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Nondiscrimination in Insurance: The Next Chapter

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NONDISCRIMINATION IN INSURANCE: THE NEXT CHAPTER

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> "We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter—and to write it in the books of law."
>
> –President Lyndon B. Johnson[1]

I. INTRODUCTION

Modern federal civil rights legislation prohibits race and gender discrimination in many important sectors of the American economy, including employment, education, public accommodations, housing, and credit.[2] No comparable comprehensive federal civil rights legislation bans race and gender discrimination in the business of insurance—a business at the core of legal and social organization, culture,[3] and finance.[4] Why not?

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[1] 109 CONG. REC. 17, 22839 (1963) (statement of President Johnson); *see also* ROBERT A. CARO, THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON, at xv (2012).

[2] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201, 401, 703, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.) (prohibiting discrimination in education and public accommodations on the basis of race, color, religion, or national origin; and in employment on the basis of race, color, sex, religion, or national origin); Fair Housing Act of 1968, Pub. L. No. 90-284, § 801-10, 82 Stat. 73, 81–89 (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)) (prohibiting discrimination in housing on the basis of race, color, national origin, or religion, with prohibitions, against sex discrimination added in 1974 by Pub. L. No. 93-383, §808, 88 Stat. 633, 729); Education Amendments of 1972, Pub. L. No. 92-318, § 901-07, 86 Stat. 235, 373–75 (codified as amended in scattered sections of 20 U.S.C.) (prohibiting discrimination on the basis of sex in education or in activities receiving federal financial assistance); Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, § 88 Stat. 1500, 1521–25 (codified as amended at 15 U.S.C. §§ 1691–1691f) (prohibiting discrimination in credit transactions on the basis of race, national origin, religion, sex, marital status, age, or because of the receipt of public assistance).

[3] *See, e.g.*, JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 5 (2004) (explaining that ideas and institutions organized around risk, security, and the actuarial categories of insurance "remain at the heart of much of our law"); RICHARD V. ERICSON ET AL., INSURANCE AS GOVERNANCE 4–13 (2003) (stating that, because risk is central to contemporary governance, insurance is a core institution in society); EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 1–3 (Tom Baker & Jonathan Simon eds., 2002) (describing how insurance has become central to industrialized societies in the twentieth century).

[4] Insurance premiums totaled approximately seven percent of the gross domestic product of the United States in 2012. At the end of that year, the life, health, property, and casualty sectors reported $7.3 trillion in total assets, about half the size of total assets held by insured depository institutions. FED. INS. OFFICE, U.S. DEP'T OF THE TREAS., ANNUAL REPORT ON THE INS. INDUS. 5 (June 2013).

Insurance provides an essential financial safety net for those who suffer the catastrophic loss of their spouse, home, health, or livelihood. For over a century and a half, individual members of groups historically subjected to invidious discrimination have been denied access to insurance coverage or have paid higher rates (or received lesser coverage) when classified by race[5] or sex.[6] As a result, they have been less able to achieve economic security for themselves and their families.[7] Moreover, the use of such classifications has preserved and reinforced traditional cultural assumptions about racial or gender groups—a harm to those groups, the individuals in those groups, and, more fundamentally, to our society as a whole.[8]

Despite important incremental reforms during the last half century, many such practices persist in today's insurance markets.[9] Industry opposition to unisex rates in individual life, annuity, disability, and auto insurance remains well entrenched, in part because of the insurance industry's long-established infrastructure to identify and classify risk.[10] Using tools it developed in the nineteenth and early twentieth centuries to effectively discriminate within diverse groups, the life insurance

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[5] *E.g.*, GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 316, 955 (1944) (discussing race-based insurance practices in America from the nineteenth century to the beginning of the modern civil rights era).

[6] Mary L. Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J.L. & FEMINISM 335, 337 & n.3 (2011). Beginning in the mid-1840s, for example, American insurers began charging women higher rates than men for life annuities, insurance products that protect insured individuals against outliving their resources. *Id.* at 337. Prior to the 1840s, unisex rates and benefits had been the industry norm in the United States for both life insurance and annuities. SHARON ANN MURPHY, INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 40 (2010). By the end of the nineteenth century until after the mid-twentieth century, insurance companies generally charged women higher rates than men for life annuities but unisex rates for life insurance, after largely abandoning a life insurance surcharge for women of child-bearing age adopted after the Civil War. Heen, *supra*, at 371–74. Greater consistency in the use of gender for pricing purposes by insurers is a relatively recent development. Insurers currently tend to charge women higher rates than men for life annuities and disability insurance, and lower rates for life insurance and auto insurance. Historically, however, members of groups subjected to invidious discrimination have been likely to pay higher rates for insurance coverage, and in some periods, have been denied coverage altogether. *See* discussion *infra* Parts II and III.

[7] Heen, *supra* note 6, at 382–84.

[8] *See id.* (summarizing how race-based and gender-based insurance rates are historically grounded in traditional ideologies about those groups).

[9] *See* discussion *infra* Part III.

[10] *See* discussion *infra* Part II.

industry has built an infrastructure full of statistical distinctions to measure and price human difference, and in so doing, it has created what has been described as a "science of difference."[11] The distinctions used by the American insurance industry have variously focused on age, geographical location, race, medical condition or impairment,[12] and beginning after the mid-twentieth century for life insurance policies, on gender.[13]

Past efforts at reform of the industry have accomplished limited reforms in some states for certain types of insurance.[14] In the 1970s and 1980s, women's rights and civil rights groups succeeded under federal law in eliminating gender-based pricing for employment-related insurance and retirement benefits[15] and achieved additional reforms in certain states with equal rights amendments.[16] Nevertheless, the industry's risk classification infrastructure and state-by-state regulation of insurance products have made comprehensive reform quite difficult to achieve.[17] After the failure to achieve ratification of a federal Equal Rights

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[11] *See* Dan Bouk, *The Science of Difference: Developing Tools for Discrimination in the American Life Insurance Industry, 1830–1930*, 12 ENTERPRISE & SOC'Y 717, 717 (2011) (examining the tools used to build this discriminatory system and naming this practice "the science of difference").

[12] *Id.* at 717–27.

[13] *See infra* notes 157–60 and accompanying text. In the late 1950s and 1960s, some companies began offering lower rates for life insurance coverage of women—the mirror image of higher life annuity rates for women—to reflect women's lower average rates of mortality (and longer average life expectancies) compared to those of men. Heen, *supra* note 6, at 383.

[14] For a recent study of state antidiscrimination laws applicable to various lines of insurance, including life, health, disability, auto, and property and casualty, see Ronen Avraham et al., *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 235–52 (2014), showing state-by-state results for race and gender as well as other policyholder characteristics. The authors conclude that state insurance antidiscrimination laws vary in substance and in intensity of regulation across lines of insurance, across policyholder characteristics, and across states, and that "a surprising number of jurisdictions do not have any laws restricting insurers' ability to discriminate on the basis of race, national origin, or religion." *Id.* at 196.

[15] *See* discussion *infra* Part III.C.

[16] *See* discussion *infra* Part III.D.

[17] *See* discussion *infra* Part III.E.

Amendment, further reform efforts were largely unsuccessful,[18] until now.[19]

Two recent developments suggest that legislative reform efforts may once again be timely. First, the enactment by Congress of gender nondiscrimination requirements, effective in 2014, as part of federal health care reform legislation,[20] provides an alternative approach to risk sharing as well as a cooperative framework for the states and the federal government to review and reconfigure their respective insurance regulatory roles.[21] Second, significant recent policy shifts abroad provide an impetus for reconsideration of these issues in the United States. Most notably, since 2012 new commercial insurance policies sold in Europe have been subject to the requirement of unisex rates and benefits under a 2011 ruling by the Court of Justice of the European Union,[22] influenced in part by civil rights principles articulated in the 1970s by the U.S. Supreme Court.[23]

This Article proposes comprehensive federal legislation to prohibit discrimination on the basis of race, color, religion, national origin, and sex in insurance coverage, rates, and benefits. It begins by placing the principal fairness arguments[24] in favor

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[18] *See* discussion *infra* Part III.

[19] *See* Denise Grady, *Overhaul Will Lower the Cost of Being a Woman*, N.Y. TIMES, Mar. 30, 2010, at D2 (explaining that the new health care law forbids sex discrimination in health insurance); *infra* Part IV.A.

[20] *See* Grady, *supra* note 19; discussion *infra* Part IV.

[21] Study of the federal government's prospective role in the regulation of insurance other than health insurance is also underway pursuant to provisions enacted by Congress in response to the financial crisis. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 502, 31 U.S.C. §§ 313–315 (2013); *see* discussion *infra* Part IV.B.

[22] Case C-236/09, Ass'n Belge des Consommateurs Test-Achats ASBL v. Council (Mar. 1, 2011), http://curia.europa.eu/juris/document.jsf?text=&docid=80019&pageIndex=0&doclang=EN&mode=1st&occ=first&part=1&cid=910025; *see also* European Commission, Guidelines on the Application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), 2012 O.J. (C 11) 1, 25 (EC) [hereinafter EC Guidelines] (describing new guidelines in place after Article 5 of Council Directive 2004/113/EC of 13 December 2004 implemented the principle of equal treatment between men and women in the access to and supply of goods and services, especially insurance); discussion *infra* Part IV.C.

[23] *See* discussion *infra* Part III.C.

[24] This Article focuses primarily on fairness rather than efficiency-based arguments, although it addresses the issue of efficiency costs posed by legal restrictions on insurers' risk classification practices. For a recent summary of the leading efficiency and fairness arguments for and against antidiscrimination laws in insurance, see Avraham et al., *supra* note 14, at 201–20.

and against the legislation in historical perspective, a perspective that has been largely missing from the discussion to date. In Part II, I advance the argument that the insurance industry's justification of its practices based on "actuarial fairness" or "equity" contains within it inherent contradictions and tensions. Those tensions were resolved by the industry in the nineteenth and early twentieth centuries in a way that created a specialized insurance understanding of equity, one that bases *individualized* determinations of risk on membership in a *group* classification, including those groups historically subjected to invidious discrimination.[25]

Part III examines previous unsuccessful efforts to enact such nondiscrimination legislation as well as alternative strategies used to achieve change, including state-by-state legislation, state and federal litigation, and incremental federal legislation, revealing important lessons for future reform. Part IV discusses recent legislative and legal developments, domestic and international policy shifts, and impending demographic challenges that make consideration of nondiscrimination legislation by Congress desirable once again. In the end, I conclude that it is now time to write the next chapter: Congress should enact legislation to address this important gap in our nation's civil rights laws.

II. DEVELOPMENT OF IDEAS ABOUT "EQUITY" IN INSURANCE

Insurance experts and civil rights advocates often talk past each other when discussing fairness issues in insurance. This is sometimes explained as the difference between an insurance industry's emphasis on *group* fairness versus the civil rights emphasis on *individual* fairness.[26] Those who defend insurance pricing distinctions based on gender point to the overall fairness to groups of policyholders, who may exhibit different patterns of

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[25] *See* discussion *infra* Part II.A.

[26] Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403, 442 (1985); *see also* Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 518 (1983) (describing the tension between individual autonomy and intragroup solidarity in the insurance classification controversy).

mortality or morbidity in age groups classified by gender.[27] Statistical differences between groups of men and women should be reflected in the pricing of products, they argue.[28] As a leading insurance law scholar recently observed, "[p]erhaps the strongest explanation for insurance law's apparent reluctance to regulate insurance classification in a more egalitarian manner is that doing so could create more adverse selection and cross-subsidization than most people would find acceptable."[29]

On the other hand, those who oppose gender-based pricing distinctions argue that classifications based on gender, like those based on race, should not be used to determine the rates and benefits of individual policyholders.[30] They argue that the

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[27] *See* Abraham, *supra* note 26, at 442 (describing the argument, made by those who defend the use of sex-based classifications, that men and women should be treated equally as *groups*).

[28] Insurers have long maintained that race and sex classifications may be more *efficiently* applied by the industry than certain alternative behavioral groupings in part because they are fixed, nonvoluntary, and easily verifiable characteristics. *See id.* at 424 (describing how reliable classification groups benefit insurers the most). Ultimately, however, it may come down to how one balances efficiency concerns against issues of equity in this context. *E.g.*, *id.* at 441–45, 449 ("A certain amount of inefficiency in the entire system . . . may be part of the price that must be paid to achieve a fairer distribution of risk.").

[29] Kenneth Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 693 (2013) (referring generally to limits on an insurer's authority to vary premiums based on the degree of risk posed by the insured). In the context of uniform non-discrimination rules, the primary adverse selection concern would be that the less risky would seek non-insurance methods of loss protection. Abraham, *supra* note 26, at 446–47. For a discussion and critique of the issue of adverse selection in the design and regulation of insurance markets, see Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1223 (2004) (referring to adverse selection as a phrase coined by insurers "to describe the process by which insureds utilize private knowledge of their own riskiness when deciding to buy or forgo insurance"), and Alma Cohen & Peter Siegelman, *Testing for Adverse Selection in Insurance Markets*, 77 J. RISK & INS. 39, 77 (2010) (concluding that adverse selection and coverage-risk correlation varies substantially across different lines of insurance and even across segments of the same market).

A recent study by Professors Avraham, Logue, and Schwarcz argues that much of the variation among state insurance anti-discrimination laws can be explained by focusing on three factors, (1) the predictive capacity of the characteristic in question, (2) the extent of the adverse selection problem created if the characteristic is restricted, and (3) the extent to which the characteristic is considered a socially suspect classification. Ronen Avraham et al., *Explaining Variation in Insurance Anti-Discrimination Laws* 3 (U. of Texas Law, Law & Econ. Research Paper No. 522, Minnesota Legal Studies Research Paper No. 13-54, U. of Michigan Law & Econ. Research Paper No. 13-018, 2013), *available at* http://ssrn.com/abstract=2316866.

[30] Civil rights advocates argue that certain fixed characteristics of individuals should not be used to deny equal opportunity or result in lesser economic security. *See generally, e.g.*,

mortality or morbidity of an *individual* overlaps to a considerable degree with that experienced by *both* men and women, and that it is unfair to individuals to be charged premiums based on gender-defined group averages rather than on other less invidious characteristics that might affect mortality or morbidity, such as smoking or other risky behavior or medical history.[31] Race and sex classifications, they point out, function largely as *proxies* for certain other favored or disfavored risk characteristics.[32] Moreover, civil rights advocates maintain that fairness to groups of policyholders should not obscure the harm that the use of such generalizations has on individual members of those groups and on society as a whole.[33]

The story of how the insurance concept of "equity"[34] developed, however, is more complex than suggested by the above-described choice between group fairness versus individual fairness. The concept of equity or actuarial fairness to policyholders that took hold in the insurance industry in the late nineteenth and early twentieth centuries—and still holds sway today—places emphasis on group classifications as well as *highly individualized* notions of

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JOHN RAWLS, A THEORY OF JUSTICE (1971) (discussing inequalities in basic rights founded on fixed natural characteristics).

