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QUESTIONS FOR WOMEN AND THE PENSION INDUSTRY

by

T. TIMOTHY RYAN, JR.* AND PAULA A. ROCK**

I. BACKGROUND: THE MANHART AND NORRIS DECISIONS

ON APRIL 25, 1978, the United States Supreme Court decided *Los Angeles Department of Water and Power v. Manhart*¹ in a way that was bound to have a profound effect on the pension industry. The division of opinion in the *Manhart* Court was indicative of the difficulty of the question presented. In Part I, this article examines the Court's findings in *Manhart*, as well as its conclusions in a more recent case, *Arizona Governing Committee v. Norris*,² in which the Supreme Court extended its *Manhart* holding in a way bound to have an equally significant impact on pension programs. In Parts II and III, this article addresses two issues concerning the future of the pension industry which the Court has left unanswered: whether the relief granted to compensate for past sex discrimination in pension programs is to be retroactive or prospective only; and whether the size of these awards is to be determined by "topping up," i.e., by requiring that benefits payable to the formerly disadvantaged sex be raised to the level now payable to the favored sex,³ or by the adoption of unisex actuarial tables which average the mortality experience of the sexes and provide mid-level benefits to all employees.⁴ In Part IV, this article contemplates the cost and Economic Retirement Income Security Act (ERISA) consequences which could accrue from possible solutions to the problem of remedying past sex discrimination in pension programs. Finally, Part V of this article deals with other practical ramifications likely to result from the *Manhart* and *Norris* decisions.

A. *The Manhart Decision*

In *Manhart* a defined contribution pension fund under the direction of

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¹435 U.S. 702 (1978). Justice Stevens wrote the majority opinion in which Justice Powell and White participated. Justice Blackmun concurred in part while Justices Burger and Rehnquist united in an opinion in which they concurred in part and dissented in part. In a separate opinion, Justice Marshall also concurred in part and dissented in part.

²103 Sup. Ct. 3492 (1983).

³UNITED STATES DEPARTMENT OF LABOR, COST STUDY OF THE IMPACT OF AN EQUAL BENEFITS RULE ON PENSION BENEFITS (1983) at 3 (hereinafter cited as DEPARTMENT OF LABOR COST STUDY).

⁴*Id.*

the defendant Department of Water and Power (“Department”) required female employees to make monthly contributions to the fund which were 14.84% higher than those demanded of comparable male employees.⁵ The women had to make these larger contributions because on the average women live longer than men and thus can, on an actuarial basis, look forward to more monthly pension payments.⁶ Because employee contributions were withheld from paychecks, the female employees involved in *Manhart* took home smaller paychecks than male employees earning the same salary.⁷

While acknowledging that “[w]omen, as a class, do live longer than men,”⁸ the Court nonetheless granted *certiorari* from the decision of the Ninth Circuit Court of Appeals “to decide whether this practice discriminated against individual female employees because of their sex in violation of § 703(a)(1) of The Civil Rights Act of 1964 as amended.”⁹ Moreover, while admitting that in using sex-based actuarial tables to determine pension benefits the Department treated its female employees differently from its male employees “because the two classes are in fact different,”¹⁰ the Court held that requiring female employees to make greater contributions in order to receive the same monthly pension benefits violated Title VII.¹¹

At the heart of the Court’s decision was its rejection of the Department’s argument that the different contributions exacted from men and women were based on the factor of longevity rather than sex, and thus were founded on a justifiable consideration under the law.¹² The Court discounted this contention with the following language: “[O]ne cannot ‘say that an actuarial distinction based entirely on sex is ‘based on any other factor other than sex.’ Sex is exactly what it is based on.’”¹³ With Title VII, the Court decreed, Congress mandated that classifications based on sex, like those grounded in national origin or race, were illegal. Therefore, just as there could be no “take-home pay dif-

⁵*Manhart*, 435 U.S. at 705.

⁶*Id.*

⁷*Id.*

⁸*Id.* at 707.

⁹*Id.* at 704. This section of the Civil Rights Act provides:

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 race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(a)(1) (1976).

¹⁰*Manhart*, 435 U.S. at 707-708 (emphasis added).

¹¹*Id.* at 711.

¹²*Id.* at 712.

¹³*Id.* at 712-713, quoting the Ninth Circuit’s opinion in *Manhart*, 553 F.2d 581, 588 (1976). The Court explained that it so concluded because “[t]he Department’s . . . contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees.” *Id.* at 713 n.24.

ferential based on racial classification," no such discrepancy in pay could be justified by a sexual classification.¹⁴

The Court summarily discounted the importance of the Department's argument that sex-based pension contributions would lead to male employees subsidizing the females, pointing out that "when insurance risks are grouped, the better risks always subsidize the poorer risks."¹⁵ Similarly, the Department's contention that different costs of providing benefits for men and women, not discrimination, accounted for the requirement of disparate contributions was rejected by the Court because Title VII contained no "cost-justification defense."¹⁶

Clearly, this was a ground-breaking decision sure to have far-reaching effect on not only public pension plans, but the entire pension industry.¹⁷ However, almost as if afraid of the enormity of its holdings, the Court added language designed to limit the reach of its decision. "Although we conclude that the Department's practice violated Title VII," the Court stated, "[w]e do not suggest that the statute was intended to revolutionize the insurance and pension industries."¹⁸ Seemingly anxious to demonstrate that annuities would not be a thing of the past after *Manhart*, the Court suggested that it would not be unlawful "for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market."¹⁹ Still, the Court qualified this "open-market" exception by warning that "an employer could [not] avoid his responsibility by delegating discriminatory programs to corporate shells."²⁰ The *Manhart* Court, however, did take pains to limit its holding to the facts presented, stating firmly that "[a]ll that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."²¹

B. *The Norris Decision*

Much more was at issue in *Arizona Governing Committee v. Norris*,²² a recent case with profound ramifications for the pension industry; yet the Court, by a very narrow margin, extended its decision in *Manhart* to encompass the *Norris* facts. By doing so, the *Norris* Court made it clear that sex discrimination could not continue in the realm of pension benefits, even in the absence of "unequal contributions" and a truly "employer-operated" pension fund.

¹⁴*Id.* at 709.

¹⁵*Id.* at 710.

¹⁶*Id.* at 716.

¹⁷Governmental pension plans are exempt from the coverage of the Employee Retirement Income Security Act of 1974. See ERISA, 29 U.S.C. § 1003(b)(1) (1976).

¹⁸*Manhart*, 435 U.S. at 717.

¹⁹*Id.* at 717-718.

²⁰*Id.* at 718 n.33.

²¹*Id.* at 717.

²²103 S. Ct. 3492 (1983).

Like *Manhart*, *Norris* was a split decision. In *Norris*, in fact, the Court was so divided that two different majorities dictated final policy. Justice Marshall wrote the majority opinion, with Justices Brennan, White, Stevens and O'Connor joining as to Parts I, II and III, and only Justices Brennan, White and Stevens joining as to Part IV, the section dealing with remedies. Thus, a different majority, consisting of the Chief Justice and Justices Powell, O'Connor, Blackman and Rehnquist, was responsible for deciding the remedy aspect of the *Norris* decision. Clearly, Justice O'Connor's vote was the key one, determinative of which school of thought would become law and leading to two different majority opinions, one concerning the legality of the plan and the other addressing the issue of the appropriate form of relief.

