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Arizona v. Norris: Title VII of the Civil Rights Act and Retroactive Relief

I. Introduction

Although the Supreme Court, in *Arizona Governing Committee v. Norris*,[1] recently extended the scope of Title VII of the Civil Rights Act of 1964[2] to encompass sexually discriminatory retirement benefits,[3] the Court's decision signals a retreat from a presumption in favor of awarding retroactive relief upon a finding of unlawful discrimination. The *Norris* Court held that Title VII prohibits an employer from offering to employees a deferred compensation plan which pays a woman a lower monthly annuity benefit than a similarly situated man when both have contributed the *same* amount from their salary to the plan.[4] The decision extends the protections of Title VII to prohibit discriminatory plans operated on behalf of an employer by a third party, private insurance company.[5]

Despite the Supreme Court's finding of a Title VII violation, however, the Court declined to fashion a remedy consistent with a presumption it had previously established in favor of awarding retroactive relief. Title VII provides that a court "may" order back pay to an employee who has lost the opportunity to earn wages as a result of an unlawful discriminatory em-

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1. 103 S. Ct. 3492 (1983).

2. Section 703(a)(1), a portion of Title VII of the Civil Rights Act of 1964 relevant to this Note, 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 . . . .

Civil Rights Act of July 2, 1964, Pub. L. No. 88-352, Title VII, § 703(a)(1), 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (1976)).

3. Retirement benefits constitute "compensation" under Title VII. Arizona Governing Comm. v. Norris, 103 S. Ct. at 3496; City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 712 n.23 (1978).

4. *Norris*, 103 S. Ct. at 3501.

5. *See id.* at 3499-502; *see also infra* text accompanying notes 102-15.

ployment practice.[6] This discretionary section was interpreted in *Albemarle Paper Co. v. Moody*,[7] where the Court concluded that once unlawful discrimination has been found, back pay should be awarded unless such an award would frustrate the central statutory purposes of Title VII.[8] The Court's decision in *Norris* indicates a willingness to overcome the *Albemarle* presumption in favor of preserving the solvency of pension funds at the expense of undermining inducements created to encourage compliance with Title VII.

Part II of this Note presents *City of Los Angeles, Department of Water & Power v. Manhart*[9] as the precursor to the *Norris* decision; a review of the guiding principles of *Albemarle* follows. Part III sets forth the facts of *Norris* and the rationale offered by the Court for extending the protections of Title VII while denying retroactive relief. Part IV analyzes the decision to deny retroactive relief in *Norris*.[10] This Note concludes that the Court erred in denying retroactive relief in *Norris*, since the defendants should have been put on notice by the *Manhart* deci-

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6. Section 706(g) of Title VII of the Civil Rights Act of 1964 provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000e-5(g) (1976).

7. 422 U.S. 405 (1975).

8. Albemarle Paper Co. v. Moody, 422 U.S. at 421. The central statutory purposes of Title VII are to eradicate discrimination throughout the economy and make persons whole for injuries suffered through past discrimination. *Id. See infra* text accompanying notes 50-65. Thus, "retroactive relief is normally appropriate in the typical Title VII case . . . ." *Norris*, 103 S. Ct. at 3510 (quoting City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 719). The Court in *Norris* uses the term "retroactive relief" rather than "back pay." This is due to the fact that the *Norris* case involves a retirement benefit derived from contributions made by the employee. Any retroactive award to the plaintiffs based on these contributions or the resulting retirement benefits are therefore not "back pay" in the ordinary sense of the word. Thus, the term retroactive relief rather than back pay is used throughout this Note in the context of retirement benefits.

9. 435 U.S. 702 (1978).

10. This Note analyzes the issue of retroactive relief as a remedy for a Title VII violation. The analysis does not extend to the issue of whether the Court was correct in applying Title VII to the provision of retirement benefits by third party insurance companies on behalf of employers.

sion that the state's retirement benefit program violated Title VII.

II. Background

A. *Liability Under Title VII: The* Manhart *Decision*

Prior to the Supreme Court's 1978 decision in *City of Los Angeles, Department of Water & Power v. Manhart*,[11] the courts had not confronted the question of whether the well-established practice of using sex-based mortality tables[12] in calculating retirement benefits[13] was unlawful, sex-based discrimination under Title VII.[14] The *Manhart* Court ruled that it was an unlawful employment practice under Title VII to require females to contribute more to their pension plans than males earning the same salary.[15] Five years later, in *Arizona Governing*

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11. 435 U.S. 702 (1978).

12. A mortality table is used as a method of expressing the probable number of years a person of a given age will live. E. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 195 (3d ed. 1982). The use of sex-based mortality tables in determining retirement benefits for employees was generally considered to be universal prior to *Manhart*. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 704; *see generally* Note, *Sex Discrimination and Sex-Based Mortality*, 53 B.U.L. REV. 624 (1973) (discusses the discriminatory impact of universal reliance on sex-based mortality tables). Separate sex-based mortality tables are used to reflect the fact that, on the average, women live longer than men. *See* J. ATHEARN, RISK AND INSURANCE 170-74 (1977).