[31] *See* Abraham, *supra* note 26, at 436–41 (describing a criticism of the use of gender or race as risk classifications based on the view that they are neither in the insured's control nor the cause of a risk of loss). By grouping risk according to gender or race rather than on individuals' choices or behaviors, insurers engage in statistical discrimination that fails to take account of individual differences. For discussion of the argument that the anti-discrimination principle itself operates as a generalization not only to prohibit irrelevant discrimination but also, and more importantly, to prohibit generalizations that appear to rest on a sound statistical foundation, see FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 151–53 (2003).

[32] *E.g.*, Lea Brilmayer et al., *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 538–58 (1980) (asserting that environmental and behavioral factors, rather than genetics, largely explain the difference between male and female mortality rates).

[33] *See* SCHAUER, *supra* note 31, at 154 (discussing how, even if statistically rational, gender-based discrimination is wrong).

[34] The insurance concept of "equity" is also sometimes referred to as "actuarial fairness" or "fair discrimination." *See* Deborah A. Stone, *Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL. POL'Y & L. 287, 292–93 (1993) ("When they speak of equity . . . insurers espouse the principle of actuarial fairness."). State insurance laws typically prohibit only "unfair discrimination" between individuals "of the same class and of equal expectation of life" in rates charged or benefits received. *E.g.*, N.Y. LAW § 4224 (McKinney 2013).

risk assessment.[35] An understanding of how that concept developed and has been applied defines more sharply the conflict between the insurance concept of "equity" and fundamental civil rights principles.

In the discussion below, I first outline the types of risk classifications used by life insurers in the nineteenth century and then examine how a specialized understanding of "fairness" or "equity" developed in ordinary commercial life insurance markets in the latter part of that century. Next, I contrast that understanding of fairness in private commercial markets with an alternative, more communitarian understanding of risk sharing that for various reasons lost ground to the commercial model in the United States at the beginning of the twentieth century.

A. EQUITY IN NINETEENTH CENTURY COMMERCIAL INSURANCE

This section focuses on the early development of ideas about equity in commercial life insurance markets. These ideas developed in ordinary life insurance markets in the 1860s, and they later became influential across other lines of commercial insurance.[36] During the Civil War, Americans experienced enormous loss of life[37] and fundamental shifts in the nature of work and daily life.[38] Along with an increasingly industrialized economy came new risks for workers and an expansion of commercial life insurance markets, as well as the development of alternative cooperative approaches to risk sharing.[39]

At the time that ideas about equity in commercial insurance took hold, race or geographic location, but not gender, were used as

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[35] *See* Stone, *supra* note 34, at 292–94 (describing this "deep contradiction" in commercial insurance). The concept of equity or actuarial fairness that developed in the life insurance context has been influential across lines of insurance, including health insurance. *See id.* at 292–300 (tracing the language of actuarial fairness at the heart of recent health insurance debates to concepts developed by insurance companies in life insurance markets).

[36] *Id.*

[37] *E.g.*, DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR, at xi–xviii (2008) (presenting data on the large number of American lives lost during the Civil War).

[38] WITT, *supra* note 3, at 22–29 (discussing how industrialization affected the work environment and accident rates).

[39] *Id.* at 71–85 (describing the growth of the cooperative insurance movement).

risk classification groupings for individual life insurance.[40] Before the Civil War, women were covered by ordinary life insurance in small percentages compared to men and were generally charged unisex rates.[41]

In the specialized "industrial" insurance markets that developed after the Civil War, however, nearly half of those insured were female and about twelve percent of policyholders were African-American.[42] In those markets, companies like John Hancock, Prudential, and Metropolitan Life provided small individual life policies to each member of the families of the "industrious" classes of low-income wage earners by collecting a few cents a week from each household.[43]

When race-based life insurance rates were first adopted in those markets after the end of Reconstruction, African-American men, women, and children were charged higher rates for coverage or received two-thirds of the benefits provided to white policyholders.[44] As a rationale for the race-based distinctions, the companies pointed to the higher average rates of mortality and shorter average life expectancies for black policyholders compared

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[40] MURPHY, *supra* note 6, at 39–45 (explaining that factors like geographic location initially received more focus than gender); Mary L. Heen, *Ending Jim Crow Life Insurance Rates*, 4 NW. J.L. & SOC. POL'Y 360, 362–70 (2009) (describing race classifications used in the insurance industry).

[41] MURPHY, *supra* note 6, at 14–45 (describing the mortality tables in use, the pricing practices, and the percentage of policies covering women among the major American life insurance companies operating during the years before the Civil War).

[42] Heen, *supra* note 40, at 378–79 n.150 (noting that 47.8% of Metropolitan's insured lives were white females and 12.5% were "colored policyholders" of which slightly more than half were female).

[43] Heen, *supra* note 6, at 365–71 (discussing this type of individual life insurance, variously called "industrial," "weekly premium," "debit," or "burial" insurance, designed to provide protection against the financial burden of a last illness and burial for the "industrious" or wage-earning classes); *see, e.g.*, MALVIN E. DAVIS, INDUSTRIAL LIFE INSURANCE IN THE UNITED STATES, at v (1944) (noting that under industrial life insurance policies, "the units of insurance [were] smaller, and the premiums [were] payable weekly . . . and usually . . . received . . . by agents at the policyholders' homes"). By 1905, Metropolitan Life, Prudential, and John Hancock accounted for about ninety-five percent of this market, and industrial life insurance constituted about seventeen percent of all life insurance. Roger L. Ransom & Richard Sutch, *Tontine Insurance and the Armstrong Investigation: A Case of Stifled Innovation, 1868–1905*, 47 J. ECON. HIST. 379, 385 n.15 (1987).

[44] Heen, *supra* note 40, at 375. The rate differentials and two-thirds coverage echoed slavery-era rates charged slaveholders for insurance coverage on slaves. *See id.* at 366 & n.44 (stating that insurance companies provided slaveholders coverage for slaves at higher rates and with policy amounts limited to two-thirds of value).

to those of white policyholders.[45] Higher policy premium rates or lower payouts for African-Americans survived in that market for well over a century.[46]

After many years of applying "substandard" mortality tables and rates to black men, women, and children, race-merged mortality tables and rates were finally developed for prospective use by the industry in the 1960s,[47] although payments equalizing benefits under older policies did not come for many policyholders until decades later.[48] Pressure from civil rights organizations, a transformation in scientific and societal views about race after World War II, post-war marketplace changes, the development of standardized race-merged tables by professional actuarial organizations, private party litigation, and late twentieth century investigations by state insurance departments all contributed to the industry's eventual abandonment of explicit race-based life insurance pricing, despite continuing race-correlated mortality differentials.[49]

At the same time that the industrial life insurance companies developed race-segregated classifications and rates, they used gender-merged mortality tables and applied unisex rates.[50] Statistics kept by the companies, however, showed that male policyholders experienced higher average rates of mortality and

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[45] *See id.* at 378–79 (describing how Metropolitan raised rates for blacks based on tables showing that black mortality rates were higher than white mortality rates). Some companies later refused to insure the lives of African-Americans, referring to them in a form of scientific racism as "biologically inferior," a "dying race," and thus not good risks. *Id.* at 377–78 (citing Paul Finkelman, *Introduction* to FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO, at i–vii (The Lawbook Exchange, Ltd. 2004) (1896)); *see also* Benjamin Alan Wiggins, Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881–1948, at 31–83 (May 2013) (unpublished Ph.D. dissertation, University of Minnesota) (on file at the University of Minnesota Library) (describing how insurance companies relied on Hoffman to justify race-based rates).

[46] Heen, *supra* note 40, at 368–70 (noting that some companies did not change their race-based policies until the early 1980s or later); *see also* J. Gabriel McGlamery, Case Note, *Race Based Underwriting and the Death of Burial Insurance*, 15 CONN. INS. L.J. 531, 531–43 (2009) (noting that insurance companies in the twentieth century continued to charge African-Americans higher policy premium rates while offering them sub-standard plans).

[47] Heen, *supra* note 40, at 380–81 (noting that the race-merged tables were developed by the industry despite statistics showing continuing race-correlated mortality differentials).

[48] *Id.* at 382–83 (noting that some policies sold in the Jim Crow era containing racially unequal premiums remained in force in the twenty-first century).

[49] *Id.* at 397–99.

[50] Heen, *supra* note 6, at 368–69.

shorter average life expectancies than female policyholders at nearly all ages. [51] Despite these differentials, white males were not treated on the basis of gender as "substandard" for pricing purposes compared to white females.[52]

By contrast, for life annuities, which at that time were frequently used by well-to-do families to support dependent or elderly relatives or to fund marriage settlements or separate estates for married women,[53] insurance companies generally utilized sex-segregated mortality tables and charged gender-distinct rates.[54] Women were charged higher policy premium rates for annuities or received lower periodic benefits during their lives than men of the same age.[55] As a rationale for men's lower rates (or higher periodic benefits), the companies pointed to men's higher average rates of mortality and shorter average life expectancies, concluding that men would require fewer payments during their lives, compared to those of women.[56]

Such inconsistencies in the use of gender and race classifications by the insurance industry in different products or markets reflected a certain tolerance for cross-subsidization or redistribution of risk in certain situations, but not in others. The risk groupings and rates adopted by commercial companies in the nineteenth century, as I argue elsewhere, tended to reflect and reinforce race and gender hierarchies and roles, especially when mortality statistics aligned with such norms; they did not represent merely a greater tolerance in products like industrial life insurance for more redistribution among policyholders. [57]

By its very nature, insurance represents *some* redistribution of amounts contributed in the form of premiums to those in the group who suffer the misfortune of loss. Risk sharing among policyholders is at the heart of insurance. By protecting against

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[51] *Id.*

[52] *Id.*

[53] *See id.* at 344, 350–52 (describing the functions of early life annuity contracts).

[54] *Id.* at 350–60, 374–77.

[55] *Id.*

[56] *Id.* at 374–77.

[57] *See id.* at 381–84 (arguing that nineteenth century gender ideology combined with certain legal and social changes influenced the development of gender-distinct life annuity rates); Heen, *supra* note 40, at 377–79 (arguing that nineteenth century race ideology combined with certain legal and social changes influenced the development of race-based life insurance rates).

financial loss to dependents from an early death of a breadwinner, for example, life insurance shifts wealth from those who live a long time to those who live a short time. On the other hand, commercial life insurance also has long been marketed as an investment vehicle for those who live longer lives, that is, as a type of savings account.[58] Those two aspects of ordinary life insurance, redistribution and accumulation, tend to be in conceptual tension with each other. How that tension was resolved by the life insurance industry in its formative years explains much of the industry's resistance to change. It was resolved in a way that limited the redistributive aspects of insurance and linked individual accumulations to categorical risk groupings.

In the latter part of the nineteenth century, the concept of "equity" in life insurance developed from the idea that the policy owners who "overpay" for insurance, especially in the early years of a level premium policy, acquire an individual interest in the savings or investment element of insurance.[59] That idea required companies to distinguish the "savings" and "expense" (costs of marketing, etc.) portions of the premium from the "insurance" portion for that policyholder, leading to assessments of the risk of loss within multiple classes of policyholders.[60]

One of the first state insurance commissioners, Elizur Wright of Massachusetts,[61] was instrumental in articulating and implementing these ideas.[62] He argued that the failure to separate the various parts of the premium from each other on the books of insurance companies would be the equivalent of paying gold and

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[58] *E.g.*, SHEPARD B. CLOUGH, A CENTURY OF AMERICAN LIFE INSURANCE: A HISTORY OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, 1843–1943, at 9 (1946) (noting that, although the primary function of life insurance is risk distribution, life insurance companies also function as financial institutions that allow policyholders to build up a surplus).

[59] *See* Daniel Bouk, The Science of Difference: Developing Tools for Discrimination in the American Life Insurance Industry, 1830–1930, at 83–84 (Nov. 2009) (unpublished Ph.D. dissertation, Princeton University) (on file with Princeton University Library) (describing the origin of the idea that policyholders had a property right in overpayment).

[60] *See id.* at 64–120 (tracing these historical developments and the related bookkeeping innovations); *see also* Bouk, *supra* note 11, at 719–26 (describing how the risk assessment of policyholders became individualized under the theory of equity).

[61] Wright was appointed insurance commissioner for Massachusetts in 1858. PHILIP GREEN WRIGHT & ELIZABETH Q. WRIGHT, ELIZUR WRIGHT: THE FATHER OF LIFE INSURANCE 232–33 (1937).

[62] *See id.* at 263 (describing how Wright's ideas about life insurance policies were eventually adopted by insurance companies).

silver into the U.S. Treasury as ingots, composed of two metals, mixed in ever-varying portions, and requiring the Secretary of the Treasury to employ scientific experts every year to ascertain the value of each metal on hand by taking the specific gravity of each ingot and applying the proper formula.[63] The insurance and the savings portions of the premium, he argued, were as real and distinct as gold and silver.[64] Under Wright's regulatory influence, bookkeeping conventions were developed to separate them and state regulatory requirements were imposed on companies to ensure financial stability of companies and equity for policyholders.[65]

Contained within the concept of equity, therefore, is a type of individualized property interest in the savings or investment element of insurance that depends upon allocation and linkage with the individual's actuarially determined "insurance" portion of the premium.[66] This specialized notion of equity for policyholders, and the related valuation conventions, led to the enactment of nonforfeiture rules by Massachusetts and other states for lapsed policies, requiring insurance companies to reflect the policy's accumulated value by providing the policyholder with some additional period of coverage (or the policy's surrender value), despite a policyholder's failure to continue paying premiums.[67] It also led to the dividend distribution policies adopted by the industry in the latter part of the nineteenth century in which the

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[63] ELIZUR WRIGHT, POLITICS AND MYSTERIES OF LIFE INSURANCE 182 (1873).

[64] *Id.*

[65] LAWRENCE B. GOODHEART, ABOLITIONIST, ACTUARY, ATHEIST: ELIZUR WRIGHT AND THE REFORM IMPULSE 146–49, 159–61 (1990).

[66] *See id.* at 156–61 (noting that Wright believed the premium consisted of an "insurance" portion and a "self-insurance" or "reserve" portion that belonged to the policyholders").