The plans challenged in *Manhart* and *Norris* were alike in that both used sex-segregated actuarial tables to calculate retirement benefits. The similarities between the plans ended there, however, for the pension plan involved in the *Norris* case differed from the one found to be illegal in *Manhart* in several significant respects. First of all, the plan alleged to be discriminatory in *Norris* was a deferred compensation plan available to all Arizona state employees.²³ Moreover, the *Norris* plan, unlike the one in *Manhart*, was not a salary reduction plan and entailed no employer contributions.²⁴ Completely voluntary, the *Norris* plan permitted those employees who chose to do so to enroll.²⁵ Those who did participate had a fixed monthly amount deferred from their income, a deferral that was treated for tax purposes as an employer contribution and thereafter invested by the state with private insurance companies.²⁶

Also unlike the *Manhart* plan, the *Norris* program allowed the employee some choice of both insurance company and form of pension benefits, for in *Norris* an employee could choose among the insurance companies selected by the state as investment managers²⁷ and could also pick one of three pension benefit options offered: a lump sum payment upon retirement; periodic fixed sum payments for a predetermined period of time; or monthly annuity payments for the rest of the employee's life.²⁸ Only the last of these options was alleged to be discriminatory in that under this option a female employee's annuity was smaller than that of a similarly situated male.²⁹ With annuity payments, in other words, the employees received different monthly benefits. According to Arizona, sex-differentiated annuities "reflected what is available in the open market."³⁰

²³*Id.* at 3494.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* at 3497.

³⁰*Id.* at 3500.

The majority discounted the significance of each of the differences in the *Manhart* and *Norris* plans, ultimately finding the *Norris* plan to be as much of a violation of Title VII as the *Manhart* program. It made no difference that the annuity option challenged in *Norris* was merely an adjunct to two sex-neutral options, the Court decreed, because “[a]n employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis.”³¹ Similarly, the Court found the absence of unequal employee contributions to be insignificant, concluding “that it is just as much discrimination ‘because of . . . sex’ to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits.”³²

In much the same way, the Court rejected the argument that the *Norris* plan was significantly different from the *Manhart* plan, and hence non-discriminatory, in that the former offered a choice of insurance companies and pension options. Instead, the Court found that offering several discriminatory options was just as unacceptable as offering one.³³ Overall, the *Norris* court declared clearly that Arizona’s use of sex-based mortality tables in determining pension benefits made their program illegal, regardless of any other characteristics that the plan might have.

In the Court’s own words:

What we said in *Manhart* bears repeating: “Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful.” 435 U.S., at 709, 17 FEP Cases, at 399. The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute “[e]ven a true generalization about [a] class” cannot justify class-based treatment.³⁴

The Court also refused to accept Arizona’s argument that its voluntary pension plan, administered by independent insurance agencies, fell within the “open market exception” of *Manhart*. Arizona argued, in effect, that it was

³¹*Id.* at 3497 n.10 (footnote omitted).

³²*Id.* at 3499.

³³*Id.* at 3497. The Court stated:

Arizona has simply offered its employees a choice among different levels of annuity benefits, any one of which, if offered alone, would be equivalent to the plan at issue in *Manhart*, where the employer determined both the monthly contributions employees were required to make and the level of benefits that they were paid. If a woman participating in the Arizona plan wishes to obtain monthly benefits equal to those obtained by a man, she must make greater monthly contributions than he, just as the female employees in *Manhart* had to make greater contributions to obtain equal benefits. For any particular level of benefits that a woman might wish to receive, she will have to make greater monthly contributions to obtain that level of benefits than a man would have to make. The fact that Arizona has offered a range of discriminatory benefits levels, rather than only one such level, obviously provides no basis whatsoever for distinguishing *Manhart*.

Id. at 3497.

³⁴*Id.* at 3498.

doing no more than “set[ting] aside equal retirement contributions for each employee” and letting him or her “purchase the largest benefit which his or her accumulated contributions could command in the open market,”³⁵ benefits which were sexually-differentiated only because the marketplace offered no other forms of life annuities. The Court, however, rejected this attempt to distinguish the *Norris* plan from the *Manhart* one, just as it had the others. First, the Court found the Arizona plan to be an “employer-sponsored” one, not an “open market” choice.³⁶ Then the Court dismissed Arizona’s attempt to shift the blame for any discrimination onto the third-party insurance companies.³⁷

Finally, because independent insurance companies were involved in the *Norris* case, the Court dealt with the question of whether its decision ran contrary to the McCarran-Ferguson Act.³⁸ In a footnote, the Court dismissed this challenge to its holding, pointing out first of all that this argument was not reserved for Supreme Court review and adding that the Court was not “regulating the business of insurance” in *Norris* anyway. Rather, the Court asserted, it was merely clarifying what constituted a correct employment practice.³⁹ The Court was not, it maintained, ordering the use of sex-neutral

³⁵*Manhart*, 435 U.S. at 717-718.

³⁶*Norris*, 103 S. Ct. at 3501. The Court applied the following rationale:

[T]he State did not simply set aside retirement contributions and let employees purchase annuities on the open market. On the contrary, the State provided the opportunity to obtain an annuity as part of its own deferred compensation plan. It invited insurance companies to submit bids outlining the terms on which they would supply retirement benefits and selected the companies that were permitted to participate in the plan. Once the State selected these companies, it entered into contracts with them governing the terms on which benefits were to be provided to employees. Employees enrolling in the plan could obtain retirement benefits only from one of those companies, and no employee could be contacted by a company except as permitted by the State. Ariz. Regs. 2-9-06.A, 2-9-20.A.

Under these circumstances there can be no serious question that petitioners are legally responsible for the discriminatory terms on which annuities are offered by the companies chosen to participate in the plan.

Id.

³⁷*Id.* at 3501-3502. The Court reasoned as follows:

Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers’ options. Since employers are ultimately responsible for the “compensation, terms, conditions, [and] privileges of employment” provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination. In this case the State of Arizona was itself a party to contracts concerning the annuities to be offered by the insurance companies, and it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested inclusion of the discriminatory provisions. It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis.

Id. (footnotes omitted).

³⁸*Id.* at 3500 n.17. The court stated “[T]he McCarran-Ferguson Act provides that [n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. 15 U.S.C. § 1012(b) (1976).” *Norris*, 103 S. Ct. at 3500 n.17.

³⁹*Id.*

mortality tables by insurance companies, but only forbidding employers' use of such tables. Thus, it was not allowing an Act of Congress unrelated to the business of insurance "to invalidate, impair or supercede any law enacted by any State for the purpose of regulating the business of insurance."⁴⁰

In short, the *Norris* Court extended the *Manhart* decision in several significant ways, thus clarifying the issue of just how far an employer must go in attempting to eliminate sex discrimination in pension plans. Unlike the pension plan challenged in *Manhart*, the annuity option in *Norris* was voluntary, involving no employer contributions and serving as an adjunct to two sex-neutral options. Thus, in holding the *Norris* plan to be illegal, and thereby finding all of these differences between *Manhart* and *Norris* to be irrelevant, the *Norris* Court clearly indicated that employers must eliminate the use of sex-based actuarial tables in their pension plans. In effect, the *Norris* Court declared that all pension plan options sponsored in any way by an employer must not be calculated according to such actuarial tables. Therefore, with this decision the *Norris* Court clearly extended the *Manhart* holding that men and women cannot be required to make unequal contributions to employer-sponsored pension funds, as far as it could go.

II. THE FIRST AMBIGUITY: RETROACTIVE OR PROSPECTIVE RELIEF?

The Courts declared in both *Manhart* and *Norris* that the relief in those cases was to be prospective only,⁴¹ though this issue was so hotly contested in *Norris* that it led to the writing of a separate majority opinion, endorsed by a new configuration of Justices, addressing the remedy question. In both cases, however, the Court left open the possibility of retroactive awards in other cases involving sex discrimination in pension plans. In fact, both decisions suggested strongly that such relief is appropriate in Title VII cases more often than not. The Court in *Manhart* did not wish to "qualify the force of the *Albemarle* presumption in favor of retroactive relief"⁴² and asserted that the "presumption in favor of retroactive liability can seldom be overcome."⁴³ Similarly, the *Norris* Court cited this *Manhart* sentiment with approval, stating, "We recognized in *Manhart* that retroactive relief is normally appropriate in the typical Title VII case."⁴⁴ Unfortunately, the Court failed to indicate explicitly the exact circumstances under which such retroactive awards should be made and what effect, if any, such relief would have on the pension industry.

⁴⁰*Id.* The dissent, however, pointed out the weakness in this argument, stating: "This formalistic distinction ignores self-evident facts It begs reality to say that a federal law that thus denies the right to do what state insurance law allows does not 'invalidate, impair, or supersede state law.'" *Norris*, 103 S. Ct. at 3507 n.6 (Powell, J., concurring in part and dissenting in part).