13. The predominate methods for providing retirement benefits are the "defined-benefit" plan and the "defined-contribution" plan. Under a "defined-benefit" plan, benefits are "defined" or predetermined in advance, either as a percentage of salary or set at a flat level. Benefits are the same for similarly employed males and females. This type of plan is widespread in private industry; the majority of the plans do not require the employee to contribute from his or her salary. Due to a female's greater longevity, and the resulting higher cost of her pension, the employer's contribution on behalf of the female group is necessarily higher. Under "defined-contribution" plans, a "defined" percentage of the *employees'* salary is contributed toward the plan, regardless of sex. The benefits are not stated in advance, and upon retirement the accumulated funds are used to provide a variety of retirement benefits. This type of plan is favored by public sector employers. *See* W. GREENOUGH & F. KING, PENSION PLANS AND PUBLIC POLICY 176-79 (1976).

14. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 722.

15. *Id.* at 717. The retirement plan utilized by Los Angeles was somewhat of an anomaly in that it required a female participant in a "defined-benefit" public sector plan to contribute from her own salary the higher cost of her pension. Although many public sector plans require employee contributions, they are generally "defined-contribution" plans. *See also supra* note 13. *See generally* W. GREENOUGH & F. KING, *supra* note 13 at 177.

Committee v. Norris,[16] the Court extended the *Manhart* rationale to a plan operated on behalf of an employer by a third party, private insurance company.[17]

To appreciate the Court's holding in *Norris*, one must be familiar with the *Manhart* Court's expanded reading of Title VII in the context of employee retirement plans. In *Manhart*, the City of Los Angeles Department of Water and Power (the Department) administered a retirement plan in which all departmental employees were required to participate.[18] The monthly retirement benefits paid to male and female employees of the same age, seniority, and salary were equal.[19] Based on mortality tables[20] and the Department's own experience, however, the Department determined that it would cost more to provide a female employee's retirement benefits, since a woman has a statistically greater chance to live longer than a man and thus collect a greater number of monthly pension benefits.[21] As a result, the Department required women to contribute 14.84% more than their male counterparts.[22] Because the employee contributions were taken directly from their paychecks, females brought home a lower monthly salary than similarly situated males.[23]

In 1973, Marie Manhart brought a class action in the United States District Court for the Central District of California on behalf of women employed or formerly employed by the

16. 103 S. Ct. 3492 (1983).

17. *Id.*

18. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 345 U.S. at 704. The plan provided several types of retirement benefits. The most common was calculated on the basis of two percent of the average monthly salary paid during the last year of employment times the number of years of employment, guaranteed for life. *Id.* at 705 n.3; *see also supra* note 13.

19. City of Los Angeles, Dep't of Water & Power v. Manhart, 345 U.S. at 705. The benefits were funded by employee contributions, an employer contribution equal to 110% of all employee contributions, and income earned on the contributions. *Id.* at n.4.

20. *See supra* note 12.

21. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 705. The Department estimated that its 2000 female employees will live, on average, a few years longer than its 10,000 male employees. *Id. See supra* note 12.

22. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 705.

23. *Id.* For example, one woman joining the suit had contributed $18,171.40 (including interest on the amount withheld) to the fund; at the same time, a similarly situated male employee would contribute only $12,843.53. For their respective contributions, each received monthly benefits which were equivalent. *Id.* at n.5.

Department.[24] Manhart sought an injunction and restitution of the excess contributions.[25] While the action was pending in the district court, California passed a law barring certain municipal agencies from discriminating on the basis of sex in determining pension fund contributions.[26] The Department amended its plan to conform to the new law, and began calculating pension contributions and benefits without regard to sex.[27] The district court ruled, on the Department's motion for summary judgment, that the Department's former plan constituted an unlawful discriminatory employment practice and thus violated Title VII.[28] The court ordered retroactive relief in the amount of the excess contributions that female employees had made prior to the plan's amendment.[29] The Ninth Circuit affirmed.[30] The Supreme Court, however, affirmed only that portion of the decision finding the plan in violation of Title VII,[31] reversing the award of retroactive relief.[32]

The Supreme Court's decision turned on the critical question of whether, for the purpose of Title VII, the discriminatory impact on female retirees should be analyzed by comparing the entire *class* of female retirees receiving pension benefits to the entire *class* of male retirees or, alternatively, should be analyzed

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24. Manhart v. City of Los Angeles, Dep't of Water & Power, 387 F. Supp. 980 (C.D. Cal. 1975), *aff'd*, 553 F.2d 581 (9th Cir. 1976), *vacated*, 435 U.S. 702 (1978), *remand*, 577 F.2d 98 (9th Cir. 1978).

25. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 706.

26. Act of 1974, ch. 1478, 1974 Cal. Stat. 3237 (codified as amended at CAL. GOV'T CODE § 7500 (West 1980)).

27. Effective Jan. 1, 1975, the female contribution rate was lowered to the male rate. Manhart v. City of Los Angeles, Dep't of Water & Power, 387 F. Supp. at 984 n.1.

28. *Id.* at 984; *see supra* note 2.

29. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 706.

30. Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581 (9th Cir. 1976).

31. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 707-18. For this part of the decision, the Court voted 5-2 aligned as follows: Justices Stewart, White, Powell, and Marshall joined the majority opinion of Justice Stevens; Justice Blackmun refused to join this part of the decision; Chief Justice Burger and Justice Rehnquist dissented; and Justice Brennan took no part in the consideration or decision of the case.