[67] MASS. GEN. LAWS ch. 186, § 1 (1861); *see generally* New York Life Ins. Co. v. Statham, 93 U.S. 24, 35 (1876) (holding that policyholders living in the Confederacy who stopped payment on their premiums with northern life insurance companies were entitled to the equitable value of the policy arising from the premiums paid up to the time of forfeiture); *see also* MASS. GEN. LAWS ch. 119, §§ 160–166 (1882) (relating to surrender value requirements). Similar legislation in New York eventually led to adoption of contractual provisions by life insurance companies. *See* J. OWEN STALSON, MARKETING LIFE INSURANCE: ITS HISTORY IN AMERICA 310–11, 497–98 (1942) (noting that insurance companies eventually capitulated to those statutory requirements and that stipulated surrender values became the normal practice).

surplus or profits of the company were distributed to mutual company policyholders in the form of dividends.[68]

How that individualized interest was determined, however, became increasingly a matter of actuarial calculation and more closely tied to the experience of the company, particularly under the "contribution plan" approach to dividend distribution[69] adopted in some form by most American life insurance companies in the 1860s.[70] To ascertain the individual policyholder's contribution to the surplus before distribution of dividends, the actuary constructed a new life table reflecting the rate of mortality among all of the company's risk classes at each age, and then calculated the company's average rate of return on investments, and the percent of income spent on company expenses.[71] If a class cost the company more than expected, its members would be required to bear a greater portion of the cost, reflecting the "actual cost" of the risk.[72] As the number of risk classes expanded, arguably less redistribution between classes occurred so that each class was assessed the "true cost" of their insurance, provided an interest return on their portion of the reserve for insurance, and then returned their share of the allocated surplus in the form of dividends.[73]

Thus, the determination of the policyholder's *individual* contribution to the surplus depended upon the *group* in which the policyholder was placed. As a result, although insurance companies made individualized determinations of the "actual cost"

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[68] Bouk, *supra* note 59, at 83–94.

[69] Sheppard Homans, *On the Equitable Distribution of Surplus*, 11 ASSURANCE MAG. & J. INST. OF ACTUARIES 121, 122–24 (1863) (explaining dividend distribution computations using a contribution plan approach).

[70] Bouk, *supra* note 59, at 90.

[71] Homans, *supra* note 69, at 123 (demonstrating the use of equations to calculate average rate of return and percent of income spent on company expenses).

[72] *Id.* at 124–25.

[73] *See, e.g.*, Ellerbe W. Carter, *Suits for Accounting on Tontine Life Insurance Policies*, 2 VA. L. REV. 18, 18–22 (1914) (describing the components of life insurance premiums and the legal issues involved in the "equitable" distribution of surplus in deferred dividend policies); *see also* Morton Keller, *The Judicial System and the Law of Life Insurance, 1888–1910*, 35 BUS. HIST. REV. 317, 330, 333 (1961) (collecting cases regarding disputes over dividends). For a contemporary discussion of distribution issues raised by proposed tontine annuities, including technical issues related to gender neutral distributions, see Jonathan Barry Forman & Michael J. Sabin, *Tontine Pensions: A Solution to the State and Local Pension Underfunding Crisis*, 163 U. PA. L. REV. (forthcoming 2015).

of insurance and the savings aspects of insurance for policyholders, those determinations were generally made based on the risk class or group to which the individual initially had been assigned.[74] This preserved and completed the process begun by assigning the policyholder to a risk class, with the goal of minimizing the redistributive aspects of insurance.[75]

B. EQUITY IN FRATERNAL AND COOPERATIVE INSURANCE AND GOVERNMENTAL PROGRAMS

As explained in the preceding section, the tension between redistribution and individualized risk assessments was resolved in the nineteenth century in a way that substantially tilted commercial life insurance companies toward differentiated risk pools and emphasized individual responsibility for risk within categorical groupings defined by race, gender, or other more mutable characteristics, such as age.[76] By contrast, certain nineteenth century co-operative insurance and fraternal organizations,[77] as well as the federal government's Civil War pension system,[78] tilted toward relatively undifferentiated risk pools that fostered social responsibility for risk.[79] For example, at the time commercial industrial insurers adopted race-based life insurance pricing practices, the federal government paid periodic benefits to veterans of the Civil War, both black and white, as well as to their widows and orphans, based on their service

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[74] *See* Bouk, *supra* note 59, at 85–88 (describing the cost calculations of the "contribution plan" used by an actuary at the Mutual Life of New York in 1863).

[75] *Id.* at 86.

[76] ERICSON ET AL., *supra* note 3, at 50–52 (describing how commercial insurance companies group individuals into detailed classes of risk).

[77] WITT, *supra* note 3, at 71–72 (describing cooperative models as advancing a vision for cooperative reconstruction of the social and economic conditions experienced by workingmen).

[78] *Id.* at 23–24 (describing how the Civil War pension program provided aid to injured veterans after the war); FAUST, *supra* note 37, at 268 (describing Civil War pensions as instilling a "dramatically new understanding of the relationship of the citizen and the state").

[79] WITT, *supra* note 3, at 71–72, 149 (describing how cooperative and fraternal organizations fostered social responsibility and identifying Civil War pensions as the basis of social welfare programs like workmen's compensation).

entitlements, rather than on age or race-correlated life expectancy.[80]

Cooperative and fraternal models were also based upon a more egalitarian or social solidarity notion of fairness, in which the risk pool or community shared in the loss more equally through assessments, regardless of the individual's contribution to the overall risk.[81] Because fraternal organizations tended to be organized on racial, ethnic, occupational, gender or religious lines,[82] however, the redistribution that occurred was within their own membership rather than across diverse racial or ethnic groups.[83]

Some excluded from all-white, all-male fraternal organizations formed their own associations or auxiliary organizations.[84] Many of these organizations provided insurance for their members at a time when commercial life insurance companies refused to sell

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[80] THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 107, 129 (1992). However, many workers and poor people, including former slaves, were left out altogether. *Id.* at 135. Skocpol estimated that between 1880 and 1910, the federal government devoted over a quarter of its expenditures to pensions, and by 1910, about twenty-eight percent of all American men aged sixty-five or over received federal benefits averaging $189 per year, and over 300,000 widows, orphans, and other dependents were also receiving benefits. *Id.* at 65.

[81] *See* WITT, *supra* note 3, at 72 (describing the cooperative insurance movement and its reliance on social rituals and symbols to forge solidarity and discourage selfishness of members).

[82] MORTON KELLER, THE LIFE INSURANCE ENTERPRISE, 1885–1910: A STUDY IN THE LIMITS OF CORPORATE POWER 10–11 (1963) (explaining that "[t]he great age of the fraternals began in the 1870's, and that they grew with the ensuing decades of industrialization and immigration until by 1895 their insurance in force surpassed that of the regular life companies," but arguing that their "very nature prevented individual societies from attaining any considerable size" because their "essence was exclusivity" and "protection from the surrounding milieu," while regular life insurance companies provided an "adaptation to an urban, industrial society") .

[83] MARY ANN CLAWSON, CONSTRUCTING BROTHERHOOD: CLASS, GENDER, AND FRATERNALISM 4 (1989) (describing fraternalism as an identifiable social and cultural form "defined in terms of four characteristics—a 'corporate' idiom, ritual, proprietorship, and masculinity"). As Clawson points out, women's involvement in voluntary associations, such as women's clubs, were primarily middle-class activities. *Id.* at 250. "Public life in working-class communities, on the other hand, occurred primarily through electoral politics, trade unionism, and fraternal orders, all of which were closed, in practice . . . to women." *Id.*

[84] *See id.* at 193–96 (describing the rise of women's fraternal organizations and auxiliaries); Heen, *supra* note 40, at 383 & n.187 (discussing black fraternal organizations).

such coverage to African-Americans,[85] or more generally, to women.[86] A few of them, like the post-Civil War fraternal benefit societies formed by former slaves,[87] later evolved into African-American owned commercial insurance companies or other enterprises, illustrating the challenges as well as the opportunities encountered by fraternal and cooperative insurance societies in implementing a more communitarian risk-sharing model.[88]

White women also formed such organizations.[89] For example, a women's auxiliary of an all-white, all-male fraternal organization created a life insurance society later known as the Woman's Benefit Association.[90] The all-women's organization[91] provided a combination of low-cost life insurance, social opportunities, and a forum in which to cultivate organizational and business skills.[92] It issued its first insurance policies on an assessment basis,[93] and by

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[85] Heen, *supra* note 40, at 383 ("As the race-based policies of white insurance companies in the late nineteenth century evolved, black fraternal and benevolent societies added insurance features to their benefits programs.").

[86] *See infra* note 90. Beginning after the Civil War, some companies began refusing life insurance coverage of women and others began imposing surcharges on women of child-bearing age. Heen, *supra* note 6, at 371–74.

[87] For discussion of the insurance programs provided by those organizations and the commercial enterprises developed by former employees of the Grand Fountain, United Order of the True Reformers and the Independent Order of St. Luke, see generally Heen, *supra* note 40, at 383–89.

[88] *Id.* at 387.

[89] CLAWSON, *supra* note 83, at 193–96.

[90] DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890–1967, at 31–32 (2000). The fraternal order, the Knights of the Maccabees, started in Ontario, Canada, and in 1878, crossed the border into Michigan with national organizational ambitions in the United States. Theda Skocpol et al., *A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States*, 94 AM. POL. SCI. REV. 527, 529 n.2, 530 (2000).

[91] When the women's auxiliary of the Knights of the Maccabees considered honorary memberships for men, Bina West, who led the organization from 1911 to 1948, explained in 1891 that "L.O.T.M.," which means Ladies of the Maccabees, may also be construed to mean, "Leave out Those Men." BEITO, *supra* note 90, at 31, 33 & n.53 (citing Bina West's first address, Oct. 21, 1891, Woman's Life Insurance Society Papers, Port Huron, Mich.). L.O.T.M. could also at that time have meant "Leave Out Those Minorities." It wasn't until 1966, over thirty years after admitting men as members, that the organization amended its bylaws to eliminate any reference to race as a qualification for benefit or social membership. KEITH L. YATES, AN ENDURING HERITAGE: THE FIRST ONE HUNDRED YEARS OF NORTH AMERICAN BENEFIT ASSOCIATION (FORMERLY WOMAN'S BENEFIT ASSOCIATION) 377 (1992).

[92] YATES, *supra* note 91, at 31–33.

[93] *Id.* at 98 (noting that L.O.T.M. members were assessed at the same rates used by the men in the Knights of the Maccabees).

the end of 1900 had nearly eighty-five thousand members and insurance in force of over $62 million.[94]

A major challenge faced by the fraternal and cooperative insurance society movement was to avoid disintegration of the associations through the sorting and resorting of the membership into different risk pools (for example, splinter groups of younger members forming) that could support lower assessments.[95] As John Fabian Witt has pointed out, the more established organizations within the movement responded by setting rates in favor of preferred risks within a pool of risks according to age and providing for adequate reserves for payment of liabilities.[96] They also lobbied for uniform state legislation requiring minimum fraternal rate tables and reserve requirements.[97] By 1919, at least forty states had enacted the proposed uniform legislation.[98] In sum, to meet the challenge posed by potential disintegration, fraternal and co-operative insurance organizations largely abandoned the assessment system in the twentieth century and joined commercial insurers by adopting actuarial and bookkeeping tools to minimize the redistributional aspects of insurance within their organizations.

Returning to the earlier example of a women's fraternal insurance program, the evolution from an assessment system to a legal reserve system occurred relatively early for the Woman's Benefit Association.[99] The Association rejected the assessment system in favor of "adequate rates" under a legal reserve system shortly after the National Fraternal Congress offered the first fraternal mortality table at the end of the nineteenth century.[100]

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[94] *Id.* at 106.

[95] WITT, *supra* note 3, at 97–98 (noting that the fraternal and cooperative insurance system lacked the power to prevent new societies from entering the market and offering lower rates to young members).

[96] *Id.* (noting that these organizations encouraged members to revise their premium structures by moving away from equal assessments and toward premium rates that varied with the ages of the members).

[97] *Id.* at 98.

[98] *Id.*

[99] *See* YATES, *supra* note 91, at 119 (describing the system adopted by the L.O.T.M. in 1905).

[100] *Id.*; *see* DAN M. MCGILL, LIFE INSURANCE 799 (rev. ed. 1967) (stating that "[o]ne of the important developments that led eventually to widespread use of reserves by fraternals was the construction in 1899 of the National Fraternal Congress Table of Mortality" but that "it

In 1901, Bina West, who had represented the Association at National Fraternal Congress meetings and committees since 1894,[101] set a goal for the organization to establish an "absolutely safe and permanent" table of rates, and a special commission was established to study new rates.[102]

The lower rates of mortality experienced by their members compared to the men's organization, combined with unisex rates (the practice for life insurance at that time),[103] provided a financial safety net for the women's organization. The Association constructed mortality tables based on its own experience from 1892 through 1904, and later updated the tables in 1913 and 1925.[104] In all three tables, its mortality rates were lower than rates based on the experience of all fraternal benefit societies.[105] Nevertheless, the Association adopted the National Fraternal Congress standard unisex ratings, with a ten cent monthly tax for management expenses for all new members admitted after 1904, noting that "adoption of this table as a standard places our organization in a position of absolute security for the future."[106] By 1906, it had over one hundred fifty thousand members and a reserve of one million dollars.[107]

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was many years before model valuation legislation applicable to fraternals was finally made effective in most of the states").

[101] YATES, *supra* note 91, at 61. Bina West continued her active involvement in subsequent years, and was elected the first woman President of the National Fraternal Congress in 1925. *Id.* at 231.

[102] *Id.* at 100–01, 108 (reporting that the rate study commission was instructed to work with a similar group from the men's organization and a consulting actuary, Abb Landis, and report back to the next convention).

[103] Heen, *supra* note 6, at 373, 377 (noting that gender-merged mortality tables and unisex premium rates for life insurance coverage of men and women was the industry norm at the beginning of the twentieth century).

[104] YATES, *supra* note 91, at 99 (reporting that the statistics were established by Frances Partridge, which were used by consulting actuary Miles Dawson to create the mortality table for women). Frances Partridge later became one of the first female actuaries in the United States; in the 1920s, she served as an officer of the Fraternal Actuarial Association. *See The Fraternal Monitor*, vol. 31, no. 2, at 40 (Sept. 1920) (reporting Partridge's election as an officer of the Fraternal Actuarial Association).

[105] YATES, *supra* note 91, at 99–100.

[106] *Id.* at 119.

[107] *Woman's Life Highlights*, WOMAN'S LIFE, https://www.womanslife.org/about-us/history/timeline/ (last visited Oct. 8, 2014); *Bina West: Founder of the Woman's Life Insurance Society*, HISTORY'S WOMEN, http://www.historyswomen.com/socialreformer/binawest.html (last visited Oct. 8, 2014).

An Association leader, Lillian Hollister, credited the longer life span of women to their healthful habits, pointing out that unlike men, women do "not stay out late at night, do not chew, smoke, or drink."[108] Most of the members, as reported in an actuarial study published in 1918, worked as housewives at the time of initiation, with a much smaller percentage of dressmakers, office workers, and professionals.[109]

By 1920, the Association had grown to over two hundred thousand members and was the largest fraternal benefit organization controlled exclusively by women.[110] It survived the depression, weathered the war years, and renamed itself as the North American Benefit Association in 1966.[111] In 1990, the Association reported insurance in force of over $588 million, assets of over $116 million, and premium income of nearly $8 million.[112] In 1996, it reincorporated under the new name Woman's Life Insurance Society,[113] and it continues to provide fraternal life insurance and other benefits to members, with a special emphasis on the needs of women.[114]

Fraternal insurance generally declined in importance, however, as commercial insurance grew into a major modern business.[115] As the commercial model increasingly took hold in the United

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[108] BEITO, *supra* note 90, at 32, 35 (quoting a column in the *Ladies Review* from 1901, and pointing out that Lillian Hollister, the first grand commander of the L.O.T.M., also played a prominent role in women's suffrage and temperance organizations).