⁴¹*Manhart*, 435 U.S. at 723. More specifically, "only benefits derived from contributions collected after the effective date of the judgment need be calculated without regard to the sex of the employee." *Norris*, 103 S. Ct. at 3510 n.12. (Powell, J., concurring in part and dissenting in part).

⁴²*Manhart*, 435 U.S. at 723.

⁴³*Id.* at 719.

⁴⁴*Norris*, 103 S. Ct. at 3510 (Powell, J., concurring in part and dissenting in part).

The *Manhart* and *Norris* opinions did, however, point out factors that a court should consider in deciding whether to grant retroactive relief. Even before going into these relevant factors, the *Manhart* and *Norris* opinions discussed the *source* of judicial power to decide whether or not to award retroactive relief (i.e., why either a prospective or retroactive award was not automatically required). Basically, justification for such an exercise of judicial discretion is found in Title VII which, as the *Manhart* Court pointed out, “[t]o the point of redundancy . . . stresses that retroactive relief ‘may’ be awarded if it is ‘appropriate.’ ”⁴⁵

This clear indication in the Act itself of the optional nature of a retroactive award suggests that the decision concerning retroactivity will remain one open to judicial discretion.⁴⁶ In other words, the prospective relief given in *Manhart* and *Norris* does not seem to be an indication that only prospective awards can be made in the future. Instead, rather than put limitations on the type of relief that can be granted when sex discrimination is found to be present in pension plans, *Manhart* and *Norris* merely point out the factors that courts should consider in making their own decisions concerning the appropriateness of retroactive relief.

In her *Norris* concurrence, Justice O’Connor, citing the Court’s 1971 decision in *Chevron Oil Co. v. Huson*,⁴⁷ explicitly set out the three criteria which she seemed to consider determinative of the decision concerning retroactivity.⁴⁸ In enumerating these factors, Justice O’Connor appeared to expressly set forth the criteria that the *Manhart* and *Norris* opinions considered implicitly but never overtly listed in deciding whether or not to award retrospective relief. Although she was not involved in the *Manhart* decision, Justice O’Connor, in *Norris*, summarized the considerations which both opinions looked at in deciding the issue of “prospective v. retroactive” compensation.

A. Legal Novelty

The first of these criteria is a determination of whether the decision on which the award was based “established a new principle of law.”⁴⁹ The Court chose, in *Manhart* and *Norris*, to gauge the legal novelty of their decisions in a somewhat indirect fashion, by determining whether the law they were declaring was either so established that the employer involved in each case should have known that his sex-based pension plan was illegal, or so new that he could

⁴⁵*Manhart*, 435 U.S. at 719 (emphasis added). See also, Title VII which states that “[a] court that finds discrimination may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement . . . with or without backpay . . . or any other equitable relief as the court deems appropriate. 42 U.S.C. § 2000e-5(o) (Supp. V. 1970).” *Manhart* at 718.

⁴⁶In fact, the *Manhart* Court specifically stated that “[t]he *Abermarle* presumption in favor of retroactive liability . . . does not make meaningless the district courts’ duty to determine that such relief is appropriate.” *Manhart*, 435 U.S. at 719.

⁴⁷404 U.S. 97 (1971).

⁴⁸*Norris*, 103 S. Ct. at 3512 (O’Connor, J., concurring).

⁴⁹*Id.*

not reasonably have been expected to have such knowledge.⁵⁰ Such employer “evaluations” were made in both cases, and in each the Court found the employer’s lack of incriminating awareness to be enough of an indication of the legal novelty of its decision⁵¹ to militate strongly in favor of granting only prospective relief.

B. *Impact on the Statute*

Both opinions pay only passing attention to the second criterion set out in *Chevron* and cited by Justice O’Connor: “whether retroactivity will further or retard the operation of the statute [Title VII].”⁵² Implicit in both decisions, however, is a consideration of this factor and a subsequent conclusion that “a retrospective award would have little effect on Title VII’s operation.” The *Manhart* Court stated simply, “There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.”⁵³ The *Norris* Court never addressed this question directly, but implicit in its conclusion that the employer “reasonably could have assumed” that his plan was “lawful” was the idea that employers’ knowledge of the unlawfulness of such plans would be enough to change their actions, even without the threat of retroactive awards.

Justice O’Connor explicitly voiced this implication in her concurrence, stating:

I see no reason to believe that a retroactive holding is necessary to ensure that pension plan administrators, *who may have thought until our deci-*

⁵⁰The source of the Court’s decision to use employer knowledge of illegality as a consideration in determining award prospectivity or retroactivity seems to be rooted in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), a case cited in both *Manhart* and *Norris*. Ironically, the Court in *Albemarle* found that an employer’s lack of “bad faith” (i.e., his unfamiliarity with the unlawfulness of his actions) was *not* a sufficient reason for denying backpay, a conclusion that seems at odds with the *Manhart* and *Norris* decisions. Still, the *Albemarle* Court went on to concede that “under Title VII, the mere absence of bad faith simply opens the door to equity,” even though “it does not depress the scales in the employer’s favor.” *Albemarle*, 422 U.S. at 422. The Court, in *Manhart* and *Norris*, used the employer’s lack of bad faith to “open the door to equity” before allowing a more pressing concern, the potentially devastating economic ramifications stemming from a retroactive award, to “depress the scales in the employer’s favor.”

⁵¹To use the Courts’ own words:

[W]e must recognize that conscientious and intelligent administrators of pension funds who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department’s was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views. The Department’s failure to act more swiftly is a sign, not of its recalcitrance, but of the problem’s complexity. As commentators have noted, pension administrators could reasonably have thought it unfair — or even illegal — to make employees shoulder more than their “actuarial share” of the pension burden.

Manhart, 435 U.S. at 720. Similarly, the *Norris* Court found:

This case presents no different considerations. *Manhart* did put all employer-operated pension funds on notice that they could not “requir[e] that men and women make unequal contributions to [the] fund,” *id.*, at 717, 17 FEP Cases, at 402, but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the “open market,” *id.*, at 718, 17 FEP Cases, at 402. Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.

Norris, 103 S. Ct. at 3510. (Powell, J., concurring in part and dissenting in part).

⁵²*Id.* at 3512.

⁵³*Manhart*, 435 U.S. at 720-21.

sion today that Title VII did not extend to plans involving third-party insurers, will not now quickly conform their plans to ensure that individual employees are allowed equal monthly benefits regardless of sex.⁵⁴

C. Inequitable Results

It is clear that both decisions correctly considered the chief argument against granting retroactive relief to be the enormous and disastrous economic effects on pension plans that would accrue from such an award. According to the *Manhart* Court:

Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund, the administrators of the fund will be forced to meet unchanged obligations with diminished assets. If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.⁵⁵

On the same subject Justice Powell stated in *Norris*:

As in *Manhart*, holding employers liable retroactively would have devastating results. The holding applies to all employer-sponsored pension plans, and the cost of complying with the District Court's award of retroactive relief would range from \$817 to \$1260 million annually for the next 15 to 30 years. Department of Labor Cost Study 32. In this case, the cost would fall on the State of Arizona. Presumably other state and local governments also would be affected directly by today's decision. Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise and property taxes are being increased. There is no justification for this Court, particularly in view of the question left

⁵⁴*Norris*, 103 S. Ct. at 3512 (O'Connor, J., concurring) (emphasis added).