32. *Id.* at 718-23. For this part of the decision, the Court voted 7-1. Justices Stewart, White, Powell, Blackmun, Rehnquist, and Chief Justice Burger joined the opinion by Justice Stevens. Justice Marshall dissented. Justice Brennan took no part in the consideration or decision of the case.

by comparing an *individual* female retiree to an *individual* male retiree.[33] The Court noted that women as a class live longer than men as a class,[34] but recognized that many individual women would not live as long as the average man.[35] Therefore, many women would not fit within the generalization upon which the pension plan was founded.[36] Hence, the Court reasoned, an unidentified number of women were being unfairly subjected to discrimination on the basis of sex:[37] they would not live as long as some of their male colleagues, yet they would receive smaller paychecks and would not be compensated for the deficiency upon retirement.[38]

Furthermore, the Court rejected the Department's contention that the plan was based on lawful discrimination as permitted by the Bennett Amendment of Title VII[39] and the Equal Pay Act.[40] Specifically, these laws sanction discrimination based

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33. *Id.* at 708. The Court focused on this as a critical question because Title VII relates to unlawful employment discrimination against "individuals." *Id.*; *see supra* note 2.

34. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 704.

35. *Id.* at 708.

36. *Id.*

37. *Id.*

38. *See id.* at 707-10. The Court would likely have decided differently had it based its analysis on a comparison of classes or groups. Specifically, females as a group, although contributing more initially, ultimately aggregate more benefits due to the mortality differential. *See supra* note 12.

39. The Bennett Amendment permits an employer to "differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differential is authorized by the [Equal Pay Act]." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 703(h), 78 Stat. 241, 257 (codified at 42 U.S.C. § 2000e-2(h) (1976)).

40. The Equal Pay Act provides in part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any factor other than sex . . . .

Fair Labor Standards Act (Equal Pay Act), § 3(d)(1), 29 U.S.C. § 206(d)(1) (1976).

In analyzing the Equal Pay Act, the Court added: "We need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII." City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S.

on a *factor other than sex*.[41] The Court disagreed with the Department's argument that it had permissively discriminated on the basis of longevity rather than sex. The Court stated that the plan "distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees."[42] According to the Court, an actuarial distinction based entirely on sex cannot possibly be based on a *factor other than sex*. Instead, it stated, "[s]ex is exactly what it is based on."[43]

Finally, the *Manhart* Court noted that its decision was not intended to revolutionize the pension industry.[44] It emphasized that the only issue to be decided was whether it was unlawful to require men and women to make unequal contributions to an employer-operated pension fund.[45] The Court added that "nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market."[46] The Court warned, however, that an employer could not delegate discriminatory programs to "corporate shells" to circumvent the protections embodied in Title VII by making the dispute one between an employee and a third party.[47] This dicta was a major focus of the *Norris* decision five years later.[48]

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at 712 n.23.

41. 29 U.S.C. § 206(d). *See supra* note 40.

42. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 713 n.24; *see also id.* at 712-13.

43. *Id.* at 712-13 (quoting Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 588 (9th Cir. 1976)).

44. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 717.

45. *Id.* at 717-18.

46. *Id.* (footnote omitted).

47. *Id.* at 718 n.33. The Court stated:

> We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to "any agent" of a covered employer, 42 U.S.C. § 2000e-(b) (1970 ed., Supp. V), and the Equal Pay Act applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). In this case, for example, the Department could not deny that the administrative board was its agent after it successfully argued that the two were so inseparable that both shared the city's immunity from suit under 42 U.S.C. § 1983.

City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 718 n.33.

48. *Norris*, 103 S. Ct. at 3510. *See infra* notes 102-15 and accompanying text.

B. *Retroactive Relief*

1. *The* Albemarle *decision*

The Court's decision in *Manhart* not to refund past contributions made under the unlawful pension plan[49] runs counter to the presumption in favor of awarding back pay, announced three years earlier in *Albemarle Paper Co. v. Moody*.[50] In *Albemarle*, the Court outlined the standards by which courts should fashion relief when an employer is found to be in violation of Title VII.[51] The Court indicated that although retroactive relief in the form of back pay is not awarded automatically,[52] the choice of remedies is not left to a court's unfettered discretion.[53] When faced with a decision to grant or to deny retroactive relief, the court should look to the underlying purposes of Title VII.[54]

The *Albemarle* Court, in a case involving racial discrimination,[55] identified two primary purposes of Title VII.[56] The first is to achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.[57] The second is to make persons whole for injuries suffered on account of unlawful employment discrimination.[58]

With respect to the first purpose, the *Albemarle* Court indicated that back pay acts as a "spur or catalyst which causes em-

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49. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702; *see infra* notes 68-80 and accompanying text.

50. 422 U.S. 405 (1975). In *Manhart*, Justice Stevens nevertheless reaffirmed the *Albemarle* presumption and limited his discussion solely to pension plans. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 723. This has led one commentator to conclude that "*Manhart* appears only to add a degree of uncertainty" to the *Albemarle* presumption in favor of granting retroactive relief in individual Title VII cases. *The Supreme Court: 1977 Term*, 92 HARV. L. REV. 5, 308 (1978-1979).

51. Albemarle Paper Co. v. Moody, 422 U.S. at 415-22; *see supra* note 6.

52. Albermarle Paper Co. v. Moody, 422 U.S. at 415. Title VII provides that a court "may" order back pay. 42 U.S.C. § 2000e-5(g); *see supra* note 6.