[109] *Id.* at 35 (reporting that 86.6% were housewives and that other occupations included sewing (mostly dressmaking) at 3.4%, office work at 1.6%, and professionals at 1.4%).

[110] *Id.* at 32, 242 n.48. As early as 1905, the organization described itself as a leader of the fraternal beneficiary societies among women. YATES, *supra* note 91, at 128–29. It counted at that time about ten women's fraternal beneficiary organizations, with a total membership of about five hundred thousand and protection in force of over four hundred million dollars. *Id.* at 129 (citing an article from the thirteenth anniversary issue of L.O.T.M.'s *The Review*, in October 1905). Five of the ten or so then existing women's fraternal beneficiary societies admitted men to membership, either as social or benefit members, and had men involved in management. *Id.* The L.O.T.M. thus counted itself as first in membership among women's orders, and seventh overall among the sixty-two orders of the National Fraternal Congress. *Id.*

[111] *Woman's Life Highlights*, *supra* note 107.

[112] YATES, *supra* note 91, at 447.

[113] *Woman's Life Highlights*, *supra* note 107.

[114] WOMAN'S LIFE, http://www.womanslife.org (last visited Oct. 8, 2014).

[115] *See* WITT, *supra* note 3, at 101 (discussing the decline of cooperative insurance in the United States).

States,[116] the development of federal governmental programs such as Social Security and Medicare, based on state welfare models, provided an alternative to the commercial approach to risk by putting more emphasis on social responsibility and cost sharing based on need.[117]

In summary, a different, more communitarian vision of risk sharing developed in fraternal or cooperative insurance programs, tempered by the practical limitations posed by the definition or redefinition of risk pools. The fraternal insurance programs addressed some of those risk pool issues through uniform state legislation favoring more established organizations with financial structures similar to those of commercial companies.

As the nineteenth century historical background shows, determining whether there should be governmentally imposed limits on how insurance risk groups are defined for the purpose of setting an individual policyholder's rates and benefits raises complex distributional and political issues that cannot be resolved simply as technical questions of insurance law. Resolution of the actuarial issues related to race-merged or gender-merged insurance pricing thus depends on social and cultural values as well as technical economic issues related to risk assessment and cost sharing.[118] The next part discusses how the insurance industry, the civil rights movement, and the legal system responded to these questions during the latter part of the twentieth century.

III. PREVIOUS REFORM EFFORTS

Thirty years ago, the insurance industry successfully blocked proposed comprehensive federal civil rights legislation that would

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[116] *Id.*

[117] *See id.* at 200–07 (describing the rise of social insurance programs during the New Deal era). As explained by Tom Baker, although "all insurance is social so that 'the loss lighteth rather easily upon many than heavily upon few'—to be considered social insurance in the traditional sense, the insurance must be compulsory and easily available, and the price must bear some relation to ability to pay." Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1579 (2011) (listing Medicare and Medicaid as examples of social insurance in the health care context).

[118] *See* ERICSON ET AL., *supra* note 3, at 6 (observing that insurance is "political, combining aspects of collective well-being and individual liberty in a state of perpetual tension").

have broadly banned discrimination in insurance.[119] During the time of these legislative reform efforts, the industry responded not only by strongly opposing the legislation but also by adopting more pervasive and consistent gender distinctions within life insurance markets.[120] Since then, limited but important incremental reforms have been achieved by civil rights and women's organizations for specific types of insurance coverage or in certain states.[121] Nevertheless, piecemeal reforms by individual states or as a result of case-by-case litigation under existing statutes have had little lasting impact on large sections of our nation's insurance markets, including in life annuities, auto insurance, long-term disability insurance, and life insurance.[122]

The following discussion of previous reform efforts begins with a brief summary of the unsuccessful efforts in the late 1970s and early 1980s to enact federal legislation to ban discrimination in insurance outside of the employment setting. It then turns to an explanation of the limiting impact that federal constitutional rulings on sex discrimination have had on constitutional challenges to the use of sex-based mortality classifications as well as a description of the practical impact of both successful and unsuccessful federal litigation. It concludes with a discussion of developments under state equal rights amendments and the lessons learned from those earlier reform efforts.

A. PRIOR ATTEMPTS TO PASS FEDERAL LEGISLATION BANNING DISCRIMINATION IN INSURANCE

Throughout the mid- to late 1970s and early 1980s, civil rights and women's organizations advocated federal legislation to ban discrimination in insurance.[123] Although the proposed legislation was never enacted, it provides a well-considered starting point for future proposed legislation. One of the key proposed bills, the Nondiscrimination in Insurance Act, H.R. 100, sponsored by

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[119] *See* discussion *infra* Part III.A.
[120] *See* discussion *infra* Part III.A.
[121] *See* discussion *infra* Part III.C–D.
[122] *See* discussion *infra* Part III.E.
[123] *See infra* notes 124, 160.

Representative John Dingell and others in 1979,[124] prohibited any discrimination on the basis of race, color, religion, sex, or national origin regarding contracts for, or terms of, insurance policies.[125] The bill thus banned discrimination in access to coverage as well as discrimination in the pricing of insurance products.

Under the initial version of the bill, administration and enforcement was to be delegated to the Federal Trade Commission (Commission),[126] along with prior state and local enforcement of the prohibited actions under any relevant state law.[127] Complaints could be filed with the Commission only after exhausting all state-based remedies within a specified time period.[128] The Commission was empowered to initiate a civil action against an insurer after an investigation into the complaint, and an opportunity to comply within a time period, and aggrieved persons would be allowed to intervene in such an action.[129] If the Commission chose not to pursue the matter, the Act also provided for a private cause of

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[124] *See Nondiscrimination in Insurance: Hearings on H.R. 100 Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 96th Cong. 2 (1980) [hereinafter *1980 Hearings*]. H.R. 100 was reintroduced in each Congress through 1985, see *infra* notes 133–53 and accompanying text (discussing the controversy over the bill throughout this time), and remained bill number H.R. 100 through 1983. *Nondiscrimination in Insurance Act of 1983: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transp., and Tourism of the H. Comm. on Energy and Commerce*, 98th Cong. (1983) [hereinafter *1983 Hearings*]. The text of the bill included the following findings:

> discrimination based on race, color, religion, sex, or national origin, when practiced by insurance companies which are engaged in commerce or whose activities affect commerce, in connection with the terms, conditions, rates, benefits, or requirements of their insurance policies and contracts (1) burdens the commerce of the Nation, (2) impairs the economic welfare of large numbers of people who rely on the protection of the insurance and annuity contracts, (3) constitutes unfair trade practices which adversely affect commerce, and (4) makes it difficult for employers to comply with Federal laws prohibiting such discrimination against their employees.

Nondiscrimination in Insurance Act of 1979, H.R. 100, 96th Cong. § 2(a) (1980).

[125] H.R 100 § 2(b) (providing that "no insurer shall . . . refuse to contract with any applicant for insurance . . . [or] treat any such applicant or insured differently than any other applicant or insured with respect to the terms, conditions, rates, benefits, or requirements of any such insurance contract"). The bill defined "insurance" broadly to include policies and contracts (including annuity or pension contracts) "relating to life, accident and casualty, theft, retirement, liability, health, disability, or economic loss." *Id.* § 3(4).

[126] *Id.* §§ 3(2), 5.

[127] *Id.* § 6(a).

[128] *Id.* § 6(b).

[129] *Id.* § 10.

action.[130] The bill provided for federal court jurisdiction for such suits regardless of the amount in controversy.[131] The remedies provided included injunctive relief as well as actual and punitive damages, attorney fees, and sanctions to force compliance.[132]

Later versions of the bill were nearly identical, but gave enforcement power to the Attorney General of the United States rather than to the Federal Trade Commission.[133] Although the 1983 version of the bill was reported out of the Subcommittee on Commerce, Transportation and Tourism to the full House Committee on Energy and Commerce in April of 1983, and reported out of the full Committee in March 1984, the bill died before reaching the floor.[134] A similar Senate nondiscrimination bill, the Fair Insurance Practices Act, S.2204, was reported to the full Senate from the Commerce Committee in December of 1982.[135]

Sponsors and supporters emphasized that the legislation was needed to bring the insurance industry in line with the established civil rights policy of the United States, in which persons were to be treated not according to membership in a class, but as individuals.[136] They argued that insurance industry discrimination on the basis of sex should be banned for the same public policy reasons that explicit discrimination on the basis of race had been discredited and largely discontinued.[137] They also

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[130] *Id.* § 11.

[131] *Id.* § 12.

[132] *Id.* § 14.

[133] *See generally* Nondiscrimination in Insurance Act of 1981, H.R. 100, 97th Cong.; Nondiscrimination in Insurance Act of 1983, H.R. 100, 98th Cong.

[134] *Bill Summary & Status for the 98th Cong., H.R. 100*, LIBRARY OF CONGRESS, http://Thomas.loc.gov/cgi-bin/bdquery/D?d098:100:./list/bss/d098HR.1st::/TOM:bss/98search.html (last visited Feb. 7, 2014).

[135] *See* S. REP. NO. 97-671, at 1–2 (1982). *See generally* Mary W. Gray & Sana F. Shtasel, *Insurers Are Surviving Without Sex*, 71 A.B.A.J. 89 (1985) (discussing H.R. 100 and S.372, another version of the Fair Insurance Practices Act, as key bills introduced in the 98th Congress).

[136] S. REP. NO. 97-671, at 1–2 (1982) (emphasizing that "no *individual* shall be treated differently because of his or her membership in a racial, sexual, religious, or ethnic group").

[137] *Id.* at 5–6. The report states that in hearings on previous versions of the legislation, the state insurance departments of at least two states "have indicated that race classification in insurance would be permitted if based on 'valid actuarial tables' or 'statistical . . . reliable data." *Id.* at 5 n.3 (quoting *1980 Hearings*, *supra* note 124, at 165); *see also 1980 Hearings*, *supra* note 124, at 165 (recording that Rep. Dingell identified the states as Kentucky and Nevada; Dingell pointed out, however, that industry representatives now acknowledge that insurance discrimination on the basis of race would

expressed the view that the insurance industry remains "the most important exception to the general Federal policy against discrimination," and that bans on discrimination in employment, housing, and credit have "not displaced State regulation of industries traditionally subject to State control."[138]

Major insurance companies and trade organizations vigorously opposed the legislation.[139] The insurance companies insisted that no effective alternative to sex-based classification existed.[140] The purpose of sex-based rating, they maintained, was to price insurance fairly according to its costs, and that changing the way insurance companies did business would result in higher rates and less access to the protections of insurance.[141] In addition, the industry argued that elimination of sex-based classifications would lead to the subsidization of higher risk classes by lower risk classes,[142] that the federal government should leave insurance regulation to the states,[143] that women would suffer from higher rates if the legislation passed,[144] and that the insurance companies

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be "contrary to both public policy and to general ethics"). In addition, Rep. Barbara Mikulski, Member of the House Comm. on Energy and Commerce, in hearings on H.R. 100 in 1981, noted that discrimination against immigrants in the insurance industry had been widespread, leading to the formation of fraternal organizations and alliances to create their own insurance associations. *Nondiscrimination in Insurance Act of 1981: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transp. & Tourism of the Comm. on Energy and Commerce*, 97th Cong. 17 (1981). For a summary of current state laws prohibiting race and national origin discrimination in insurance, see Avraham et al., *supra* note 14, at 239 (noting that only twelve states have currently forbidden the use of race and national origin across all lines of insurance).

[138] S. REP. NO. 97-671, at 16–17 (1982) (addressing the issue of state versus federal regulation of the business of insurance).

[139] *See, e.g.*, *1983 Hearings*, *supra* note 124, at 623–25 (statement of Denise F. Mullane, President of Connecticut Mutual Life Insurance Company) (asserting that sex was one of the primary means used by life insurance companies to create accurate rates and that adopting of H.R. 100 would confuse companies, agents, and policyholders and increase premiums, among other effects).

[140] *See, e.g.*, *id.* at 636–40 (statement of Barbara J. Lautzenheizer, President of the Society of Actuaries, and the Senior Vice President of Phoenix Mutual Life Insurance Company).

[141] *Id.* at 644–45 (statement of Barbara J. Lautzenheizer, President of the Society of Actuaries and Senior Vice President of Phoenix. Mutual Life Insurance Company).

[142] *Id.* at 300 (statement of Andre Maisonpierre, Senior Vice President, Alliance of Am. Insurers).

[143] *Id.* at 481 (statement of New York State Sen. Donald M. Halperin, Conference of Insurance Legislators, and South Carolina State Rep. Warren Arthur, President, Conference of Insurance Legislators).

[144] *Id.* at 363, 370, 378 (statement of Galen R. Barnes, Vice President of Nationwide Mutual Insurance Company, on behalf of the National Association of Independent Insurers)

would be dealt a blow from the legislation from which it might not recover.[145]

The American Academy of Actuaries (AAA) did not take a position on the legislation, and its members testified both in opposition to and in favor of the legislation. Many actuaries maintained that the pricing practices were based on sound actuarial data, not sexual stereotypes.[146] Some, however, including a former Federal Insurance Administrator and then head of a consumer organization, strongly supported the legislation as a matter of principle.[147] In testifying in favor of the legislation, he referred to a 1979 federal government report finding that the National Association of Insurance Commissioners (NAIC)[148] "has declined to follow through on its task force findings that . . . sex and marital status be eliminated as rating criteria . . . and thus, uniform remedies to deficiencies in the current classification system will probably have to come about through [f]ederal legislation."[149] He noted that the AAA's own principles establish as an important criteria that classification

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(stating that the legislation as applied to auto insurance would be "unfair to women" and that without the use of gender classifications and a recognition of loss experience in rating, insurance becomes merely a "social welfare program that pays for the accidental setbacks of life").

[145] *See id.* at 415, 420 (statement of George K. Bernstein, United States Fiduciary and Guarantee Company, Fireman's Fund Insurance Companies, Republic Insurance Companies, and New York State Teachers' Retirement System) (detailing the negative effects that passage of the bill could have on various aspects of the insurance industry).

[146] *Id.* at 497 (statement of Robert L. Knowles, Chair, Commission on Risk Classification, American Academy of Actuaries); *id.* at 643–44 (statement of Barbara J. Lautzenheizer, President of the Society of Actuaries).

[147] *See id.* at 391 (statement of J. Robert Hunter, President, National Insurance Consumer Organization) (stating that gender-based classification does not pass the "social acceptability test").

[148] The National Association of Insurance Commissioners is a nonprofit "regulatory support organization created and governed by the chief insurance regulators from the [fifty] states, the District of Columbia[,] and five U.S. territories. Through the NAIC, state insurance regulators establish standards . . . conduct peer review, and coordinate their regulatory oversight." The NAIC also "represents the collective views of [insurance] regulators domestically and internationally." *See* NAIC Frequently Asked Questions (FAQ), NAT'L ASS'N OF INS. COMM'RS, http://naic.org/index.htm (click "About the NAIC"; then click "NAIC Frequently Asked Questions") (noting also that about three percent of its funds comes from the states as membership dues and that the NAIC is exempted by the IRS from the Form 990 reporting requirements).