⁵⁵*Manhart*, 435 U.S. at 722-23 (footnotes omitted). The *Manhart* Court discussed this subject not once, but twice. In a second part of the decision, it stated the following:

Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing — more than \$400 billion was reserved for retirement benefits at the end of 1976 and reserves are increasing by almost \$50 billion a year. These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

Manhart, 435 U.S. at 721. (footnotes omitted.)

open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.”⁵⁶

In making these economic determinations in *Manhart* and *Norris*, the Court was obviously evaluating the third *Chevron* criterion: “whether retroactive application would impose inequitable results.”⁵⁷ Based on the Court’s emphasis on, and detailed analyses of, the potential economic consequences of retroactivity, it seems safe to conclude that this consideration will be accorded great weight in future determinations of the appropriateness of granting retroactive awards to remedy past sex discrimination in pension plans.⁵⁸

In short, while at first glance the *Manhart* and *Norris* decisions may suggest that only prospective awards are appropriate when sex discrimination is found to have been inherent in a pension plan, a closer look reveals an ambiguity concerning when and whether retroactive relief is appropriate. In the end, neither opinion resolves this ambiguity, and the only conclusion to be drawn is that either type of relief may be appropriate depending on the circumstances. The circumstances to be given special attention, moreover, are set out to be the following: (1) whether the decision establishes a new principle of law; (2) “whether retroactivity will further or retard the operation of the state”; and (3) “whether retroactive application would impose inequitable results.”⁵⁹

Another pension benefit case, now on remand from the Supreme Court, *Spirit v. Teacher’s Insurance and Annuity Ass’n*,⁶⁰ provides an example of a case in which a consideration of the same factors taken into account in *Manhart* and later in *Norris* could lead to the conclusion that retroactive relief is appropriate. On the subject of the novelty of the question of law being decided or, to use *Manhart* and *Norris*’ alternate approach to this question, of the reasonableness of expecting the employer to know that his pension plan was illegal, the circuit court in *Spirit* found that, due to prior court decisions,⁶¹ there was little novelty in the question of law to be decided in *Spirit* and ample warning

⁵⁶*Norris*, 103 S. Ct. at 3510. (Powell, J., concurring in part and dissenting in part).

⁵⁷*Id.* at 3512. (O’Connor, Jr., concurring). In a way, when making these economic determinations, the Courts are considering the second criterion as well since avoidance of the destruction of pension programs clearly “furthers” rather than “frustrates” the goals of Title VII, i.e., “eradicating discrimination” and “making people whole for injuries suffered through past discrimination.” *Abermarle*, 422 U.S. at 421.

⁵⁸The Court’s considerations were not unprecedented, in that “these very concerns — the need to insure financial integrity of retirement systems and the desire to protect the interests of employees and their beneficiaries — led to the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., (1976) which requires covered plans to conform to specified minimum standards.” Brief for the Equal Employment Opportunity Commission as Respondent and for the United States as Amicus Curiae in Support of Respondents 15, *Spirit v. Teachers Ins. & Annuity Ass’n*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *aff’d in part and rev’d in part*, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3565 (1983).

⁵⁹*Norris*, 103 S. Ct. at 3512 (O’Connor, J., concurring).

⁶⁰*Spirit v. Teachers Ins. & Annuity Ass’n*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *aff’d in part and rev’d in part*, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3565-66 (1983).

⁶¹See *Retired Public Employees’ Ass’n of California v. California*, 677 F.2d 733 (9th Cir. 1982) *vacated*, 103 S. Ct. 3565 (1983); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. Teachers’ Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981); *Peters v. Wayne State Univ.*, 476 F. Supp. 1343 (E.D.Mich. 1979).

to the employer involved of the illegality of his plan. In *Spirit*, as in *Manhart* and *Norris*, the Court gave scant attention to the second factor, whether retroactivity would further or retard the operation of Title VII, concluding summarily, as in the previous cases, that the presence or absence of a retroactive award would have little effect on Title VII's continued effectiveness.

As it had in the *Manhart* and *Norris* decisions, however, the Court in *Spirit* concentrated much of its attention on the third criterion, whether retroactive application would impose inequitable results. Deciding that it would not, the Second Circuit justified its conclusion by pointing out both that granting retroactive relief would be far less "drastic" a measure than such a reward would have been in *Manhart*,⁶² and that such a retroactive grant would not unfairly interfere with male employees' pension expectations.⁶³ This decision provides proof that at least some jurists believe retroactive relief can be appropriate to remedy some types of sex discrimination in pension plans.

However, the cost of affording this relief in *Spirit* could be too high. Because only a very limited number of cases will reach the Supreme Court, and because legislation concerning pension benefits does not seem to be in sight, *Spirit* could become important post-*Norris* precedent.⁶⁴ Should the Second Circuit require retroactive relief on remand, many courts may order such awards in pension cases, with disastrous results. Although the pension plan in *Spirit* can bear the financial burden of funding retroactive relief, many plans cannot. Thus, a retroactive award in *Spirit* could lead indirectly to the demise of many pension programs. Moreover, the legality of making such an award retroactive despite employers' former ignorance, and lack of warning of, the illegality of their pension plans is, of course, questionable. In short, a retroactive award on remand in *Spirit* could revolutionize the insurance industry in a way that the

⁶²The Court explained this conclusion as follows:

There the district court's order that all female employees and retirees receive refunds of all excess contributions made to the plan since April 5, 1972, when Title VII became applicable to governmental employers, see *Manhart v. City of Los Angeles Dept. of Water & Power*, 553 F.2d 581, 583 (9th Cir. 1976), vacated and remanded, 435 U.S. 702, 98 S. Ct. 1370, 55 L.Ed.2d 657 (1978), required Plan administrators to remove money from the fund for this purpose. The fund would nevertheless have been required, at the same time, to meet undiminished obligations. In the present case a "retroactive" award does not require the wholesale removal of moneys from TIAA-CREF reserves. The equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds. A result which did not affect past contributions and granted only "prospective" relief, as that is defined by defendants, would effectively postpone full conversion to gender-neutral tables for as much as 30 to 40 years.

Spirit, 691 F.2d at 1068.

⁶³The Court explained that the male employees had no clearly settled expectations that would be violated for three reasons. First, the literature distributed to TIAA-CREF participants emphasized the difficulty involved in accurately predicting the amount of retirement annuity income to be expected by an individual participant. Second, while TIAA did guarantee its participants certain minimum monthly payments, the amounts guaranteed were so low that there was no danger that the male participants' expectation that they would receive the minimal guaranteed benefit would be imperiled by the relatively minor changes in the value of past benefits necessitated by an award of retroactive relief. Third, CREF guaranteed plan participants no specific amount of monthly payments. *Spirit*, 691 F.2d at 1068-1069.

⁶⁴Both H.R. 100 and S. 2204 seem to be languishing in the legislature.

Court, beginning with the *Manhart* decision, has sought to avoid.

III. THE SECOND AMBIGUITY: HOW TO CALCULATE THE BENEFITS — “TOPPING UP” OR UNISEX TABLES?

Yet another ambiguity left after the *Norris* decision is how these awards, whether prospective or retroactive, are to be calculated. Basically there are two possible approaches to this problem: “topping up” or the adoption of unisex actuarial tables. “Topping up” involves requiring that benefits payable to the formerly disadvantaged sex be raised to the level now payable to the favored sex.⁶⁵ The adoption of unisex actuarial tables, on the other hand, entails the use of tables that average the mortality experience of the sexes and provide mid-level benefits to all employees.⁶⁶ In her *Norris* concurrence, however, Justice O’Connor rejected the “topping up” possibility, advocating the unisex table approach⁶⁷ and arguing that the Equal Pay Act was inapplicable to the *Norris* award question.⁶⁸

As it is unclear whether any of her colleagues adopted Justice O’Connor’s “unisex table” approach,⁶⁹ the correct method of determining damages in cases involving sex discrimination in pension plans remains uncertain. How the question is finally resolved is enormously important, however, in that the cost and Employee Retirement Income Security Act (“ERISA”) consequences stemming from these awards will differ greatly according to whether they are arrived at by using the “topping up” or the unisex table approach. Only a decision definitively resolving the other ambiguity left after *Norris* — exactly when these awards are to be prospective or retroactive — will have as much of an effect on the ramifications accruing from awards in cases involving sex discrimination in pension benefits, as will the resolution of this question as to how to calculate the amount of these awards.

⁶⁵DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 3.

⁶⁶*Id.*

⁶⁷She advocated, “requiring employers to use longevity tables that reflect the average longevity of all of their workers.” *Norris*, 103 S. Ct. at 3512 (O’Connor, J., concurring).