53. Albemarle Paper Co. v. Moody, 422 U.S. at 416.

54. *Id.* at 417.

55. *Id.* The original purpose of Title VII was to eliminate racial discrimination. The inclusion of the word "sex" in the statute was a last-minute addition with almost no congressional debate. *See Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

56. Albemarle Paper Co. v. Moody, 422 U.S. at 417-19.

57. *Id.* at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

58. Albemarle Paper Co. v. Moody, 422 U.S. at 418.

ployers and unions to . . . self-evaluate their employment practices"[59] with a view to eliminating unlawful discrimination.[60] It maintained that if employers faced only an injunctive order, they would have little incentive to amend their discriminatory practices.[61]

As to the second purpose of Title VII, the Court noted that the legislative history of the statute evinced an intent to provide a remedy designed to make the injured party whole.[62] Thus, it followed that awarding back pay would be consistent with the purposes and legislative history of the statute;[63] awards providing for back pay make whole the wronged employee, whereas prospective relief merely eliminates the incidence of discrimination in the future.[64] The Court concluded that given these two underlying premises, back pay should be awarded unless such an award would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[65]

2. *Retroactive relief denied in* Manhart

The Supreme Court was persuaded in *Manhart* to overcome the presumption, created by *Albemarle*,[66] in favor of granting retroactive relief.[67] The Court noted, however, that their decision not to award retroactive relief should not qualify the *Albemarle* presumption for future cases.[68] Instead they recognized

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59. *Id.* at 417-18 (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

60. Albemarle Paper Co. v. Moody, 422 U.S. at 417-18.

61. *Id.* at 417.

62. *Id.* at 419. The Court noted that the legislative history indicates that the back pay provision of Title VII, 42 U.S.C. § 2000e-5(g), was modeled after the back pay provision of the National Labor Relations Act. Albemarle Paper Co. v. Moody, 422 U.S. at 419. Further, the Court noted that Congress was aware, upon the enactment of Title VII, that the NLRB "since its inception, has awarded back pay as a matter of course —not randomly or in the exercise of a standardless discretion." *Id.* at 419-20.

The Court also noted that in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit a Court's power to award back pay, and all were rejected. *Id.* at 420.

63. *Id.* at 419-22.

64. *See id.* at 417-18.

65. *Id.* at 421 (footnote omitted).

66. *See supra* notes 49-65 and accompanying text.

67. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 719-23.

68. *Id.* at 723.

that the pension plan at issue involved special considerations which needed to be examined before the *Albemarle* presumption would be followed.[69]

The Court's examination of these considerations persuaded it, in the end, that it was error for the district court to grant retroactive relief.[70] First, it noted that due to the problem's complexity,[71] the fact that courts had heretofore been silent on the question,[72] and the conflicting views that had been expressed by administrative agencies,[73] the Department's failure to amend the plan was not unreasonable.[74] Retroactive relief, the Court added, was not essential to spur other administrators to modify their plans to conform to the mandates of the decision.[75] Second, the Court reasoned that since pension plans are the result of a careful assessment of probable liability, a midstream unforeseen change such as retroactive relief would possibly "[jeopardize] the insurer's solvency and, ultimately, the insured's benefits."[76]

Thus, the *Manhart* Court's decision to grant the plaintiff prospective relief, rather than retroactive relief, turned primarily on the absence of notice and the defendant's inability to pay. Since the employer operating the plan was probably unaware that the plan violated Title VII, it would be unfair to hold the employer liable retroactively.[77] Perhaps more importantly, such an award would be contrary to the interests of the employee-plaintiff class.[78] Given the time that had elapsed since *Man-*

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69. *Id.* at 719-23.

70. *Id.* at 723.

71. *Id.* at 720. The Court noted that pension administrators could reasonably have assumed that it would be illegal or unfair to equalize male and female benefits. Specifically, due to a male's shorter life span, discrimination might be alleged based on the requirement that males as a group shoulder more than a fair share of the "actuarial burden." *Id. See also* Note, *supra* note 12, at 633-34.

One commentator has noted that introducing "complexity" of the issues as a factor in awarding a retroactive remedy for a Title VII violation may permit some employers to avoid amending discriminatory practices until a clear mandate of their unlawfulness is declared by a court. *The Supreme Court: 1977 Term*, *supra* note 50, at 309.

72. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 720.

73. *Id.* The Court pointed to the different positions on the use of sex-based mortality tables held by the EEOC and the Wage and Hour Administrator. *Id.* at n.92.

74. *Id.* at 720.

75. *Id.* at 720-21.

76. *Id.* at 721.

77. *See id.* at 720-21; *see also supra* notes 71-75 and accompanying text.

78. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 721. *See*

hart[79] and the distinguishing factual elements,[80] the Supreme Court in *Norris* had to determine whether these rationales continued to be valid.

III. *Arizona Governing Committee v. Norris*

A. *The Facts*

Nathalie Norris, an employee of the Arizona Department of Economic Security, participated in a state-administered *voluntary* retirement benefit program which enabled her to defer receipt of part of her earnings until she retired.[81] The state's program included several options, one of which permitted the accrued savings to be used to purchase a life annuity.[82] Since Arizona law prohibits the state from undertaking the risk of

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supra note 76 and accompanying text.

