \textit{Id.}
\textsuperscript{203} \textit{Id.}
Court rejected the state's contention that Title VII was unlawfully interfering with the McCarran-Ferguson Act. 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. 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. 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.

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. In holding that Arizona violated Title VII regardless of whether third parties were also involved in the discrimination, the Court determined that "employers are ultimately responsible" for the fringe benefit schemes they adopt under Title VII's "compensation, terms, conditions and privileges of employment" clause. 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." 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. 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. In the Norris Court's view, these good faith actions were enough to deny a retroactive remedy to Manhart employees. 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. To support this conclusion, the Court cited Albemarle Paper Co. v. Moody, a 1975 decision emphasizing that a central purpose of Title VII was to compensate persons who are injured because of employment discrimination.
Although Justice O'Connor concurred with the majority opinion on the merits of the case, she disagreed with Justice Marshall on the retroactivity issue. 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. According to Justice O'Connor, sufficient uncertainty existed as to Manhart's precedential value, making retroactive relief inappropriate. 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. Justice O'Connor, therefore, held that retroactive relief was inappropriate.

Justice Powell wrote a dissenting opinion in Norris and was joined by three other Justices. 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." 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. 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.

The dissent then discussed the terms of the Arizona plan at issue and the relative advantages of the life annuity option of that plan. 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. First, an employer could provide the unisex annuities itself, without using independent insurance companies to manage the policies. Second, an employer could provide the unisex annuities itself, using independent insurance companies to manage the policies. This option, according to the dissent, would be both too expensive to operate and too difficult to administer for an employer to accomplish alone.

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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 . . . ."

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. 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. Third, the employer could elect not to provide the advantageous life annuity option at all. 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. 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. The Norris dissent indicated that none of the choices remaining open to the employer were likely to benefit the employee. 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. 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. 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.

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. 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. 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. Under that legislation, the regulation of the insurance industry was presumptively committed to the states. 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. 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. This interpretation of Title VII, in the dissent's view, would prohibit employers from purchasing any annuities for their employees. The dissent explained that

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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.
246 Id. at 3507 n.5 (Powell, J., dissenting).
247 Id.
248 Id. at 3507 n.6 (Powell, J., dissenting).
249 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. 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. 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. 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.” Because life expectancy is a “nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis,” the dissent found nothing arbitrary, irrational, or discriminatory about recognizing the objective actuarial disparity in sex-based mortality tables. 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.”

Finally, the dissent discussed the availability of retroactive relief. 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. The dissent noted that, like the employer in Manhart, Arizona may well have assumed that its pension plans were lawful. 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. Accordingly, the dissen-

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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

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\(^{275}\) Norris, 103 S. Ct. at 3501.

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retroactive relief would range from $817 to $1260 million annually for the next 15 to 30 years."\(^{17}\) Id. These figures assume that employers would be required to "top up" women's benefits to allocate resources between men and women. \(^{276}\) Id. at 3510 n.11 (Powell, J., dissenting).

\(^{277}\) 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." \(^{17}\) Id. at 3510 n.12 (Powell, J., dissenting).

\(^{278}\) Id. at 3499.

\(^{279}\) 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. 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. 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. 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. 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. Similarly, in General Building Contractors Ass'n, Inc. v. Pennsylvania, 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. 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. 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. 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. 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. For example, in 1980, in Harris v. McRae, 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

Petitioner's Reply Brief at 13.

Id. at 6.


Peters, 691 F.2d at 238.

Id.


Id. at 392-93.

Id. at 395. See Petitioner's Brief at 12 (citing General Building Contractors, 73 L.Ed 2d at 851).

Petitioner's Brief at 12.

See infra text accompanying notes 324-28.

See infra text accompanying notes 309-23.

448 U.S. 297 (1980).
indigency, by providing funding for an abortion for women unable to pay themselves.\textsuperscript{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.\textsuperscript{311} In *Nashville Gas Co. v. Satty*,\textsuperscript{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,\textsuperscript{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.\textsuperscript{314} Although Congress recently amended Title VII to require employers to provide disability benefits for pregnant employees,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{318} For instance, in 1982, in *Briggs v. City of Madison*,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{322} The Court concluded that
nothing in Title VII indicates that an employer's liability extends to conditions of the marketplace it did not create. The Norris Court erred in holding Arizona liable under Title VII for practices in the marketplace over which it had no control. 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. 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 retirement 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. 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. 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. In

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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. 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. While in other post-Manhart pension cases finding Title VII violations, such as Spirt v. Teachers Insurance and Annuity Association and EEOC v. Colby College, the employers' annuity plans were mandatory for all employees, Arizona employees were not required to participate in the "discriminatory" annuity plan. 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 Spirt employees, however, entered into an annuity plan automatically upon employment with Long Island University. 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. 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. Relying on a footnote from the Supreme Court's decision in 1982, in Mississippi University for Women v. Hogan, the Court dis-

338 Manhart, 553 F.2d at 583.
339 Norris, 103 S. Ct. at 3494-95.
340 691 F.2d 1054 (2d Cir. 1982). See supra notes 139-43 and accompanying text.
341 589 F.2d 1139 (1st Cir. 1978). See supra notes 116-37 and accompanying text.
342 Norris, 103 S. Ct. at 3503 (Powell, J., dissenting).
343 Spirt, 475 F. Supp. at 1300.
344 Norris, 103 S. Ct. at 3494.
345 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.
346 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."

missed Arizona's contention that the greater freedom of choice offered by the state could be a critical difference in determining liability. 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. 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. 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. For instance, Justice O'Connor recognized that Hogan was considerably inconvenienced because the school to which he was denied admission was in his hometown. According to Justice O'Connor, Hogan would have had to travel long distances to attend other state-supported nursing schools in that state. The Hogan Court ultimately held, in a five-to-four decision, that Hogan was denied equal protection under the fourteenth amendment. 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.

The Norris Court's reliance on a controversial footnote is tenuous. First, the issue in Hogan involved an educational discrimination under an equal protection analysis, while the Norris case involved a Title VII violation of employment discrimination. 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" 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

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239 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)).

240 Hogan, 458 U.S. at 733.

241 Id. at 723-24 n.8.

242 See supra note 338.

243 See supra note 338.

244 See supra note 338.

245 Hogan, 458 U.S. at 733.

246 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).

247 Id. at 733.

248 Norris, 103 S. Ct. at 3501.

249 Id. at 3497 n.10.
the equal protection clause, even though the alleged discrimination was against males. 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 Spirit 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. 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. 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." For example, in International Brotherhood of Teamsters v. United States, 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. 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. 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. The Supreme Court has reasoned that by imposing the ultimate burden of

350 Hogan, 458 U.S. at 729.
352 Id.
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, 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. 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. 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. 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. According to the court, Norris did not have to prove intent to discriminate under Manhart. 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, Norris was not required to show Arizona's discriminatory motive in adopting the annuity plan. The presence of an intent to discriminate could be presumed, the court stated, because the "practices in question" treat men and women differently. 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. The employer was the controlling party who decided that women should make larger contributions to the retirement fund. 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

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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.368 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

368 See Petitioner's Brief at 26.
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.
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.

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