[149] *1983 Hearings*, *supra* note 124, at 399–400 (statement of J. Robert Hunter) (referring also to a study of the economics of insurance discrimination sponsored by the Federal Trade Commission, which was cancelled by Congress in 1980, prior to its completion).

systems "be acceptable to the public" and "recognize the values of society."[150] Therefore, he argued, it was understood by actuaries that social values may trump actuarial data as criteria for classifications.[151]

The insurance industry's determined opposition to the legislation killed it in the Senate after it was reported out of committee in 1982.[152] Senator Bob Packwood, who sponsored several of the insurance nondiscrimination bills during the 1980s, later expressed his dismay at the industry's "massive effort" to block the legislation: "I was discouraged and appalled . . . by the extent to which insurance companies lobby to make sure that women continue to be treated unequally in insurance."[153]

At about the same time H.R. 100 was under consideration by congressional committees, insurance industry groups were developing new gender-based distinctions for life insurance, opting to broaden and deepen the use of gender classifications rather than taking a more consistent unisex approach. For example, in the mid- to late 1970s, the NAIC studied whether it should modify its model state legislation establishing certain minimum recommended nonforfeiture and valuation requirements for life insurance companies.[154] As part of that study, the NAIC briefly considered the development of new gender-merged, unisex mortality tables to replace references to older gender-merged mortality tables dating from the 1940s and 1950s.[155] However, as discussed in greater detail below, after consultation with the Society of Actuaries (SOA), the American Council of Life Insurance, and others, the NAIC for the first time adopted separate male and female mortality tables in place of a gender-

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[150] *Id.* at 391.

[151] *Id.*

[152] *See* Heen, *supra* note 6, at 383 nn.296–97 (discussing the failure of the bill).

[153] *Potential Inequities Affecting Women: Hearings Before the S. Comm. on Fin., Part I*, 98th Cong. 48 (1983) (statement of Senator Bob Packwood, bill cosigner).

[154] *Proceedings of the National Association of Insurance Commissioners*, 1977-2 NAIC PROC. 494 (June 5–10, 1977) [hereinafter *June 1977 Proceedings*].

[155] *Id.*; *see also Proceedings of the National Association of Insurance Commissioners*, 1957-4 NAIC PROC. 138 (Dec. 3–7, 1956) [hereinafter *Dec. 1956 Proceedings*] (incorporating permission to use a new mortality table to substitute for the 1941 Commissioners' standard ordinary mortality table); JOSEPH B. MACLEAN, LIFE INSURANCE 8 (9th ed. 1962) (referencing the gender-merged 1958 Commissioners' standard ordinary mortality table [hereinafter (1958 CSO Table]). See *infra* discussion in text and notes 158–60.

merged table for its updated model state standard valuation legislation.[156]

At that time, as had been the practice beginning in the late 1950s and 1960s, many insurance companies used a multi-year set-back from age-based, gender-merged mortality tables[157] to provide lower life insurance rates for women.[158] For example, if a three-year set-back to the 1958 Commissioners' Standard Ordinary (CSO) Mortality Table were used, a thirty-five year old woman would be quoted rates applicable to a thirty-two year old man without the need to separately calculate nonforfeiture values, policy reserves, and dividends.[159]

When women's groups began organizing against discrimination in insurance,[160] the industry became concerned about criticisms

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[156] *Proceedings of the National Association of Insurance Commissioners*, 1981-4 NAIC PROC. 515, pt. 3 (Nov. 30–Dec. 5, 1980) [hereinafter *Dec. 1980 Proceedings*] (adopting for this purpose the newly developed sex differentiated Commissioners' 1980 Standard Ordinary Mortality Table [hereinafter 1980 CSO Mortality Table]).

[157] *See* McGill, *supra* note 100, at 152–62 (describing the leading mortality tables in this period). In 1958, for example, the Equitable Life Assurance Society adopted lower premiums on all plans of life insurance for women in policies of $10,000 and over. *See* R. CARLYLE BULEY, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES 1859–1964, Vol. 2, at 1261–62 (1967). In a treatise on life insurance published in the early 1960s, a former actuary of the Mutual Life Insurance Company of New York wrote "[w]ith the increased number of women applying for insurance, many for substantial amounts, the situation has changed radically and there is no longer justification for charging the same premium rates as for men. Practically all companies now have lower rates for women. . . ." MACLEAN, *supra* note 155, at 263.

[158] *Dec. 1956 Proceedings*, *supra* note 155 (approving the use of an age set-back of the 1958 CSO Table in connection with policies on female risks, and noting that the permitted set-back of up to three years "takes into account that both C.S.O. Tables contain male and female lives in unknown proportions and that there may be instances where an age set-back would not be justified for a particular policy form when other cost factors as between policies on males and females are not the same"). The SOA at that time was asked by the NAIC to undertake a study of male and female mortality from the records of insured lives. *Id.*; *see* MCGILL, *supra* note 100, at 158–59 (explaining that since company mortality data for male and female lives "were combined in unknown proportions in the construction of the 1958 C.S.O. Table," it was "impossible to determine precisely how large a reduction should be made in the rates in calculating premiums for female lives" but that the NAIC recommended that companies be permitted to use an age set-back of not more than three years).

[159] MACLEAN, *supra* note 155, at 109; *see also Dec. 1956 Proceedings*, *supra* note 155 (recommending that a differential be permitted up to three years).

[160] Memorandum from Dr. Eleanor J. Lewis, Assistant Commissioner, Consumer Services, New Jersey Department of Insurance, to Mr. Robert T. Jackson, President, Society of Actuaries (Feb. 10, 1977), *in June 1977 Proceedings*, *supra* note 154, at Attachment C-7 (noting that "[f]or several years women have been questioning insurance regulators and

regarding the consistency and accuracy of the use of gender classifications for rates but not to determine dividend distributions, cash surrender values, or for other valuation purposes.[161] Thus, although women received the benefits of lower rates for life insurance, insurers were not generally using gender-distinct mortality classifications for other important policy purposes such as nonforfeiture valuation or reserve requirements.[162] In addition, some in the industry recognized the apparent inconsistency of using gender-distinct mortality tables for life annuity rates but not for life insurance rates and other policy valuation purposes.[163]

In the mid-1970s, the NAIC convened a task force to consider whether a new mortality table should be developed for standard valuation and nonforfeiture valuation regulation, and if so,

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companies about industry practices which discriminate against women in life insurance," focusing both on the lack of consistency regarding the use of gender distinctions and on the lack of a single rate for both sexes).

[161] *Minutes of the Society of Actuaries Commission to Develop New Valuation Tables, in Proceedings of the National Association of Insurance Commissioners*, 1977-4 NAIC PROC. 478 (Dec. 6–10, 1976) [hereinafter *Dec. 1976 Proceedings*], Attachment F ("The consensus was that . . . the present treatment of female lives from a public relations standpoint is not satisfactory.").

[162] *See generally Valuation and Nonforfeiture Developments*, SOCIETY OF ACTUARIES 1977 Vol. 3 No. 3 at 596–98 [hereinafter *Valuation and Nonforfeiture*] (statement of Waid J. Davidson, Jr.). Davidson explained that if cash values were computed using either gender-distinct tables or female age set-backs, cash values of female policies would be less than the corresponding benefits in a male policy. That problem could be solved, he suggested, by using male cash values so long as they exceeded the minimum required by the female table; in that case, however, other nonforfeiture benefits such as paid up or extended insurance would produce lower non-forfeiture benefits than required by the female table. At the time, he noted, there was no general agreement that separate mortality tables were necessary for the purpose of determining cash values and reserves. *See also Proceedings of the National Association of Insurance Commissioners*, 1959-4 NAIC PROC. 187 (Dec. 15–19, 1958) (summarizing the view of the subcommittee that each company must decide whether it is justified in offering policies to female risks at a premium rate lower than for a male the same age on the basis of "the distribution of its business by geographical subdivision, by economic class, and by the marital status of the females it insures, on the basis of the broadness or refinement of underwriting classification in the various classes of policies that it offers, and on the basis of the average size of the policy, and the relative importance of disability [or] retirement annuity benefits in these policy classes" and noting that if a company decides to provide lower premium rates, "it could, of course, still compute non-forfeiture values and reserves on the basis of the true age of the female insured" or could on the other hand, "decide to compute non-forfeiture values and reserves by using those for a male younger than the true age of the female insured"); *see also* discussion *supra* Part II.A (discussing the idea of equity in insurance).

[163] *Valuation and Nonforfeiture*, *supra* note 162, at 597.

whether the tables should be by sex or unisex.[164] It noted that "[t]he use of different mortality tables by sex requires review in the light of views of some state legislators in disallowing the age-setback approach and requiring either completely separate mortality tables by sex or only one unisex mortality table."[165] The task force consulted with a committee formed by the Society of Actuaries (SOA) on these and a range of other technical issues, and formed an NAIC technical subcommittee to review the SOA report.[166]

The SOA report recommended various changes to the NAIC's model standard nonforfeiture law, including a modified age setback.[167] It concluded that a "six year age setback for determining whole life cash values would reasonably approximate the results using a separate female table."[168] The SOA favored an age setback based on the benefit of achieving simplicity in nonforfeiture calculations.[169] In an evaluation of the SOA report, the NAIC technical subcommittee disagreed, although it was sharply divided on this point,[170] stating as follows:

> The age setback adjustment does not fit the current mortality experience by sex. Separate mortality tables based on the experience by sex appear to be the only approach currently acceptable, unless a unisex table could be used. There is much uncertainty as to which attitudes to take to meet the views of the feminist movement.[171]

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[164] *Proceedings of the National Association of Insurance Commissioners*, 1975-2 NAIC PROC. 414 (June 8–12, 1975).

[165] *Proceedings of the National Association of Insurance Commissioners*, 1976-4 NAIC PROC. 520 (Dec. 7–11, 1975) [hereinafter *Dec. 1975 Proceedings*].

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Proceedings of the National Association of Insurance Commissioners*, 1976-2 NAIC PROC. 541 (June 7–11, 1976) [hereinafter *June 1976 Proceedings*].

[170] *Id.* ("Of the thirty comments and conclusions presented in [the SOA] report the NAIC Technical Subcommittee believes that half of them merit immediate inclusion in proposals for revision of the Standard Nonforfeiture Value Legislation and [for] only [one] (the use of a six year age setback for female rates and values) . . . was [there] total disagreement.").

[171] *Dec. 1975 Proceedings*, *supra* note 165. A few years later, in a memorandum to the President of the SOA, Dr. Eleanor Lewis of the New Jersey Department of Insurance

Comments submitted by the American Council of Life Insurers favored the development of separate mortality tables for males and females.[172] Ultimately, the NAIC technical subcommittee concluded that "[e]ntirely separate mortality tables . . . are required."[173] In support of its conclusion, it noted the concern that "if the same values are available for both sexes then a need for cash value deficiency reserves may possibly be indicated."[174]

Accordingly, the NAIC technical subcommittee requested that a SOA committee develop separate male and female mortality tables.[175] Later in 1976, the SOA committee observed "it was felt that our only choice is to develop separate tables. This choice is made notwithstanding the extra costs in ratebooks, file maintenance, computing of dividends and other increased costs. The committee agreed that we appear to be 'inexorably driven' to the development of two tables."[176] As explained by an SOA committee member, the basic premise of their deliberations was that "males and females have significantly different mortality characteristics and recognizing this difference is not unfair

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Consumer Affairs division urged the appointment of an advisory group to advise the SOA committee on the less technical aspects of its decisions, including those influenced by "value judgements, philosophy, and basic concepts of equity." *June 1977 Proceedings*, *supra* note 154, at Attachment C-7. The Lewis memorandum included a roster of suggested committee members, including insurance commissioners and their deputies, the President of the NAIC, and "activist" women such as Professor Ruth Bader Ginsburg, Susan Ross, Barbara Shack, Professor Sylvia Law, and others. *Id.* I have been unable to find evidence that a committee with that composition was appointed. However, Eleanor Lewis later served as temporary chairperson of a consumer advisory committee for the NAIC technical task force. Proceeding of the National Association of Insurance Commissioners, 1978-2 NAIC PROC. 316 (June 11–16, 1978) [hereinafter *June 1978 Proceedings*]. The consumer advisory committee recommended that unisex tables be developed in each situation where a mortality table is prepared and made recommendations regarding the funding and composition of the committee. *Id.* After the departure of Lewis as temporary chairperson, Marsha Greenberger of the National Women's Law Center agreed to serve as coordinator of committee activities but there was no indication that the committee was ever funded as requested. *Id.* (summarizing consumer advisory committee input).

[172] *Dec. 1976 Proceeding*, *supra* note 161, at Attachment B.

[173] *June 1976 Proceedings*, *supra* note 169 (noting that "[t]he use of unisex tables will subsidize one sex at the expense of the other").

[174] *Id.* For discussion of the increase in the cash values of women's life insurance policies under unisex rates, see *infra* note 291.

[175] *June 1976 Proceedings*, *supra* note 169.

[176] *Minutes of the SOA Comm. Meeting Oct. 12, 1976*, *in Dec. 1976 Proceedings*, *supra* note 161, at Attachment F.

discrimination based on sex."[177] On the other hand, he noted, "[i]f we do not accept this premise, the problem becomes very simple from a rate and value standpoint. We must charge men and women the same premium rate and use a unisex table."[178] In addition, "[c]ash values, dividends, and reserves must also be the same."[179] He also noted "if we wish to use higher female tables for annuity, disability, and medical expense policies, we are hard pressed to object to the lower female tables for life insurance."[180]

Over the next several years, the SOA worked on developing sex differentiated tables, later identified as the 1980 CSO Standard Ordinary Mortality tables.[181] In late 1980, the NAIC adopted the new mortality tables for individual life insurance valuation purposes in its NAIC standard valuation model laws recommended for adoption by state legislatures.[182]

In sum, at the time the federal nondiscrimination legislation was being considered, the industry, the NAIC, and the states responded[183] by making the use of gender distinctions in life insurance more consistent and pervasive, nearly a century and a half after their first use in life annuities. As discussed in the following two sections, the industry consolidated their use of such distinctions at the same time that legislatures and courts were

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[177] *Valuation and Nonforfeiture*, *supra* note 162, at 596 (Statement of Waid J. Davidson, Jr.).

[178] *Id.*

[179] *Id.*

[180] *Id.* at 597.

[181] *Mortality and Other Rate Tables*, SOCIETY OF ACTUARIES, http://mart.soa.org/ (last visited Sept. 5, 2014).