79. Approximately five years had elapsed between *Manhart* and *Norris*.

80. Two facts distinguish *Manhart* and *Norris*. First, the retirement plan at issue in *Manhart* was a "defined-benefit" plan and as such it discriminated at the "pay-in" stage. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 704. *See supra* notes 13, 18-23 and accompanying text. *Norris* was a "defined-contribution" plan and as such it discriminated at the "pay-out" stage. *Norris*, 103 S. Ct. at 3494. *See supra* note 13 and *infra* notes 81-88 and accompanying text. Second, the *Manhart* plan was operated directly by the employer, City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 704-05, *see supra* note 18 and accompanying text, while in *Norris* a third-party insurer administered the plan. *Norris*, 103 S. Ct. at 349. *See infra* note 84 and accompanying text.

81. Arizona Governing Comm. v. Norris, 103 S. Ct. 3492, 3494-95 (1983). By contrast, the *Manhart* plan provided retirement benefits in the form of a mandatory pension plan. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 704-05 (1978). *See supra* notes 18-23 and accompanying text.

82. *Norris*, 103 S. Ct. at 3494. A life annuity may be defined as a periodic payment which commences at a contingent or future date and continues for the designated life of the annuitant. E. VAUGHAN, *supra* note 12, at 190.

Retirement payouts are calculated on the basis of the value of the person's account at the time of retirement divided by the number of months a person of that age and sex is expected to live, and factored by any guaranteed payment period. Norris v. Arizona Governing Comm., 486 F. Supp. 645, 648 (D. Ariz. 1980). A guaranteed payment period insures that payments on the annuity will continue for a certain guaranteed period if the annuitant dies soon after retirement. E. VAUGHAN, *supra* note 12, at 191.

The other options provided under the *Norris* plan included receiving the entire accumulated amount in a "lump sum" or receiving periodic payments for a fixed period of time. *Norris*, 103 S. Ct. at 3494. Neither of these options used sex as a determinative factor. *See id.* at 3505 (Powell, J., dissenting). No one contends that either of these options is discriminatory. Therefore, they are not included in the present dispute. *Id.* (Powell, J., dissenting).

financing life annuities,[83] the state contracted with private insurance companies who provided the annuities.[84]

These private companies used separate sex-based mortality tables which reflect the actuarial determination that female employees as a group are expected to live longer.[85] Consequently, they collect a larger number of monthly benefit checks than similarly situated male employees.[86] Thus, to equalize the aggregate benefit payments received by the class of males and the class of females, women annuitants received smaller monthly checks.[87] Although Mrs. Norris and a comparable male co-worker made identical contributions to the plan during their lifetimes, upon retirement the male received a larger benefit check each month.[88]

Mrs. Norris brought a class action alleging that the state violated Title VII[89] by administering an annuity plan that discriminated on the basis of sex.[90] The district court certified the cause as a class action[91] and granted summary judgment in favor of the class.[92] The court held that the Arizona plan violated Title VII.[93] It directed the state to pay males and females equal monthly retirement benefits.[94] The court of appeals, with one judge dissenting, affirmed.[95] The Supreme Court affirmed, but overturned the district court award in so far as it involved retro-

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83. ARIZ. REV. STAT. ANN. § 38-871.C.1 (1974).

84. *Norris*, 103 S. Ct. at 3501.

85. *See supra* note 12.

86. *See supra* note 82.

87. *Norris*, 103 S. Ct. at 3495.

88. Arizona Governing Comm. v. Norris, 486 F. Supp. at 648. The district court pointed out that if Mrs. Norris did not increase or decrease the amount she deferred, the total value of her account at age 65 would be $53,890.93, and the corresponding annuity payment received would be $320.11 per month for life, with 10 years certain. If she were male, and all the other above factors remained identical, she would receive $354.07 per month for life with 10 years certain. *Id.*

89. 42 U.S.C. § 2000e-2(a)(1). *See supra* note 2.

90. Norris v. Arizona Governing Comm., 486 F. Supp. at 647.

91. *Id.*

92. *Id.* at 652.

93. *Id.*

94. *Id.*

95. Norris v. Arizona Governing Comm., 671 F.2d 330 (9th Cir. 1982). District Judge Nielsen, sitting by designation, concluded that the Arizona plan fell within the *Manhart* open market exception. *Id.* at 336 (Nielsen, J., dissenting). *See supra* text accompanying note 46.

active payments to the plaintiffs.[96]

B. *The Decision*

1. *The plan's discriminatory impact under Title VII*

The Supreme Court, although noting that the *Norris* and *Manhart* retirement plans differed in two aspects, found little difficulty in extending the principles of *Manhart* to the *Norris* plan.[97] Regarding the first distinction, the Court noted that the *Manhart* plan required female employees to "pay-in" more from their paychecks than similarly employed males in order to receive *equal* benefits upon retiring.[98] The *Norris* plan, on the other hand, required men and women to contribute *equally*, but women received less "pay-out" in the form of lower monthly benefits.[99] Mindful of this distinction, the Court nevertheless ruled that the classification on the basis of sex "is no more permissible at the pay-out stage of a retirement plan than at the

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96. *Norris*, 103 S. Ct. at 3492. The Court was careful to avoid a remedy which would have retroactive consequences and ruled that only those funds collected after the effective date of the decision in *Norris* would have to be disbursed upon retirement without regard to the sex of the employee. Specifically, because the plan was a defined-contribution plan, the discrimination would not occur until the time of pay-out. *See supra* note 13. As such, without limiting relief to funds collected *after* the decision, the annuitant's newly calculated benefits could include funds collected before *Norris*. *See Norris*, 103 S. Ct. at 3509 n.10.