⁶⁸Justice O’Connor’s two-part argument was as follows: First, although the Bennett Amendment of Title VII, 42 U.S.C. § 2000e-2(h), incorporates the Equal Pay Act defenses for disparate “compensation” as well as disparate “wages,” see *Manhart*, 435 U.S. at 711, n.22, the language of the Equal Pay Act proviso seems to apply only to wages. Thus, it is questionable whether the proviso would apply at all to the retirement plan at issue here. Second, even if the proviso has some relevance here, it should not be read to require a pension plan, whose entire function is actuarially to balance contributions with outgoing benefits, to calculate benefits on the basis of tables that do not reflect the composition of the work force. *Cf. Manhart*, 435 U.S. at 720 n.36, (“The District Court should have at least considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.”).

⁶⁹In the “damages” section of the decision, Justice Powell indicates that he agrees that the award should be prospective only but says nothing about how this award is to be calculated. *Norris*, 103 S. Ct. at 3510 n.12 (Powell, J., dissenting in part and concurring in part).

IV. RESOLVING THE AMBIGUITIES: THE COST AND ERISA CONSEQUENCES WHICH COULD ACCRUE FROM THE POSSIBLE RESOLUTIONS

A. *Background: The Two Types of Pension Plans and Their Current Prevalence*

Basically, there are two types of pension plans: defined benefit plans and defined contribution plans. Under the former, an employer agrees to provide his employees with a specific type and amount of pension benefits when they retire, benefits established under wage and length of service formulas.⁷⁰ Generally, the normal benefit forms offered are single life annuities.⁷¹ Since such annuities usually provide equal benefits for men and women with the same salary histories and length of service,⁷² most defined benefit plans will be unaffected by changes made to eliminate the use of sex-based actuarial tables in pension plans. However, certain optional benefits established under some defined benefit plans, such as lump sum or survivor options, are based on sex-differentiated actuarial tables⁷³ and will be affected by the sex-neutral changes mandated by *Norris*.

As of 1977, only about 29% of the 450,000 pension plans in operation were such defined benefit plans.⁷⁴ However, about 90% of the workers in the pension system receive their sole or primary benefits from such plans.⁷⁵ Forty-five percent of these employees, furthermore, are in plans which employ sex-segregated mortality tables.⁷⁶ Thus, changes in these plans will have widely-felt effects.

Under defined contribution plans, on the other hand, the employer contributes a given amount each year to the individual account of each employee.⁷⁷ At retirement, a worker is entitled to the lump sum in his account, or, alternately, to an actuarially equivalent amount which he can "purchase" with the lump sum.⁷⁸

With such plans, while the lump sum is the normal benefit, a life annuity is the most typical optional benefit form. Currently, about 60% of the defined contribution plans in existence offer such annuities as an option.⁷⁹

⁷⁰DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 7.

⁷¹*Id.* at 10.

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.* at 8.

⁷⁵*Id.* at 9.

⁷⁶*The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce*, 98th Cong., 1st Sess. 68 (1983) (statement of T. Timothy Ryan, Jr., Solicitor, U.S. Dept. of Labor) [hereinafter cited as *Ryan Statement*].

⁷⁷DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 7.

⁷⁸*Id.* at 10.

⁷⁹*Id.*

Under these plans, too, the lump sum is converted into an annuity on the basis of its actuarial value, which is now typically calculated by using sex-segregated annuity tables.⁸⁰ Women receive lower monthly payments under such plans because of their typically longer lives which portend the necessity of spreading their lump sum out over a longer period of time.⁸¹ Thus, these annuity plans will also be affected by changes accruing from the attempt to eliminate the use of sex-based actuarial tables in calculating pension benefits.

B. The "Topping Up" Approach: The Effects of Raising Both Sexes' Benefits to the Highest Level Currently Available

1. Cost Ramifications

According to one estimation, "topping up" pension benefits could necessitate expenditures of as much as \$1195-1663 million a year, if awards are applied retroactively to current and future retirees.⁸² Specifically, were the awards made retroactive, "topping up" could cost defined benefit plans as much as \$885 to \$1052 million annually and defined contribution plans between \$310 to \$611 million a year.⁸³ Even if employers were required to "top up" the benefits of only those employees who retired after the Court's *Manhart* order, the annual cost to plans would be between \$909 and \$1360 million.⁸⁴ Short-run costs would be especially prohibitive, more than \$1.7 billion annually if employers were required to "top up" benefits of all active and retired employees.⁸⁵

The cost of wholly prospective "topping up" would not be low either. Rather, this cost would range from \$428 to \$676 million annually for at least the next fifteen years.⁸⁶ Breaking this cost down by type of plan, such prospective "topping up" would cost defined benefit plans anywhere between \$289 and \$547 million annually and defined contribution plans between \$139 and \$343 million a year, depending on the group to whom prospective relief is granted. Ironically, the higher expenditures made by defined benefit plans will ultimately find their way into men's pockets, while women will reap the benefits of only the lower costs to defined contribution plans.⁸⁷

Men benefit from defined benefit costs because their expenditures go to increase men's joint and survivor option payments which extend throughout the life of the man and his wife, should she survive him. Such options have, when sex-based actuarial tables are used, been smaller for men, because a man's

⁸⁰*Id.*

⁸¹*Id.* at 10-11.

⁸²*Id.* at 33 (in 1980 dollars).

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.* at 3.

⁸⁶*Id.* at 31, *quoted in Norris*, 103 S. Ct. at 3494 n.1 (Powell, J., concurring in part and dissenting in part).

⁸⁷This relief could be given to future retirees only, to post-*Manhart* retirees or to all retirees. DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 31.

spouse is expected to outlive him (both because most wives are younger than their husbands and because women have longer expected live spans). In other words, because a man's joint and survivor payments are predicted to be spread out over longer period of time than those of a woman whose spouse is unlikely to survive her, each periodic payment has been smaller for a man than for his female counterpart.

Women, on the other hand, benefit from the increased cost to defined contribution plans because these costs go to supplement womens' life annuity options under such plans. With this type of option, when sex-based actuarial tables are employed, a woman's benefits are spread out over a longer period of time because women, as a group, live longer than men. Thus, an annuity option that a woman can buy for a certain lump sum provides lower monthly benefits than an option that a man can buy for the same price, when different mortality tables are used for the sexes. Therefore, with the elimination of these tables, an employer supplement is needed to equalize these benefits.

Basically, "topping up" can be accomplished in two ways, either by using a unisex table in which womens' benefits have been raised to the "higher-paid" male level or by supplementing contributions of those employees who have been shortchanged due to sexually discriminating practices. Such supplements would have to be supplied, on occasion, to both men and women.⁸⁸ The costs of such supplements would be great whether applied retroactively or only prospectively.⁸⁹ These costs, at first glance, seem prohibitively high, and yet advocacy groups have contended that the price of "topping up," when put

⁸⁸See *supra* text accompanying note 87.

⁸⁹

- *Topping-up* with extra contributions for female employees would directly increase pension plan costs for employers in the short run. The exact costs depend on the sex composition of the plan, whether it covers retirees as well as active workers, and the extent of retroactive liability.
 - If the supplements apply *wholly prospectively* either to:
 - Active employees only, the annual cost increase is estimated at between \$139-\$309 billion (in 1980 dollars).
 - If all current retirees are also included, annual prospective costs rise to between \$169-\$343 million.
 - If the rule covers only those who retired or will retire after *Manhart*, the prospective cost increases are only about \$7 million more a year than those estimated for active workers alone.
 - In either case, the annual prospective costs will eventually fall back to the \$139-\$309 million level as current retirees die.

DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 18-19.

- *Topping-up*, this time with supplements for *male* employees, would greatly increase pension plan costs for employers in the short-run.
 - If the supplements apply *wholly prospectively* either to:
 - Active employees' future service credits only, the annual cost increase is estimated at between \$289-\$367 million.
 - If all current retirees' future payments are also covered, prospective costs rise to between \$459-\$547 million a year.
 - If the rule covers only those who retired or will retire after *Manhart*, prospective cost increases are only about \$25 million more a year than those estimated for active workers alone.

DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 24-25.

in the proper perspective, is not exorbitant.⁹⁰ Whether or not the price is exorbitant, however, there is further irony in the fact that so much of the cost will go to men rather than to the female victims of discrimination whom pension equalization was meant to benefit.⁹¹

2. ERISA Ramifications

Because the deferred compensation plan involved in the *Norris* case was sponsored by the State of Arizona, it fell within the exemption from ERISA coverage.⁹² Thus, ERISA considerations played no part in *Norris*. Clearly, the implications of the Court's decision in *Norris* were not limited to state ERISA-exempt plans, though. Rather, the *Norris* decision will impact on all employer-sponsored retirement plans subject to Title VII. Because almost all such plans are sponsored by private sector employers, with the result that far more employees participate in private plans which are subject to ERISA,⁹³ it is necessary to consider the ERISA consequences stemming from the various possible methods of equalizing pension benefits.

⁹⁰For example, the following argument was made in support of H.R. 100, The Nondiscrimination in Insurance Act:

There are still problems with the figures and methodology of the DOL study, but it does emphasize how small the costs really are . . . equalization costs are less than one billion dollars in plans which ave a total of 650 billion dollars in them and which have 42.5 million participants. To cite another figure: to "top up" benefits to the male level would cost only six to eleven dollars per plan participant per year. The total "shift of benefits" if the benefits were averaged out over men and women would be less than \$100 per year per retiree. Even if employers were required to put in additional money, DOL estimates are of the order of magnitude of less than one-half of one percent of payroll costs. We contend that even DOL estimates are too high and that there would be essentially no cost to employers because of the conservative guarantees built into existing plans.

The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 98th Cong. 1st Sess. 220 (1983) (Statement of Dr. Mary Gray, President, Women's Equity Action League).

⁹¹According to the DEPARTMENT OF LABOR COST STUDY, *supra* note 3:

Men as a group would receive 55-95 percent of the money industry would have to spend in order to equalize benefits under most options. This is primarily because of (1) the larger number of male participants (73% of the active participants in private plans and 56% in state and local plans), (2) men's higher earnings, and (3) the larger percentage of employees who receive the primary pension from defined benefit plans (90%), where it is the men who are currently disfavored.

DEPARTMENT OF LABOR COST STUDY, *supra*, at 3.

⁹²Title I of ERISA applies generally to pension plans established or maintained by employers or unions engaged in or affecting interstate commerce (29 U.S.C. § 1003(4) (1977)). Title II of ERISA, and subchapter D of chapter 1 of the Internal Revenue Code (26 U.S.C. § 401-416) (1976 and Supp. V 1981), contained standards to qualify pension, profit-sharing and stock bonus plans for favorable tax treatment. Those standards are substantially identical to the ones in Title I.

The plan involved in *Norris* is a "governmental plan" exempt from coverage under Title I of ERISA. See section 4(b)(1), 29 U. S. C. § 1003(b)(4) (1976); Section 3(32), 29 U.S.C. § 1002(32) (1976). Title II is also inapplicable to such plans because their tax status is generally governed by either section 457 of the Internal Revenue Code or by the provisions of that Code that were in effect before the passage of ERISA (26 U.S.C. § 410(c)(2), 411(e)(2) (1976)).

⁹³In 1977, there was an estimated 42,485,000 participants in private pension plans, and only an estimated 10,951,000 participants in state and local public employee retirement systems. UNITED STATES DEPARTMENT OF LABOR, LABOR-MANAGEMENT SERVICE ADMINISTRATION, PRELIMINARY ESTIMATES OF PARTICIPANT AND FINANCIAL CHARACTERISTICS OF PRIVATE PENSION PLANS, 1977 Tables 1 and 3 (1981); AMERICAN COUNCIL OF LIFE INSURANCE, PENSION FACTS 31 (1980).

One such ERISA ramification, albeit a somewhat indirect one that is a cost ramification as well, has to do with joint and survivor annuities.⁹⁴ Under ERISA, as well as the Internal Revenue Code, plans that offer annuity benefits must provide married employees with the joint and survivor annuity option unless these employees affirmatively elect a different form of benefit.⁹⁵ Because female employees generally receive larger joint and survivor annuity payments than men,⁹⁶ costly adjustments will have to be made in such programs following *Norris*. Thus, one “ERISA ramification” of *Norris* is that employers wishing to offer the annuity option will be forced to offer, at potentially great cost, a sex-neutral joint and several annuity variety of this option. The ironic side of this *Norris* consequence is that it is perhaps the best example of how the sex meant to benefit from the supposed elimination of discrimination in pension plans will often not be the one reaping the rewards of sex-neutrality in pensions.

Several more direct ERISA consequences could accrue from an adoption of the “topping up” approach to pension benefit equalization, or more specifically, from using an employer supplement to eliminate sex discrimination in pension plans. First of all, in the defined benefit context, “topping up” might require an employer supplement in order to raise the level of options open to the economically disfavored sex to the level of benefit now available to the favored one.⁹⁷ Providing such a supplement might be interpreted, however, as violating the ERISA “actuarial equivalence” requirement that prohibits the calculation of one sex’s benefits through use of the mortality table of the other sex.⁹⁸

In regard to defined contribution plans, potential ERISA complications arise from the provision stating that an individual account plan is one involving benefits based *solely* on an employee’s account balance.⁹⁹ In light of this

⁹⁴Under such an annuity, “the annuitant receives a specified amount each month for life, and the surviving spouse (or other specified individual) receives a monthly payment for his or her life.” Department of Labor Cost Study, *supra* note 3, at 11.

⁹⁵See ERISA § 205, 29 U.S.C. § 1055 (1976); I.R.C. § 401(a)(11) (1976).

⁹⁶See *supra* text p. 185-186.

⁹⁷See *supra* text accompanying note 86.

⁹⁸ERISA § 204(c)(3), 29 U.S.C. 1954(c)(3) (1976), requires that optional forms of benefits under a defined benefit plan must, with certain exceptions not relevant here, be the “actuarial equivalent” of the normal form of benefit under the plan. In the case of a defined benefit plan, this provision might be violated if male (as distinguished from unisex) actuarial tables are employed to determine the level of optional benefits payable to females or vice versa.

⁹⁹See ERISA §§ 3(34), (35), 29 U.S.C. §§ 1002(34), (35) (1976). ERISA § 3(34) defines the term “individual account plan” to mean a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account. The term “defined benefit plan” is defined in section 3(35) generally to mean a pension plan other than an individual account plan. A benefit that is based in part on an employer’s commitment to make a payment at a future date is not a benefit based *solely* on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participants’ account. A plan may be a hybrid of these two types of plans, but to the extent it is a defined benefit plan, it is subject to the requirements imposed under ERISA on defined benefit plans that are relevant in this context.

provision, the supplement that an employer promises during the process of “topping up” might well be viewed as a defined benefit plan to the extent of the promised supplement which was not “based solely” on the employee’s account balance. If so, ERISA would dictate that female participants have vested rights in the value of the pledge of an additional sum to which they would be entitled whether or not they chose to take the annuity option.¹⁰⁰ In other words, female workers would be entitled to more compensation than their male counterparts under any lump sum options offered by the plan. It is true that this possible consequence of *Norris* does at least benefit the sex meant to be helped by an elimination of sex-based actuarial tables, but it does so in a way so rife with reverse discrimination that it would undoubtedly be challenged.