[182] *Dec. 1980 Proceedings*, *supra* note 156. The model standard valuation law also contained a multistep procedure that permitted new mortality tables developed in the future to become effective in a state without specifically being named in the text of the laws. *Id.* The NAIC would first approve any such new table, followed by approval by regulation promulgated by the Commissioner of Insurance for that state. *Id.*

[183] For example, the California legislature amended its insurance law, which prohibits "unfair discrimination" between individuals of the same class or equal expectation of life, to require differentials based on sex in rates, dividends, or benefits for ordinary life insurance or individual life annuities applied for and issued on or after January 1, 1981. CAL. INS. CODE § 790.03(f) (West 2014) (specifying that the "requirement is satisfied if those differentials are substantially supported by valid pertinent data segregated by sex, including, but not necessarily limited to, mortality data segregated by sex" but permitting differentials in rates based on certain age set-backs until an amendment specifying the use of sex-segregated mortality tables for nonforfeiture benefits and valuation reserves went into effect).

reviewing the use of gender distinctions in insurance and pensions, as well as in other areas of the law.[184]

B. THE FEDERAL CONSTITUTIONAL STANDARD: RACE AND SEX CLASSIFICATIONS

On the federal legal front more generally, the women's rights litigation effort focused on the constitutional standard of review to be applied to sex-based classifications.[185] Although the effort to establish strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment would not have direct application to insurance classifications used by private companies unless state action could be established,[186] establishing the parallel between gender and race classifications as a matter of constitutional law could more broadly influence the public's understanding of the harm of gender discrimination.

Women's rights advocates viewed the litigation strategy leading to the U.S. Supreme Court's landmark race discrimination case, *Brown v. Board of Education*,[187] as a path-breaking model for their own efforts to achieve equal rights for women.[188] An influential two-volume study of race in America, *An American Dilemma*, which was cited by the Court in *Brown*,[189] contained, tucked away

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[184] *See infra* Parts III.B–D (discussing how courts, legislatures, and regulators responded to the industry's gender-based pricing distinctions).

[185] SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 3 (2011) (noting that "[l]itigators argued that sex, like race, should be a 'suspect classification' under the Fourteenth Amendment").

[186] *E.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883) (emphasizing that the Equal Protection Clause does not "invest Congress with power to legislate upon subjects which are within the domain of State legislation" but instead provides "modes of redress against the operation of State laws and the action of State officers executive or judicial when these are subversive of the fundamental rights" specified in the Fourteenth Amendment).

[187] 347 U.S. 483, 495 (1954) (rejecting the doctrine of "separate but equal" and holding that race segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment).

[188] *E.g.*, MAYERI, *supra* note 185, at 3–4 (describing how feminists "promoted parallels between race and sex as legal categories" and "tried to emulate the civil rights movements' organizational structure and tactics"); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 762–69 (2004) (describing a proposed feminism litigation strategy "modeled on the civil rights movement's successful transformation of the Fourteenth Amendment judicial meaning.").

[189] 347 U.S. at 494 n.11.

in an appendix,[190] a lesser-known analysis of the parallels between race and sex discrimination.[191] In the appendix, the study's author, Gunnar Myrdal, argued that the similarities in the position of, and feelings toward, women and blacks were "not accidental," but instead uncovered a "fundamental basis of our culture" and that they "were originally determined in a paternalistic order of society."[192] He briefly summarized historical, social, legal, and economic factors affecting the position of women in American society, and noted that the problems remained even though paternalism was "losing its economic basis."[193] Myrdal concluded that although racial barriers were much stronger in America due to the legacy of slavery, women were still hindered in their economic competition "by the function of procreation," a more "eternally inexorable" barrier.[194]

Nearly twenty years after *Brown*, during the "second wave"[195] of women's rights activism, the Supreme Court decided a key sex

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[190] Although Myrdal had intended that analysis to have a more central place in the text of the published study, it was moved to the appendix, along with other appendices containing methodological notes and additional quantitative studies. *See* DAVID W. SOUTHERN, GUNNAR MYRDAL AND BLACK-WHITE RELATIONS: THE USE AND ABUSE OF AN AMERICAN DILEMMA 1944–1969 (1987):

> One issue provoked so much commotion that Myrdal backed down before his critics. In the 1962 edition of the *Dilemma,* Myrdal claimed that he had never been censured on any subject, not even after Pearl Harbor. (The State Department asked to see a copy of Myrdal's manuscript, but Myrdal, on Keppel's advice, refused.) He failed to reveal, however, that he removed the analogy between racism and sexism from the text. Like many nineteenth-century abolitionists, the Carnegie liberals declined, either for tactical reasons or because of sexism, to connect the racial issue with women's rights.

Id. at 42–43 (citing Myrdal correspondence).

[191] GUNNER MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1073 app. 5 (1944) (providing "A Parallel to the Negro Problem").

[192] *Id.* at 1078.

[193] *Id.*

[194] *Id.* (citing the work of his wife Alva Myrdal). Alva Myrdal, a prominent intellectual and political activist, was involved in establishing social welfare programs in Sweden, and later, promoted social welfare internationally. *Alva Myrdal–Biographical*, NOBELPRIZE.ORG, http://nobelprice.org/peace/laureates/1982/Myrdal-bio.html (last visited Sept. 5, 2014). In 1982, she was awarded a Nobel Peace Prize for her international work in support of nuclear disarmament. *Id.*; *e.g.*, SISSELA BOK, ALVA MYRDAL: A DAUGHTER'S MEMOIR 4 (1991) (discussing many events in Alva Myrdal's life, including her political and social activism and her Nobel Peace Prize).

[195] MAYERI, *supra* note 185, at 3 (referring to the "second wave" of feminists in the 1960s).

discrimination case, *Frontiero v. Richardson*.[196] Justice Brennan's opinion for the plurality in *Frontiero* referred to the similarity of the nineteenth century legal status of women and blacks, citing Myrdal's *An American Dilemma*:

> [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. See generally . . . G. Myrdal, An American Dilemma 1073 (20th anniversary ed. 1962).[197]

Ruth Bader Ginsburg had referred the Court to the Myrdal appendix in support of her argument that "the legal status of women and children served as the model for the legal status assigned to black slaves."[198] Her *amicus* brief included the following excerpt from *An American Dilemma*:

> In the earlier common law, women and children were placed under the jurisdiction of the paternal power. When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest

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[196] 411 U.S. 677, 690–91 (1973) (Brennan, J., plurality opinion) (holding that federal statutes treating men and women members of the uniformed services differently with regard to spousal benefits are inherently suspect classifications based on sex and are unjustifiably discriminatory in violation of the Due Process Clause of the Fifth Amendment); *see also* Reed v. Reed, 404 U.S. 71, 74 (1971) (holding Idaho's preference of "males over females" as estate administrators when the degree of relationship to the decedent was otherwise a tie to be without a reasonable basis and therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

[197] 411 U.S. at 685.

[198] Brief for American Civil Liberties Union as Amicus Curiae Supporting Appellants at 14–15, Frontiero v. Richardson, 411 U.S. 677 (1973) (No. 71-1694). Ruth Bader Ginsburg, then a law professor and head of the newly formed ACLU Women's Rights Project, argued on behalf of the ACLU as *amicus curiae* before the U.S. Supreme Court. *See Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/biographies.aspx (last visited Oct. 10, 2014) (noting Justice Ginsburg's instrumental role in launching the ACLU's Women's Rights Project).

> and most natural analogy was the status of women and children. The ninth commandment—linking together women, servants, mules and other property—could be invoked, as well as a great number of other passages of Holy Scripture.[199]

In *Frontiero*, the Court came within one vote of applying the same constitutional standard to classifications based on sex as to those based on race.[200] Three others, Justices Douglas, Marshall, and White, joined Justice Brennan's opinion.[201] Justice Stewart concurred in the plurality's judgment.[202] Justice Powell also concurred, joined by Chief Justice Burger and Justice Blackmun, arguing that the ongoing Equal Rights Amendment ratification process was a "compelling . . . reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny."[203] Justice Rehnquist dissented.[204]

The fifth vote never materialized however, and the Court ultimately adopted an intermediate standard of scrutiny for sex-based classifications, a less rigorous standard under the Equal Protection Clause than the strict scrutiny applied to race-based classifications.[205]

Revisiting Myrdal's observations about the parallels between sex and race discrimination[206] prompts speculation about what

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[199] Brief for American Civil Liberties Union at 14-15, *Frontiero*, 411 U.S. 6 (1973) (No. 71-1694) (citing AN AMERICAN DILEMMA 1073 (2d ed. 1962)).

[200] 411 U.S. at 691–92 (Powell, J., concurring); *see, e.g.*, Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789, 1793 (2008) (noting that the analogy to race helped feminists persuade judges and other decisionmakers that discrimination based on sex should be eradicated, and they came within one vote of a Court majority in *Frontiero*).

[201] 411 U.S. at 678.

[202] *Id.* at 691 (Stewart, J., concurring).

[203] *Id.* at 692 (Powell, J., concurring).

[204] *Id.* at 691 (Rehnquist, J., dissenting).

[205] *See* Craig v. Boren, 429 U.S. 190, 197, 210 (1976) (requiring sex-based classifications to be "substantially related" to "important governmental objectives" and invalidating a state drinking age statute differentiating between teenage boys and girls). The Court much later applied an augmented "skeptical scrutiny" standard in *United States v. Virginia*, 518 U.S. 515, 531 (1996) (Ginsburg, J.) (invalidating Virginia Military Institute's policy of excluding female students from admission).

[206] After *Frontiero*, Justice Brennan cited other portions of *An American Dilemma* in two subsequent cases, both involving race discrimination. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979) (Brennan, J., majority) (upholding a private voluntary

"might have been" if a more complete version of women's equality had been embraced by the Court in *Frontiero* or, alternatively, in a subsequent case if the then ongoing efforts to ratify the Equal Rights Amendment[207] had been successful.[208] However, it also raises questions about the impact of the Court's sex discrimination decisions, a question that cannot be addressed without consulting the changes in society more generally.[209]

Nevertheless, the intermediate level of scrutiny adopted by the Court, combined with its narrowing interpretation of the governmental action requirement for Fifth and Fourteenth Amendment equal protection claims,[210] made federal constitutional litigation an unlikely vehicle for legal reform of sex-based practices of the private insurance industry, despite state regulation of the business of insurance. As discussed in the next section, litigation by women's rights groups under federal statutory law provided a much more promising avenue for reform.[211] Federal constitutional challenges, with the exception of

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affirmative action plan under Title VII of the Civil Rights Act of 1964, and in rejecting a claim of reverse discrimination by white workers, taking judicial notice of the historical exclusion of blacks from craft worker positions on racial grounds); McCleskey v. Kemp, 481 U.S. 279, 330 (1987) (Brennan, J., dissenting) (disagreeing with the majority's rejection of the claim that Georgia's capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments).

[207] "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong. (1972); *see also* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889–900 (1971) (discussing the Equal Rights Amendment).

[208] *See, e.g.*, Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 747–62 (2002) (discussing the "choices . . . a hypothetical set of feminist drafters face if they were to constitutionalize women's equality. . . .").

[209] Justice Ginsburg has since attributed the courts' altered views of sex discrimination in large part to a "sea change" in the views and experience of women in American society. Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 268 (1997); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204–05 (1992) ("[B]y requiring legislative reexamination of once customary sex-based classifications, the Court helped to ensure that laws and regulations would 'catch up with a changed world.' " (quoting WENDY W. WILLIAMS, SEX DISCRIMINATION: CLOSING THE LAW'S GENDER GAP, IN THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986, at 109 (Herman Schwartz ed., 1987))).

[210] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171–79 (1972). *But see* Reitman v. Mulkey, 387 U.S. 369, 376 (1967).

[211] Unlike constitutionally-based claims of gender discrimination, which require a showing of governmental action and apply an intermediate standard of scrutiny, statutory civil rights prohibitions reach certain actions of private parties and often apply the same legal

Manufacturers Hanover Trust Co. v. United States,[212] an estate tax case discussed briefly below, generally have not been asserted; and where attempted, have not been successful. However, efforts to implement an initial favorable ruling in *Manufacturers Hanover* ultimately led to significant changes in related governmental policies.[213]

In the initial ruling in *Manufacturers Hanover*, the federal district court in 1983 held that use of gender-based actuarial tables, required by the federal taxing authorities to determine for estate tax purposes the present value of a reversionary interest in the trust of a decedent, constituted impermissible sex discrimination in deprivation of due process of law guaranteed by the Fifth Amendment.[214] Shortly after the district court issued its decision, the Treasury issued proposed revised regulations, which eliminated the sex-based distinction in actuarial tables used for valuing annuities, life estates, terms for years, remainders, and reversions for purposes of federal income, estate, and gift taxation.[215] Because the unisex regulations proposed changing the rule prospectively,[216] however, they did not resolve the pending estate tax refund case.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court's judgment in favor of the decedent's executor.[217] The majority opinion disagreed with the district court's constitutional analysis; it held instead that the use of sex-distinct actuarial tables could be justified by the Internal Revenue Service under the intermediate level of scrutiny applicable to sex-based classifications "as substantially related to important

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standards to race and sex discrimination. *See infra* note 250 and accompanying text ("[R]ace and sex distinctions stand on the same footing under the Civil Rights Act.").

[212] 576 F. Supp. 837 (S.D.N.Y. 1983), *rev'd* 75 F.2d 459, 461 (2d Cir. 1985).

[213] *See infra* notes 222–24 and accompanying text (noting that unisex tax regulations went into effect and that the federal government also adopted unisex mortality tables for certain other purposes).

[214] Mfrs. Hanover Trust Co. v. United States, 576 F. Supp. 837, 843–44 (S.D.N.Y. 1983) (relating to a refund claim for over $458,000 in estate taxes and additions to tax).

[215] *See* Revision of Actuarial Tables and Interest Factors, 48 Fed. Reg. 50,087–50,111 (Oct. 31, 1983) (to be codified at 26 C.F.R. pts. 1, 11, 20, 25) (issuing proposed regulations that eliminated sex-based distinctions prospectively but left gender-based tables applicable to estates of persons dying before, or valuations effective before, November 30, 1983).

[216] *Id.* at 50,087.

[217] Mfrs. Hanover Trust Co. v. United States, 775 F.2d 459, 461 (2d Cir. 1985).

governmental objectives."[218] The court concluded that defining the value in terms of average sex-based life expectancies,[219] rather than in terms of individualized estimation of life expectancy, provided more accurate valuation of a "special kind of average value of reversionary interests"[220] for estate tax purposes and thus did not constitute invidious discrimination.[221]

Despite the Second Circuit's reversal of the district court's constitutional determination, finalized prospective unisex tax regulations went into effect.[222] In addition to the revised tax regulations providing unisex mortality tables for purposes of computing reversionary interests for estate tax purposes, the federal government adopted unisex mortality tables for certain employee pension computations,[223] and for a number of other tax

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[218] *Id.* at 464 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). The court emphasized that the Constitution, unlike Title VII, does not give sex discrimination the same level of scrutiny it gives to race discrimination. *Id.* at 468.