The Court issued a two-part per curiam opinion. In the first part, the Court held that the *Norris* plan constituted discrimination on the basis of sex in violation of Title VII. Further, all retirement benefits derived from contributions made after the Court's *Norris* decision must be calculated without regard to the annuitant's sex. In the second part, the Court denied retroactive relief, holding that only those benefits derived from contributions made before the *Norris* decision may be calculated under the existing Arizona plan. *Id.* at 3493.

On the question of whether the Arizona plan violated Title VII, the Court voted 5-4. Justice O'Connor wrote a separate opinion, concurring in the judgment. Justice Marshall wrote the plurality opinion, joined by Justices Brennan, White, and Stevens. Justice Powell wrote the dissenting opinion, joined by Chief Justice Burger and Justices Blackmun and Rehnquist. On the question of retroactive relief, the Court also voted 5-4. Justice O'Connor wrote a separate opinion, concurring in the judgment. Justice Powell wrote the plurality opinion, joined by Chief Justice Burger and Justices Blackmun and Rehnquist. Justice Marshall wrote the dissenting opinion, joined by Justices Brennan, White, and Stevens. *Id.* at 3492.

97. *Norris*, 103 S. Ct. at 3496-99; *see supra* note 80.

98. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 705.

99. *Norris*, 103 S. Ct. at 3494-95.

pay-in stage."[100] The Court, therefore, concluded that the Arizona plan would violate Title VII if the state, like the municipality in *Manhart*, had administered the plan itself.[101]

It then addressed the second distinguishing aspect: whether the state was outside the scope of Title VII, because it used the services of a private third party insurance company instead of directly administering the plan.[102] Arizona contended that the state was in compliance with the caveat in *Manhart* 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 contribution could command in the open market."[103] Arizona contended its plan fell within the open market exception, relying on a stipulation[104] that *all* industry actuarial tables provide for larger payments to males than to females of equal age, total contribution, and guaranteed payment period.[105]

The Court rejected Arizona's argument and reasoned that it was irrelevant that no other insurers offered a sex-neutral annuity plan.[106] Instead, the Court maintained, several significant aspects of the plan demonstrated that the state's employees were not merely purchasing a plan on the "open market."[107] For instance, the state solicited bids requesting the terms on which the companies would supply the benefits,[108] selected the companies that were permitted to participate in the plan,[109] entered into

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100. *Id.* at 3497. This conclusion was consistent with the disposition of the question by all the lower courts with the exception of one. *Id.* at 3497 n.9.

101. *Id.* at 3499.

102. *Id.* This question is critical because Title VII "primarily governs relations between employees and their employer, not between employers and third parties." *Id.* (quoting City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 718 n.33).

103. *Norris*, 103 S. Ct. at 3499-500 (quoting City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 717-18 (footnotes omitted)).

104. *Norris*, 103 S. Ct. at 3500. This stipulation was contained in the statement of facts. Justice Marshall, writing for the plurality, pointed out that the stipulation "on which petitioners rely means only that all the tables used by the companies taking part in the Arizona plan are based on sex, but our conclusion does not depend upon whether petitioner's contention of the stipulation is accepted or rejected." *Id.* (footnote omitted).

105. *Id. See supra* note 82.

106. *Norris*, 103 S. Ct. at 3501.

107. *See id.* at 3500-01.

108. *Id.* at 3501. The Court noted that Arizona asked potential plan administrators to list their annuity rates for men and women separately. *Id.* at 3501 n.19.

109. *Id.* at 3501.

contracts with the companies which governed the terms on which the benefits were to be provided,[110] and restricted employees enrolled in the plan to obtaining retirement benefits only from one of the selected companies.[111] The Court found that these activities, in the aggregate, constituted sufficient participation to bring the plan outside the *Manhart* "open market" caveat.[112]

The Court concluded that under these circumstances the state was ultimately responsible for the privileges granted employees by the retirement plan.[113] Since the privileges were disbursed on a discriminatory basis, the state should not be able to avoid liability on the ground that it was unable to find a third party insurance company willing to use sex-neutral actuarial tables.[114] In such a situation, the Court added, an employer should either provide the non-discriminatory benefits himself, or not provide them at all.[115]

2. *The denial of retroactive relief*

The *Norris* Court adopted the same reasoning set forth in *Manhart* for denying retroactive relief to the plaintiffs.[116] The Court's reluctance in *Manhart* and *Norris* to follow the *Albemarle* presumption[117] was premised on several considerations. First, the Court in *Manhart* stated that administrators of pension funds may well have assumed that a program like the Department's was lawful.[118] This was, the Court wrote, because no court had addressed the question of sex-based mortality tables prior to *Manhart*,[119] and the administrative agencies had expressed conflicting views.[120]

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110. *Id.*
111. *Id.*
112. *See id.* at 3502.
113. *Id.* at 3501.
114. *Id.* at 3502.
115. *Id.*
116. *Id.* at 3509-10.
117. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975). *See supra* notes 50-66 and accompanying text.
118. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 720; *see supra* notes 70-74 and accompanying text.
119. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 720-21.
120. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 722; *see*