C. Unisex Tables

1. Cost Ramifications

The costs inherent in adopting the unisex approach, *i.e.*, in using tables that average the mortality experience of the sexes and provide mid-level benefits to all employees, will be high — approximately \$85-93 million a year — even if employers apply these tables in a purely prospective fashion.¹⁰¹ Still, viewed from an overall perspective, this approach is relatively inexpensive since unisex costs are generally only fifteen to forty percent of “topping up” costs.¹⁰² More specifically, under a wholly prospective application of unisex tables, men would gain anywhere from \$85 to \$273 million annually (in 1980 dollars),¹⁰³ depending upon the service and the participants to which the award is applied.¹⁰⁴ Women, on the other hand, under defined contribution plans, would gain from \$0 to \$34 million annually were unisex tables to be applied prospectively.¹⁰⁵ With such plans there would be an additional \$8.5 million loss annually to active male participants and a \$5 million annual gain to active women participants.¹⁰⁶ Even so, it is clear that once again men benefit more than women from this approach to eliminating the use of sex-based actuarial tables to calculate pension benefits.

As with retrospective “topping up,” if the unisex tables are applied retro-

¹⁰⁰Benefits under defined benefit plans are required to be accrued over an employee’s career in more or less equal increments and benefits thus accrued are ordinarily required to become vested during the employee’s career rather than at retirement. ERISA § 204, 29 U.S.C. 1054 (1976). Obviously, determining how to spread this supplement over an employee’s career is more or less equal increments would be another ERISA problem inherent in pension equalization through employer supplements.

¹⁰¹DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 4, *cited in Norris*, 103 S. Ct. at 3494 n.1.

¹⁰²DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 4.

¹⁰³*Id.* at 31. These increases stem from the costs of increasing men’s payments under joint and survivor annuities. Survivors, who are usually women, will get about five to ten percent of the total increase in benefits.

¹⁰⁴These awards can be applied to all retirees or only post-*Manhart* ones and to total service or only that performed post-*Manhart*.

¹⁰⁵DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 31 (in 1980 dollars). Again, the exact amount depends on the retirees and service taken into account. (See *supra* note 104).

¹⁰⁶DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 31.

actively, costs will be much higher.¹⁰⁷ In such a case, men under defined benefit plans will gain anywhere from \$155 to \$516 annually.¹⁰⁸ With defined contribution plans, women will accrue an additional \$9 to \$69 million annually. There will also be an additional \$12 to \$17.1 million annual loss to active male participants and \$6.9 to \$9.9 million gain to active female participants under such plans.¹⁰⁹ Still, whether unisex tables are applied prospectively or retroactively, men clearly reap the most benefits from this means of alleviating sex discrimination in pension plans.

2. ERISA Ramifications

The use of unisex tables in a completely prospective fashion would have no apparent adverse ERISA consequences. This approach would cause ERISA difficulties, however, if the use of the tables was retroactive. Under ERISA, a participant's benefits cannot be reduced once he has met certain requirements which make him entitled to these benefits. Normally, such an entitlement arises when an employee either has already retired and is receiving payments at a certain level,¹¹⁰ a level which cannot be lowered because an employee has worked his way up to it, or has not retired but has accrued benefits based on past work service, an accrual which has been earned and thus cannot be reduced.¹¹¹ Therefore, retroactive application of unisex tables could violate ERISA insofar as these tables decrease benefits of workers who have already retired and decrease the portion of future retirees' total benefits derived from past work service.¹¹² In such cases, the employer could comply with ERISA requirements only by providing a terminal supplement or periodic additional contributions to the disfavored sex. As discussed above, however, such supplements could also lead to ERISA and other tax complications.

All in all, the easiest way to avoid ERISA problems seems to be to apply unisex tables only to that work performed after the date of the court order (the option chosen in *Manhart* and *Norris*). This approach postpones bringing the plan into full compliance with Title VII until after the end of the working lives of all current employees. In short, this approach stays carefully within the bounds of ERISA and the Internal Revenue Code while compromising the

¹⁰⁷Retroactive liability raises the compliance costs of each regulatory option significantly. The increase is about 24-45 percent if the rule applies to all work service after *Manhart* (April 1978) and nearly doubles if the rule covers all past and future work service. *Id.* at 4.

¹⁰⁸*Id.* at 33 (in 1980 dollars). The specific gain depends on what retirees and service must be included in the calculations (see *supra* note 104).

¹⁰⁹DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 33.

¹¹⁰See ERISA §§ 3(19), 3(2), 29 U.S.C. 1002 (19), (22) (1976).

¹¹¹See ERISA §§ 411(d)(6), 204(g), 29 U.S.C. 1054(g) (1976). The IRS, which is responsible for enforcement of these provisions, has ruled that the prohibition contained therein applies to the alteration of the actuarial factors used for determining a participant's benefits to the extent that participants' accrued benefits are reduced as a result of the alteration. Treas. Reg. § 1.411(d)(6)-3(d) (1977); Rev. Rul. 81-12, 1981-2 I.R.B. 10 (Jan. 16, 1981). The Service's rationale is that whenever the amount of a benefit in a defined benefit plan is determined by the use of actuarial assumptions, those assumptions must be specified in the plan.

¹¹²In the former cases retired employees' benefits would be impermissibly interfered with. In the latter, benefits accrued from past work service would be reduced, contrary to ERISA's mandate.

Title VII remedial interests of the employees.

V. THE FUTURE: THE RAMIFICATIONS OF MANHART AND NORRIS

It is easy to foresee the possibility of unfortunate consequences accruing from these decisions, all of which would, ironically, impact adversely on the sex whose interests these decisions were meant to advance. The cost of pension benefit equalization is, of course, the most obvious potential problem, both because women receive a smaller percentage of these expenditures,¹¹³ and because eventually these costs are bound to be shifted to *all* current or future participants in the form of smaller increases in pension benefits.¹¹⁴ Even if higher costs do not lead to a reduction in pension benefits, these costs will have to be reflected in the employers' products' costs, thus contributing to inflation and its concomitant loss of jobs.¹¹⁵ At the opposite extreme, these costs, along with the administrative expenses needed to effect the changes, could cause small employers to reduce or even eliminate their plans, as many did when ERISA was enacted.¹¹⁶ At a time when the Social Security system is so shaky, it seems especially unwise to so put these smaller plans in jeopardy.

Probably the unfortunate result most likely to accrue from the *Norris* decisions was suggested by the *Norris* Court itself: employers are apt to stop offering the life annuity option and to offer instead only benefits payable for a fixed number of years or as a lump sum.¹¹⁷ In fact, this is exactly what the state of Arizona did after the adverse decision in *Norris*.¹¹⁸ Elimination of the life annuity option is an obvious possibility in that it allows employers to predetermine and control pension costs and to provide sex-neutral pension benefits, without making any additional expenditures or running afoul of ERISA or the Tax Code.

Clearly, it is the employees who will suffer from the removal of this option, for several reasons. The *Norris* opinion itself pointed out two of the ways in which this option is desirable for pension plan participants: it offers the individual tax advantage inherent in life annuity plans, and does not "require

¹¹³See *supra* sections IV. B.1. and IV. C.1.

¹¹⁴*Ryan Statement, supra* note 76, at 64-65.

¹¹⁵*The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 651 (1983)* (statement of Barbara J. Lautzenheiser, Senior Vice President of the Phoenix Mutual Life Insurance Co.).

¹¹⁶*Id.* The Superintendent of Insurance of the state of New York, for example, has estimated that the amount needed to equalize the results of sex distinct tables as of the date of *Manhart* to New York funded pensions is enough possibly to bankrupt the system. Lewis, *Manhart et Sequentia: A 20 Billion Dollar Cost to Local Government?* 7 EMPLOYEE BENEFITS J. 8, 13 (1982).

¹¹⁷"An employer who confronts such a situation [i.e., lack of a third party willing to treat his employees on a nondiscriminatory basis] must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all." (emphasis added) *Norris*, 103 S. Ct. at 3502.

¹¹⁸*The Nondiscrimination in Insurance Act: Hearings, Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 506 (1983)* (statement of Robert L. Knowles, Chairman, Committee on Risk Classification, American Academy of Actuaries) [hereinafter cited as *Knowles Statement*].

an employee to speculate as to how long he will live."¹¹⁹ A loss of this "income they cannot outlive,"¹²⁰ will prove especially disastrous to financially unsophisticated employees.