[219] *Id.* at 465 (quoting Memorandum from IRS Commissioner Randolph Thrower to Edwin S. Cohen, Assistant Secretary of the Treasury) (explaining that the government adopted the use of sex-based tables to compute the value of reversionary interests in 1970 "in the interest of greater actuarial accuracy"). The Treasury had previously used unisex tables. *See, e.g.*, Regulations Relating to Estate Tax, 17 Fed. Reg. 5016, 5017 (Dep't of Treas. June 4, 1952) (miscellaneous amendments).

[220] *Mfrs. Hanover Trust Co.*, 775 F.2d at 469.

[221] *Id.* at 465–66.

[222] Revision of Actuarial Tables and Interest Factors, 49 Fed. Reg. 19,973 (May 11, 1984) (to be codified at 26 C.F.R. pts. 1, 11, 20, 23) ("The regulations [were] generally effective for transfers occurring after November 30, 1983."); *see* also I.R.C. § 7520(c)(3) (1988) (requiring revision of tables for valuation purposes "not less frequently than once each 10 years" to take into account recent mortality experience available at the time of revision); Treas. Reg. § 20.2031-7A (2013) (providing current unisex tables). The 1983 Unisex Mortality tables promulgated by the Treasury and the IRS, according to a study published in 2001, was a weighted average of the 1983 mortality tables for men and women published by the Society of Actuaries, with different weights at different ages. *See* JEFFREY R. BROWN ET AL., THE ROLE OF ANNUITY MARKETS IN FINANCING RETIREMENT 192, tbl.7.1 (2001) (citing 1983 IAM from Society of Actuaries, Transactions, Volume XXXIII). After the study authors "reverse engineered" the IRS tables, they found that the weighted averages used by the IRS varied with age and placed heavier emphasis on female than male mortality. *Id.* at 193. Although the Treasury has revised the mortality tables used to value the benefits of group life insurance and certain other insurance products, the authors noted that the tables used to compute the taxable income from payments made under single-premium annuities had remained unchanged since 1986. *Id.*

[223] For example, concern about implementation of court rulings under Title VII of the Civil Rights Act, as amended, contributed to related changes from sex-based to unisex mortality tables used to compute statutory limitations applicable to qualified pension plans. *See, e.g.*, Rev. Rul. 95-6, 1995-1 C.B. 80, 80 (1995) (citing Arizona v. Norris, 463 U.S. 1073 (1983)) (specifying that a unisex group annuity table, based upon a fixed blend of half of the male

purposes, including the income taxation of life annuity payments received under private commercial insurance contracts.[224] Following these federal regulatory changes, some states adopted unisex mortality tables for state tax or probate purposes, relying on the federal tables as a model.[225] Thus, during this period, both federal and state governmental authorities extended the principle of sex-neutral classification beyond the employment context,

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mortality rates and half of the female mortality rates, be used for purposes of adjusting benefits or limitations and determining the present value of plan benefits under federal tax provisions), *superseded by* Rev. Rul. 2001-62, 2001-2 C.B. 632, 633 (2001) (citing *Norris* in adopting an updated unisex group annuity table for distributions with annuity starting dates after 2002), *modified by* Rev. Rul. 2007-67, 2007-2 C.B. 1047–48 (2007) (citing *Norris* and adopting an updated unisex table for plan years beginning in 2008).

[224] Treas. Reg. § 1.72-9 (1995) (including unisex mortality tables used to compute the income tax on payments received under life annuity contract investments made after June 30, 1986, but permitting the use of gender-based tables for annuity contract investments made prior to July 1, 1986); *see also* Treas. Reg. § 1.101-7 (1989) (cross-referencing Reg. § 1.72-9 unisex mortality tables for computation of income tax on lifetime payout option for life insurance proceeds to beneficiaries for deaths occurring after October 22, 1986).

Those unisex tables were promulgated after enactment by Congress of a provision in the Tax Reform Act of 1986, giving the Secretary of the Treasury authority to prescribe mortality tables for purposes of certain tax calculations. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1001(b), 100 Stat. 2085, 2387 (codified as amended in 26 U.S.C. § 101(d)(2)(B)(ii)). Prior law specified the use of insurance company mortality tables for purposes of valuing the delayed payment of a nontaxable death benefit. S. REP. NO. 99-313, at 487 (1986). The Committee reports accompanying the amendment directed the Secretary to prescribe gender-neutral tables for that purpose. *Id.* at 487–88; H.R. REP. NO. 99-841, vol. II, 338–39 (1986) (Conf. Rep.).

Representative Dingell, a former sponsor of the proposed nondiscrimination in insurance legislation as well as the amendment to I.R.C. section 101 in the 1986 Act, vigorously objected to the portion of the section 72 regulations permitting the continued use of gender-based tables for investment in contracts made prior to the effective date of the Act. While Dingell urged a broader application of the unisex principle to future payouts under earlier investments, he also praised the Treasury for having "gender-neutralized some 30 of its previous gender-discriminatory regulations" over the previous three years. Letter from John D. Dingell, Chairman of the House Commerce Comm. to James A. Baker III, Sec'y of the Treasury (Feb. 27, 1987) (on file at Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, NOW LDEF Collection, MC 623, Box 125, No. 11).

[225] *See* Estate of Karnen, 607 N.W.2d 32, 40 (S.D. 2000) (affirming the trial court's use of unisex mortality tables, as adopted for federal estate tax and other purposes, for determining the present value of a family trust used to satisfy surviving spouse's elective share entitlement). *But see* Estate of Darrin v. Dir. of the Div. of Taxation, 557 A.2d 677, 680 (N.J. Super. Ct. App. Div. 1989) (reversing and remanding determination by tax court that gender-based mortality tables were unconstitutional); *on remand*, 11 N.J. Tax 482, 496 (1991) (concluding that equal protection was not violated by the use of gender-based mortality tables to value life estates in determining transfer inheritance tax liability).

discussed below, to include certain governmental valuation practices based on life expectancies.[226]

C. FEDERAL LITIGATION

Although the opponents of gender or race-based rate distinctions generally acknowledge that overall mortality or morbidity experience of policyholders, among other factors, helps determine insurance company *overall* cost of coverage, they argue that the industry should be prohibited from using invidious race or gender classifications to allocate individual policyholders' share of those costs.[227] They point to the civil rights principle that statistical generalizations about traditionally discriminated against groups should not be used to determine the opportunities available to or consequences for an individual member of that group—that is, to determine the rates or benefits for individual policyholders.[228]

In the late 1970s and early 1980s, the U.S. Supreme Court applied that civil rights principle to prohibit employers from using gender-based classifications to determine individual employee pension or retirement annuity contributions[229] or benefits.[230] The Court held in the landmark *City of Los Angeles Department of Water & Power v. Manhart* case that the use of sex-segregated actuarial tables to calculate pension contributions violates Title VII of the Civil Rights Act of 1964, whether or not the tables

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[226] For discussion of private law approaches to life expectancies and the computation of damages in the personal injury context, *see generally* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010) (arguing that women and minorities have been undercompensated in tort law and that traditional biases have resurfaced in updated forms to perpetuate past patterns).

[227] *See generally, e.g.,* Abraham, *supra* note 26, at 450 ("Where more generalized efforts at redistribution of a particular risk, however, have occurred—by eliminating sexual or racial discrimination at large, for instance--asking the holders of specialized forms of insurance coverage to bear their share of the cost of this effort is much less problematic.").

[228] *See* Brilmayer et al., *supra* note 32, at 505, 509 (arguing that use of sex-based actuarial tables to calculate rates or benefits violates the civil rights principle of equal treatment of individuals rather than groups).

[229] City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

[230] Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1074–75 (1983) (holding that the employer violated Title VII by providing employees with the option of receiving retirement benefits from one of several commercial companies selected by the employer, all of which paid lower monthly retirement benefits to a woman than to a man who made the same contributions).

reflect an accurate prediction of the longevity of women as a class.[231] Under the statute, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[232] The Court explained that "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."[233]

The employer in *Manhart* had argued that the different contributions required from men and women were based on longevity and not sex.[234] It pointed out that women as a group tend to live longer than the average group of men; thus, it would cost it more to provide lifetime pension benefits for women.[235] As a result, according to the employer, women should be required to contribute more for their benefits.[236] Otherwise, men's contributions would in part subsidize the benefits to be received by women, which the employer considered to be unfair to the men in the plan.[237]

The Court rejected that argument, and held that individual women employees could not be required to contribute more—resulting in women employees receiving a lower take-home pay than men—for equal periodic benefits during retirement.[238] Justice Stevens, writing for the majority, explained as follows:

> For when insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons

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[231] *Manhart*, 435 U.S. at 715.

[232] *Id.* at 708–09 (stating also that "the basic policy of the statute requires that we focus on fairness to individuals, rather than fairness to classes"). The Court pointed out that many women do not live as long as the average man, and many men outlive the average woman; thus, many of those individuals who have worked for the employer will not live as long as the average man but will have received smaller paychecks because of their sex, with no compensating advantage when they retire. *Id.*

[233] *Id.* at 709. The Court noted that "[s]eparate mortality tables are easily interpreted as reflecting innate differences between the sexes," but that a significant part of the mortality differential may be explained by social behavioral factors, like smoking. *Id.* at 709–10.

[234] *Id.* at 712.

[235] *Id.* at 704, 716.

[236] *Id.*

[237] *Id.* at 708–09.

[238] *See id.* at 705 (noting a female employee's monthly contribution to the pension fund was approximately fifteen percent higher than the contributions required of a comparable male employee, and at retirement, the monthly benefits were equal for men and women of the same age, seniority, and salary).

> subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other.[239]

As Justice Stevens pointed out, the employment benefits at issue involved employee groups where cross subsidization may be more common.[240] Five years later, in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, the Court extended the nondiscrimination principle outlined in *Manhart* to prohibit the payment by an insurance company of unequal periodic retirement benefits to men and women under a payout option provided by the employer under its retirement plan.[241] Unlike the employee benefit plan involved in *Manhart*, the employees in *Norris* made equal contributions to the employer's group annuity plan during their working years.[242] The Court held in *Norris* that lower periodic payments made to retired women under an annuity payout option violated Title VII, and required the equalization of payouts made to future retirees under the plan.[243]

After the Court's decision in *Norris*, the insurance industry quickly responded by supplementing the new 1980 CSO mortality

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[239] *Id.* at 710 (footnotes omitted).

[240] *Id.*

[241] Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1094 (1983).

[242] *Id.* at 1106 (noting that men and women made equal contributions).

[243] *Id.* at 1097; *see also, e.g.*, Spirt v. Teachers Ins. & Annuity Assoc., 735 F.2d 23, 27–29 (2d Cir. 1984) (applying *Norris* to retirement annuity benefits provided to employees of colleges and universities by the Teacher's Insurance and Annuity Association and College Retirement Equity Fund and upholding the district court's pre-*Norris* ruling that male and female employees retiring after the effective date of its judgment in 1980 receive equal periodic annuity payments).

tables with gender-merged (blended) tables to permit pension-related insurance policies to equalize nonforfeiture benefits and cash values for men and women.[244] In 1983, the NAIC approved the gender-blended mortality tables for inclusion in its model laws and regulations as an option for those purposes,[245] and many states subsequently adopted NAIC's model regulations.[246] Later model provisions adopted by the NAIC, which reference updated 2001 CSO mortality tables, contain a similar gender-blended option.[247]

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[244] *See* discussion *supra* Part III.A.

[245] The NAIC Executive Committee initially approved an interim procedure in the fall of 1983, followed by a finalized procedure, which included specific supplemental tables recommended by NAIC's Life Insurance Committee, and adopted by the NAIC, effective retroactive to the effective date of *Norris*. *See NAIC Procedure for Permitting Same Nonforfeiture Standards for Men and Women Insured Under 1980 CSO and 1980 CET Mortality Tables*, NAT'L ASS'N OF INS. COMM'RS, http://www.naic.org/store/free/MDL-811.pdf. The preamble to the procedure stated that "[a]lthough there is some uncertainty as to the breadth of the Supreme Court's decision, it would seem to require that after August 1, 1983, employer pension[s] . . . may need to be funded by life insurance products that have identical nonforfeiture values for men and women." *Id.* Under the model procedure, no attempt was made to define which policies and situations were covered by *Norris*. *Id.* However, the preamble explained that because the scope of the *Norris* decision "may ultimately have to be resolved by further court decisions or federal legislation," insurers were given the flexibility under the procedure to use either the 1980 gender-distinct tables or a range of gender-merged tables. *Id.* Nevertheless, the drafting comments made clear that the reason for the model procedure was to facilitate compliance with *Norris* since the gender-distinct 1980 CSO Mortality Tables made it "very difficult if not impossible" for companies to determine actual nonforfeiture values that "are identical for men and women and also satisfy a sex-differentiated minimum standard." *Id.*; *see also Proceedings of the National Association of Insurance Commissioners, Life Insurance Committee Meeting*, 1984-4 NAIC PROC. 374, Attachment Two-A1 (1983) (stating that the new procedures had been adopted on an interim basis); *Proceedings of the National Association of Insurance Commissioners, Executive Committee Meeting*, 1984-4 NAIC PROC. 29 (1983) (adopting the Life Insurance Committee's report and minutes of meeting at which the interim measures were adopted); *Proceedings of the National Association of Insurance Commissioners, Plenary Session III, 1983 Winter Annual Meeting*, 1984-4 NAIC PROC. 5 (1983) (adopting the Executive Committee's report). At about this time, the NAIC also approved the smoker and nonsmoker tables as supplements to the 1980 CSO tables for use in determining minimum reserve liabilities and nonforfeiture benefits. *Id.* at Attachment Two-A4, A5.

[246] *E.g.*, WASH. ADMIN. CODE § 284-74-200 (2014) (adopting NAIC model regulations in 1988); *see also NAIC Model Laws, Regulations and Guidelines* § 811-1, *State Adoption* (2012) (listing all the states that have adopted NAIC's model regulations).

[247] *Proceedings of the National Association of Insurance Commissioners*, 2002-3 NAIC PROC. 985 (2002). When the 1980 CSO Mortality Tables were updated by the 2001 CSO Mortality Tables, some members of the NAIC's Life and Health Actuarial Task Force urged that limitations be placed on gender-blended mortality tables by restricting their use beyond the scope of the decision in *Norris*. *Id.* In response to those concerns, but without referring to *Norris*, the task force included the following language in the proposed new model provisions:

Those opposed to gender-neutral rates outside of employer group insurance maintain that additional issues related to selection of individual insurance coverage by members of groups most likely to benefit from the cross subsidization could result in pricing problems or in greater market segmentation and coverage limitations.[248] As over a century of experience with race-based rates in private markets for individual life insurance has shown, some sort of unified national response or unified industry action, or both, was required before lasting change could be achieved in those individual insurance markets.[249]

As the Supreme Court noted in *Norris*, "if it would be unlawful to use race-based actuarial tables, it must also be unlawful to use sex-based tables," because race and sex distinctions stand on the same footing under the Civil Rights Act.[250] Outside of Title VII law, however, commercial insurance companies and many state

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> For any ordinary life insurance policy delivered or issued for delivery in this state on and after January 1, 200[_] . . . , that utilizes the same premium rates and charges for male and female lives or is issued in circumstances where applicable law does not permit distinctions on the basis of gender, a mortality table that is a blend of the 2001 CSO Mortality Table (M) and the 2001 CSO Mortality Table (F) may, at the option of the company for each plan of insurance, be substituted for the 2001 CSO Mortality Table for use in determining minimum cash surrender values and amounts of paid-up nonforfeiture benefits.