Similarly, the *Norris* Court concluded that the defendants did not have notice that their plan was in violation of Title VII.[121] The Court noted that although *Manhart* put all *employer*-operated plans on notice that unequal contributions for equal retirement benefits would be unlawful under Title VII, they added that *Manhart* approved the practice of permitting each retiree to purchase on the "open market" an annuity in the amount of his contribution.[122] Notwithstanding their finding in *Norris* that Arizona could not come under the "open market" exception,[123] the majority concluded that the plan's administrators could have reasonably assumed that by offering their employees the option of purchasing an annuity from a third party insurance company that the plan qualified under the "open market" exception of *Manhart*. Therefore, the Court concluded, there would be no justification for holding Arizona liable retroactively, since the state did not have adequate notice that the retirement plan violated Title VII.[124]

The Court in *Norris*, as in *Manhart*, found that awarding retroactive relief in the case of a pension plan would be financially dangerous.[125] Drastic changes in the legal rules governing pension and insurance funds require adequate time for a pension administrator to adjust his plan, because the success or failure of such plans depend upon an accurate prediction of the future.[126] The Court noted that a major unforeseen change, such as equalizing benefits for men and women retroactively, could jeopardize the plan's ability to pay future obligations.[127] It concluded that since the decision to equalize benefits was a marked departure from past practice, relief should be prospective

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supra note 73 and accompanying text.

121. *Norris*, 103 S. Ct. at 3510.

122. *Id.*

123. *Id.*; *see supra* notes 102-15 and accompanying text.

124. *Norris*, 103 S. Ct. at 3510.

125. *Id.* The Court rejected the plaintiff's claim for retroactive relief by stating in part that the district court's award would have "devastating" results. As authority for this proposition the Court cited a Department of Labor study showing that the cost of complying with the district court award for all employer-sponsored pension plans in the United States "would range from $817 to $1260 million annually for the next 15 to 30 years." *Id.* (footnote omitted).

126. *See id.*

127. *See id.*

only.[128]

IV. Analysis

The *Norris* Court was probably correct in extending the principles of *Manhart* to find Title VII liability,[129] but erred in denying a *modified* retroactive relief award to Mrs. Norris and her class. First, while the *Manhart* Court was perhaps justified in rejecting the *Albemarle* presumption[130] in the interest of providing pension administrators with adequate notice, these considerations were not present in *Norris*. *Manhart* clearly established that the use of sex-based actuarial tables by an employer in determining retirement benefits was unlawful under Title VII.[131] Therefore, *Manhart* provided adequate notice.

Despite the existence of the *Manhart* "open market" exception, a reasonable interpretation of the *Manhart* opinion should have provided Arizona with adequate notice that its plan would not fall within this exception.[132] The *Manhart* Court clearly indicated that while Title VII[133] and the Equal Pay Act[134] primarily govern relationships between employees and employers, an employer could not avoid liability by delegating discriminatory programs to "corporate shells."[135] Furthermore, the Court clarified its position by indicating that Title VII applies to "any

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128. *See id.*

129. The scope of this Note is limited to the issue relating to the decision whether to grant or to deny retroactive relief. The following reasons are given, however, to indicate why the author concurs with the majority's decision to extend the principles of *Manhart* to find Title VII liability in *Norris*. The *Norris* Court expressed no hesitation in extending the principles applied in *Manhart* to prohibit the use of sex-based mortality tables by a third party insurance company who contracts with the employer to provide an employee retirement plan. *See supra* notes 97-115 and accompanying text. This decision is a sound one since to rule otherwise could weaken the effect of *Manhart*. If the plan at issue in *Norris* had been found lawful, other employers could avoid liability by operating their plans through third party insurance companies. These companies would be immune from suit under Title VII in the absence of an employer-employee relation to trigger the law. *See supra* notes 2, 100 & 102.

130. *See supra* notes 50-65 and accompanying text.

131. *See supra* notes 33-43 and accompanying text.

132. *See supra* notes 44-48 and accompanying text.

133. 42 U.S.C. § 2000e-2(a)(1). *See supra* notes 2 & 102.

134. 29 U.S.C. § 206(d). *See supra* note 40.

135. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 718 n.33 (1978); *see supra* note 47.

agent" of a covered employer,[136] and the Equal Pay Act applies to "any person acting directly or indirectly in the interest of an employer in relation to an employee."[137] In light of the above, the Arizona administrators, at the very least, should have had an indication that the Court would not only strike down a *Manhart*-type plan, but also a plan operated by a third party on behalf of an employer.[138] Thus the *Norris* Court was not justified in placing the same emphasis on notice in overcoming the *Albemarle* presumption as was the Court in *Manhart*.

Second, the Supreme Court in its absolute rejection of the district court's award missed an opportunity to uphold the principles of *Manhart* and *Albemarle*. The district court had ruled that "annuity payments to female employees who have retired shall be equal to similarly situated male employees."[139] The Supreme Court recognized that appropriate relief ought to be prospective only[140] and that the district court's rule, although seemingly prospective, was "fundamentally retroactive in nature."[141] If *Norris* had fashioned a modified retroactive remedy, rather than rejecting the district court award entirely, it would have been consistent with *Manhart* without weakening the *Albemarle* presumption. Relief could have been limited to those contributions made subsequent to *Manhart*.[142] Specifically, *Manhart* ex-

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136. A "covered" employer is defined as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5) or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e-(b) (1976).

137. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 718 n.33.

138. *See supra* notes 44-48 and accompanying text.

139. Norris v. Arizona Governing Comm., 486 F. Supp. 645, 652 (D. Ariz. 1980).

140. Arizona Governing Comm. v. Norris, 103 S. Ct. 3492, 3510 (1983).

141. *Id.* at 3509 n.10; *see supra* note 96.

142. This minority view was suggested by Justice Marshall who concludes:

> To the extent that any disparity in benefits coming due after the date of the District Court judgment is attributable to contributions made after *Manhart*, there is

pressly stated that the force of the *Albemarle* presumption was not qualified by the *Manhart* holding.[143] *Manhart* denied retroactive relief[144] not because it was per se an inappropriate remedy, but because the pension administrators lacked adequate notice[145] and such relief would have caused undue financial hardship.[146] Thus, because *Manhart* effectively notified the Arizona administrators that its plan was likely to be in violation of Title VII, the *Norris* Court had no justification for refusing to examine the feasibility of upholding the *Albemarle* presumption by awarding retroactive relief for the period subsequent to the decision in *Manhart*.[147]

Furthermore, modified retroactive relief would lessen the financial hardship envisioned by the *Norris* Court.[148] In short, while *Norris* may have been correct in applying many of the *Manhart* principles, a wholesale rejection of retroactive relief was unwarranted.

Third, as noted by the *Albemarle* Court, one of the central purposes in awarding retroactive relief is to provide a "catalyst" to induce employers to amend their discriminatory practices as quickly as possible.[149] Without the threat of having to pay a retroactive award, an employer has no financial incentive to act un-

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therefore no unfairness in requiring petitioners to pay retired female employees whatever sum is necessary each month to bring them up to the benefit level that they would have enjoyed had their post-*Manhart* contributions been treated in the same way as those of similarly situated male employees.

Norris, 103 S. Ct. at 3503.

143. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 723.

144. *Id.*

145. *Id.* at 720-21; *see supra* notes 69-74 and accompanying text.

146. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 721; *see supra* note 76 and accompanying text.

147. *See supra* note 142.

148. Whereas a full-scale retroactive award might have had severe economic effects, *see supra* note 125, a modified retroactive award, only including contributions made after *Manhart*, would obviously not have had the same severe effects since a shorter time period and therefore fewer benefit payments would be involved. Another factor to consider would be to pool all existing resources in the fund and to recalculate benefits based on a "unisex" table. *See Norris*, 103 S. Ct. at 3512 n.4. This Note does not attempt to deal with the possible ramifications of relying on "unisex" tables in calculating retirement benefits.

149. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); *see supra* notes 59-61 and accompanying text.

til ordered to do so by a court.[150] The Court in *Norris*, as in *Manhart*,[151] indicated that retroactive relief is not necessary to induce other pension administrators to modify their retirement plans to equalize benefits.[152] The *Norris* decision itself, however, is a reminder that merely granting injunctive relief may not provide other pension administrators with the incentive to carefully explore the possibility that their plans may be discriminatory. Perhaps the Court's reluctance in *Manhart* to award retroactive relief eliminated the *Albemarle* "catalyst"[153] and thus the incentive for the Arizona administrators to modify their plan. Similarly, the *Norris* decision may have further weakened the financial inducement to compel pension administrators after *Norris* to quickly modify their plans without a court order.

Finally, the Court in *Norris*, as in *Manhart*, ignored entirely the *Albemarle* Court's interpretation of one of the central purposes of Title VII. In *Albemarle*, the Court indicated that persons injured on account of unlawful employment discrimination should be made whole.[154] The *Norris* Court focused on the employer's ability to a pay a retroactive award,[155] thus shifting the emphasis away from fashioning an award designed to make the plaintiff whole, to fashioning an award based on the ability of the defendant to pay such an award. Consequently, *Norris* may have emasculated the "make whole" purpose of Title VII.

V. Conclusion

In *Arizona Governing Committee v. Norris*,[156] the Supreme Court extended the reach of Title VII to retirement plans, operated for the benefit of employees by third party insurance companies, which unlawfully discriminate on the basis of sex. The Court, however, continued to deny retroactrive relief upon a finding that such retirement plans violate Title VII. As a result of *Norris*, it is now questionable whether the force of the *Al-*

150. Albemarle Paper Co. v. Moody, 422 U.S. at 417-18.

151. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. at 720-21.

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

153. *See supra* notes 59-61 and accompanying text.

154. Albemarle Paper Co. v. Moody, 422 U.S. at 419-21; *see supra* notes 62-65 and accompanying text.

155. *Norris*, 103 S. Ct. at 3510.

156. 103 S. Ct. 3492 (1983).

bemarle presumption continues unqualified, despite the *Manhart* Court's assurance that it does. By using the *Manhart* rationale to strike down a retroactive award based on facts which did not present the same novel circumstances as did *Manhart*, the *Norris* Court seems to have taken an unnecessary step in weakening the *Albemarle* presumption. This trend threatens to undermine both the inducement that the *Albemarle* presumption created for employers to comply with the mandates of Title VII and the central statutory purpose of Title VII to "make whole" those injured as a result of a Title VII violation.

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