Faced with the absence of an employer-sponsored annuity plan, an employee might pursue the possibility of purchasing such a plan from an independent insurance company. In doing so, however, the employee is likely to encounter yet other unfortunate ramifications of the elimination of employer-provided life annuities. First of all, since these annuities will not be offered through employer-sponsored plans, an employee will usually lose the group annuity rates which are generally available when annuities are bought through such plans. Thus, both men and women will be faced with smaller annuity benefits. Ironically, since unisex plans are in the minority at present, the employee may find that these more expensive individual annuities, available from private insurance companies, are calculated on the same sex-segregated annuity tables that the employers have been forbidden to use.¹²¹ Therefore, the result of eliminating employer-sponsored plans which use sex-segregated tables is likely to be a reduction in annuity payments available to all employees who wish to purchase such an option, without the elimination of sex-based pension benefit differentials.

Still, a convincing argument can be made for the proposition that the economic effects of *Norris* will not be nearly as devastating as some predict and will be clearly outweighed by the equitable principle that *Norris* establishes. The United States Department of Labor Cost Study indicates that the cost of all of the pension equalizing options which it examined would actually require very small additional employer contributions.¹²² Moreover, others in favor of the abolition of sex discrimination in pension benefits have argued that the insurance industry should be able to make the switch to unisex tables with relative ease¹²³ and that employers who have sought insurance companies offering sex-

¹¹⁹*Norris*, 103 S. Ct. at 3494.

¹²⁰*Knowles Statement*, *supra* note 118.

¹²¹This would not be true, of course, if H.R. 100, the "Nondiscrimination in Insurance Act," completely forbidding the use of sex-based actuarial tables, becomes law.

¹²²"In the aggregate, the various options examined translate into added employer contributions ranging between one-tenth of a percentage point and three percent annually. Of course, the cost increase would be larger in heavily affected plans." DEPARTMENT OF LABOR COST STUDY, *supra* note 3, at 5.

¹²³For example, to quote Professor Douglas Laycock:

[I]n individual policies, insurers commonly make much more individualized predictions, with a larger number of predictors. Thus, the expense of using these predictors is already being incurred; any further expense from abandoning sex discrimination would be quite marginal. It would also be unnecessary for group plans not already covered by Title VII to add more expensive predictors.

The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 570 (1983) (statement of Professor Douglas Laycock on behalf of the American Association of University Professors). John Dingell illustrates the same point:

The statements by some insurance industry spokesman that the bill will cost the industry many billions of dollars and cause "financial catastrophe" to the insurance industry and the nation are widely exaggerated and without foundation. For example, the Teachers Insurance and Annuity Association (TIAA-CREF) said that ending sex discrimination in its annuities will cost \$3.2 billion, but the Labor Department's recent study (released in January 1983) points out that the cost of

neutral annuities have been able to find them.¹²⁴

Perhaps the most valuable contribution made by advocates of the elimination of sex discrimination in pensions is their outlook on the inherent fairness of such discrimination abolition. While proponents of sex-segregated actuarial tables maintain that pension equalization would be a “gift” to women,¹²⁵ opponents of sex-based pension benefits look on this as money owed to women who have been unjustly discriminated against in the past.¹²⁶ On the whole, although willing to debate the economic ramifications inherent in pension equalization, these advocates seem unconvinced that such considerations should be controlling. Instead most appear to adhere to the position that “the principle of equity should govern all of our activities and no major segment of our economy should be exempt from this principle.”¹²⁷

VI. CONCLUSION

With its decision in *Norris*, the Supreme Court extended *Manhart*, holding, in effect, that any employer-sponsored pension plan — even one involving no employee contributions — which was voluntary and an adjunct to two sex-neutral options, could not offer benefits calculated according to sex-based actuarial tables. The *Norris* Court stretched the definition of “employer-sponsored” as far as it would go, finding that a plan linked to an employer

amortizing such a liability (if it exists) would be only \$23 million annually at 8 percent interest rate. That would be only \$6,764 for each of the 3400 colleges and universities served by TIAA-CREF. But even that estimate is over-exaggerated, since TIAA-CREF has for years consistently used its high earnings to pay its annuitants much more than the sex-based guarantees under their contracts. Hence, TIAA-CREF can, by gender-neutral payment of its dividends, pay its annuitants on a gender-neutral basis without a single additional cent having to come from any of the colleges and universities it serves.

The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 31-32 (1983) (statement of John D. Dingell, Chairman, House Committee on Energy and Commerce).

¹²⁴For example, the University of Minnesota was able to obtain agreements from two insurance companies to use sex-neutral annuity tables to calculate annuity benefits for its employees. See Perry, *U. of Minnesota Adopts ‘Unisex’ Plan for Pensions: ‘Right Thing to Do,’* CHRON. HIGHER EDUC., Oct. 13, 1982, at 25-26.

¹²⁵ To provide equal periodic benefits to women over their full lifetime would require a gift, not a return on the accumulations they earned. It is such a gift — that in the case of a retirement pool of 100,000 men and 100,000 women, each receiving \$10,000 a year for life beginning at age 65, would amount to 4.1 billion dollars. Not equality, not fairness, not a proper return on earnings, but a windfall.

The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. or Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. 412 (1983) (statement of George K. Bernstein, on behalf of United States Fidelity and Guaranty Co.).

¹²⁶ No direct estimate seems to be available, however, on the amount of income that retired women are currently losing year after year as a result of past “savings” by employers through sex-based pension schedules. An idea might be gained from New York Insurance Superintendent Albert Lewis’ 1982 estimate that the cost of equalizing state funded pensions retroactively to the date of the *Manhart* decision in 1978 could amount to \$19 to \$20 billion for governmental systems alone.

This 4-year estimate suggests that several billion dollars each year is owed by state governments, but not paid, to retired workers and their spouses and to pension funds in order to provide equal retirement pay for currently employed women.

The Nondiscrimination in Insurance Act: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 98th Cong. 1st Sess. 257 (1983) (statement of Judy Goldsmith, National Organization for Women).

¹²⁷*Id.* at 8.

by only a very fragile thread was, in fact, an employer-provided pension program.

Having reached one such definitive conclusion, however, the *Norris* Court remained ambiguous, just as the *Manhart* Court had, when it came to two other important questions. First of all, the Court left unresolved the issue of whether awards to compensate for former sex discrimination in pension plans should be retroactive or prospective only. While finding prospective relief appropriate in *Norris*, the Court suggested that retroactive relief might well be called for in similar cases. Exactly when such retroactive relief would be in order was also left undisclosed, but the Court did give clear indications of the factors to be considered in reaching this decision.

Also left ambiguous after *Manhart* and *Norris* was the question of whether the amount of such an award, whether prospective or retroactive, should be determined by “topping up” (i.e., raising the disfavored sex’s benefits to the level of the favored sex’s) or using unisex tables (which average the mortality experience of the sexes and provide mid-level benefits to all employees). Justice O’Connor advocated the unisex approach in her *Norris* concurrence, but it was unclear whether either *Norris* majority agreed with her conclusion.

The resolution of this question is important, moreover, in that the cost, ERISA and tax ramifications accruing from the elimination of sex discrimination in pension plans will vary greatly according to whether the awards are arrived at through “topping up” or by using unisex tables. Ironically, however, it is clear that no matter which approach is used, men, the already “favored” sex, will benefit more from the abolition of sex discrimination in pension plans than will the presently “disfavored” female sex.

Equally clear is the fact that the elimination of sex discrimination in pension plans will be costly to employers — so costly, in fact, that it may, in the long run, lead to smaller increases in employees’ pension benefits or even the abolition of pension funds by smaller employers. A less dire and more likely consequence of the elimination of sex discrimination in pension benefits will be employers’ decisions not to offer life annuity options. As such options are often the most attractive ones for employees, the increasing scarcity of employer-sponsored life annuity plans will impact hardest on them.

Nevertheless, advocates of sex-neutral pension plans maintain that both the costs and difficulties inherent in administering such nondiscriminatory plans have been greatly exaggerated and that the equity inherent in sex-neutral pension plans is far greater than any problems associated with them. Whether or not this is an accurate conclusion is likely to become apparent in the near future, as employers scramble to comply with *Norris*.