Id. For the final version of the model regulation, *see NAIC Model Laws, Regulations, and Guidelines*, NAT'L ASS'N OF INS. COMM'RS, http://www.naic.org/store/free/MDL-814.pdf, http://www.naic.org/store/free/MDL-815.pdf.

[248] *See generally, e.g.*, Abraham, *supra* note 26, at 445–51 (discussing ways that reform of suspect insurance risk classifications may be undermined by market forces that could result in much less cross-subsidization than the modified system had originally envisioned, leading to pricing and coverage issues for those remaining in the risk pool). The issue of adverse selection is less understood empirically than sometimes recognized or acknowledged in policy debates. For a survey and discussion of recent studies of adverse selection in various markets for insurance, the difficulty of disentangling the coverage-risk correlation resulting from adverse selection and moral hazard, and a detailed discussion of possible reasons for the puzzling negative cost-risk correlation (that is, a lack of evidence of selection by greater risks) for life insurance, but positive correlation for life annuities, see Cohen & Siegelman, *supra* note 29, at 57–60, 62–77.

[249] As previously discussed, see *supra* notes 40–49 and accompanying text, elimination of race-based insurance rates took over a century to accomplish. Although some states enacted laws banning race discrimination in life insurance as far back as the 1880s, reforms in those states tended to drive such business elsewhere and resulted in the creation of race-segmented markets. Heen, *supra* note 40, at 397–99.

[250] Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1083–84 (1983).

policymakers and regulators did not place gender and race on the same footing.[251]

D. STATE LAW REFORM EFFORTS

By the late 1970s and early 1980s, when it became clear that ratification of the federal Equal Rights Amendment (ERA) might not be attained within the time limits set by Congress,[252] women's rights groups pursued multi-pronged challenges to discriminatory insurance practices under state equal rights amendments as well as under existing state and federal civil rights statutes.[253] At the same time, they continued to push for comprehensive federal legislation banning sex-based insurance practices.[254]

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[251] *See* discussion *supra* Part III.B; *infra* Parts III.D (discussing the response to reform efforts outside of the Title VII context).

[252] *E.g.*, Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2059–60 (2000) (discussing the factors leading to failure of ERA ratification during the set timetable); Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 928–29 (1979) (describing the vote by Congress in 1978, to extend the original 1979 deadline until June 30, 1982). Ratification of the ERA failed when only thirty-five of the required thirty-eight states approved it by 1982. *See* Kay, *supra*, at 2064.

[253] For example, the Women's Equity Action League (WEAL) announced a "two-pronged strategy on the issue of unisex insurance legislation," with work at both the national and the state levels:

> In conjunction with BPW [Business and Professional Women's Clubs], WEAL is planning a survey of the states to determine what is happening in each in the area of unisex insurance legislation and also to find examples of individual women who have been discriminated against by the insurance industry. WEAL and BPW are combining efforts to put together an insurance packet, available to all interested groups, to include: testimony, sample legislation, strategy for action, "the good guys and the bad guys," regional and national contacts, networking strategy, recent reports and facts, etc.

WEAL Insurance Discrimination Kit, Unisex Insurance (Mar. 30, 1985) (on file at Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, WEAL collection, Carton 78, #2).

[254] *See, e.g.*, Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1952 (1991) (discussing the Women's Rights Project's continued litigation and legislation-support efforts following Congress's failure to ratify the ERA); *see also, e.g.*, *Fair Insurance Practices Act: Hearing on S. 2204 Before the S. Comm. on Commerce, Sci., and Transp.*, 97th Cong. 72, 77 (1982) (statement of bill sponsor Sen. Bob Packwood, Chair of the Comm., in agreement with the statement of Isabelle Katz Pinzler, Director, ACLU Women's Rights Project, that "[i]n the wake of the expiration of the ratification period for the proposed Equal Rights Amendment, this bill presents a

State equal rights amendments provided an alternative ground for eliminating the sex-based risk classifications utilized by the insurance industry.[255] By the early 1980s, some states prohibited sex-based auto insurance rates by statute;[256] however, no state prior to 1983 prohibited sex-based rates or benefits for life insurance.[257] By the mid-1980s and into the 1990s, women's rights organizations turned their attention from passing proposed federal insurance non-discrimination legislation to achieving incremental gains in key states through legislative advocacy and litigation.[258]

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tremendous opportunity and challenge to those who opposed the ERA but claim to favor equal rights without a constitutional amendment").

[255] A NOW Insurance Resolution, adopted by the National Conference of the National Organization for Women in October 1982, provided as follows:

> RESOLVED that the National Organization for Women will mount a major campaign to outlaw all sex discrimination in insurance as part of a comprehensive action plan for economic empowerment for women. The campaign will focus efforts and public attention through specific legal and regulatory challenges based on state ERAs, fair trade acts, and other anti-discriminatory statutes. Such challenges will form bases to inform and involve activists and the public through mass demonstrations and the application of economic and political pressures.

1982 Conference Resolutions: NOW Insurance Resolution, NAT'L NOW TIMES, Oct. 1982 (available on microfilm at Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University); *see also, e.g.*, Clara Germani, *Industry Fights Back Against Campaign for 'Unisex' Insurance Rates*, CHRISTIAN SCI. MONITOR, June 14, 1983, http://www.csmonitor.com/1983/061430.html (reporting that major industry trade groups viewed the campaign for unisex insurance as "one of the biggest challenges ever to its actuarial foundations" and that NOW in the past week had staged demonstrations over the issue in twenty-five cities).

[256] HAW. REV. STAT. § 431:10C-207 (2013); MASS. GEN. LAWS ch. 175E, § 4(d) (2014); MICH. COMP. LAWS § 500.2027 (2009); N.C. GEN. STAT. § 58-3-25(a) (2013). Since then, according to a recent study, those states have been joined by a handful of other states in prohibiting (by statute or regulation) gender discrimination in auto insurance rates. Avraham et al., *supra* note 14, at 245.

[257] *See* Avraham et al., *supra* note 14, at 246, 250 & n.142 (stating that as of 2012 Montana was the only state to prohibit sex-based life insurance rates); *see infra* Part III.D.2 (discussing Montana's insurance non-discrimination statute enacted in 1983, with a 1985 effective date).

[258] *See, e.g.*, Jane Bryant Quinn, *Unisex-Insurance Proponents Wage Guerrilla Warfare in States*, WASH. POST, Sept. 9, 1985, at Business 63 ("Rob Bier of the American Council of Life Insurance says that if unisex pricing prevails in a populous state like Massachusetts, California or New York, it might force the companies to adopt at least part of that pricing, on some products, nationwide."); *NOW Suit Alleges Mutual of Omaha Overcharges Women*, WALL ST. J., Aug. 17, 1984, at 31 (quoting NOW President Judy Goldsmith as saying, "If the insurers thought they had won when they poured millions of dollars into a successful lobbying campaign to gut the Nondiscrimination in Insurance Act, they were wrong," referring to House action on the measure).

1. State Regulatory Reforms and Litigation Under State ERAs. In a few states, including Pennsylvania, reform-minded insurance commissioners relied on their general supervisory authority under state insurance law to disapprove sex-based auto insurance rates or benefits.[259] In 1984, the Supreme Court for the Commonwealth of Pennsylvania upheld the insurance commissioner's actions as an appropriate exercise of his statutory authority given the state's strict policy against sex discrimination evidenced by the state's Equal Rights Amendment.[260] After the Pennsylvania ruling, women's rights groups expressed the hope that sex-based auto insurance rates would be eliminated in all fifteen states with state equal rights amendments.[261]

However, the insurance industry successfully blocked a broader regulatory movement toward unisex insurance rates. The hope that state equal rights amendments would provide additional impetus for reform soon waned when state courts, including the highest court in Massachusetts in *Telles v. Commissioner of Insurance*,[262] issued opinions invalidating unisex regulations and

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[259] *See also, e.g.*, Ins. Servs. Office v. Comm'r of Ins., 381 So. 2d 515, 517 (La. Ct. App. 1979) (invalidating the cease and desist order issued by Louisiana's Commissioner of Insurance requiring auto insurers to discontinue their use of sex-based rates and interpreting the insurance statute, which prohibits "unfair discrimination," to permit classifications based on age and sex when statistically sound); Wayne King, *Trenton Gives Rate Details for Insurance*, N.Y. TIMES, Mar. 6, 1992, at B1 (describing regulations issued by the Insurance Commissioner banning sex-based auto insurance rates and adopting new rate-setting procedures to be phased in over two years but noting that they had "generated a storm of protest from insurers," and that Republicans, with "veto-proof majorities in both houses," had proposed a bill that would "return to insurers the power to determine the factors that they use in predicting which drivers are most likely and least likely to have accidents").

[260] Hartford Accident & Indem. Co. v. Ins. Comm'r of Commonwealth, 482 A.2d 542, 549 (Pa. 1984).

[261] *See Pennsylvania court disallows sex-based auto insurance rates under state Equal Rights Amendment*, From the State Capitals, Insurance Regulation 3–4 (Nov. 5, 1984) (noting that a spokesperson from the Legal Defense and Education Fund of the National Organization for Women told them "that the Pennsylvania ruling probably will prompt lawsuits challenging the constitutionality of sex-based auto insurance rates in the 15 other states that have equal rights amendments," including "Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Texas, Utah, Virginia, Washington and Wyoming," and reporting that four states had already outlawed such rates as not based on equal rights laws, including "Hawaii, North Carolina, Massachusetts and Michigan"); *Equal Rights Ruling for Auto Insurance Expected to Spread*, N.Y. TIMES, Oct. 23, 1984, at A18.

[262] 574 N.E.2d 359, 363 (Mass. 1991).

upholding the industry's continued use of sex-based distinctions in life insurance[263] as well as in other types of insurance, including auto insurance.[264]

Telles invalidated regulations issued in 1987 by the Massachusetts insurance commissioner that broadly prohibited insurers from utilizing certain discriminatory classifications, including sex and marital status,[265] with respect to policy "availability, terms, conditions, rates, benefits or requirements."[266] Several major life insurance companies and individual purchasers of life insurance immediately sought a preliminary injunction to enjoin implementation of the unisex regulations before they were to become effective in 1988.[267] Although the regulations were initially upheld as within the commissioner's implicit authority derived from the state's equal rights amendment, the Supreme Judicial Court of Massachusetts on appeal reversed the judgment below and rejected the commissioner's authority to issue the regulations.[268]

The court first held that the commissioner's regulations conflicted with several state insurance statutes.[269] In the majority's view, the state insurance law's prohibition against "unfair discrimination" meant discrimination among insureds of the same class based on something other than actuarial risk; thus, according to the court, the statute permitted discrimination supported by differences in actuarial risk.[270] In addition, the court found that the regulations directly conflicted with a statute requiring that premiums of ordinary insurance be calculated on

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263 *Id.*

264 State Dep't of Ins. v. Ins. Servs. Office, 434 So. 2d 908, 913 (Fla. Dist. Ct. App. 1983) (holding that the insurance department had no authority to prohibit auto insurers from charging rates on the basis of sex if those rating factors were found to be actuarially sound).

265 The regulations prohibited classification based on race, color, religion, sex, marital status, or national origin. *Telles*, 574 N.E.2d at 361 (citing 211 MASS. CODE REG. § 35.04(1) (1987)).

266 *Id.* (quoting 211 MASS. CODE REG. § 35.04(2) (1987)).

267 *Id.* at 361; *Insurance: Equal Rates for Both Sexes*, TIME (June 1, 1987), http://www.time.com/time/magazine/article/0,9171,964516,00.html (noting that Massachusetts Insurance Commissioner Peter Hiam, ordered firms to comply by July 1988, and reporting that although many insurance executives opposed the Commissioner's involvement in rate setting, the John Hancock lobbyist supported the Commissioner's action, saying that "[c]urrent rates discriminate against the individual").

268 *Telles*, 574 N.E.2d at 363.

269 *Id.* at 361–62.

270 *Id.*

the basis of the Commissioner's 1980 Standard Ordinary Mortality Table, which utilized gender-based mortality classes.[271] Finally, the court concluded that the commissioner had no implicit authority under the Equal Rights Amendment of the Massachusetts Constitution to regulate underwriting practices in regard to gender.[272] In sum, the court determined that the insurance "commissioner lacked either express or implied authority to promulgate the regulations."[273]

Back in Pennsylvania, following judicial approval of the insurance commissioner's regulatory authority to ban sex-based auto insurance rates, the casualty insurance industry successfully lobbied the legislature to enact legislation expressly permitting such rates.[274] Enacted in 1986, the legislation authorized sex-based auto insurance rates (but not rates based on race, religion, or national origin) if "supported by sound actuarial principles" or "related to actual or reasonably anticipated experience."[275] When challenged by parents of a male teenage driver and the League of Women Voters of Pennsylvania, however, the statute was invalidated as unconstitutional under the state Equal Rights Amendment, and the insurance commissioner was enjoined from enforcing the statute.[276] On appeal, the lower court's order was affirmed without opinion by an equally divided state Supreme Court.[277]

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[271] *Id.* at 362. The concurring opinion would have rested its analysis solely on this ground. It was critical of the majority's "conclusory and unnecessary determination" that actuarial soundness automatically translates into "fair" discrimination and was apparently discomforted by the implications of that analysis for race-based risk classifications. *Id.* at 363 n.1. In addition, according to the concurrence, the Insurance Commissioner should have instead sought a declaratory judgment if he believed that the use of gender-based mortality tables violated the Equal Rights Amendment. *Id.* at 363–64.

[272] *Id.* at 363.

[273] *Id.*

[274] *See* Casualty and Surety Rate Regulatory Act of 1986, P.L. 80, No. 27 (codified as amended 40 PA. STAT. ANN. § 1183(e) (West 2014).

[275] *Id.*

[276] *See* Bartholomew v. Foster, 541 A.2d 393, 397–98 (Pa. Commw. Ct. 1988) (concluding that "[t]he ability to operate a motor vehicle [was] not a physical characteristic uniquely related to one's sex," the only type of sexual discrimination permitted under the state Equal Rights Amendment, and rejecting sex-based insurance rates under that standard even if actuarially sound).

[277] Bartholomew v. Foster, 563 A.2d 1390, 1390 (1989) (per curiam).

Although the constitutional principle held, the politics had changed. The political momentum behind the regulatory innovations stalled as the industry fiercely fought change at both the federal and state levels. In some states, the legislature overturned the regulatory changes. As a result, the women's organizations were unable to build nationally on early regulatory successes within key states.

Women's rights groups also challenged the continuing use of sex-distinct insurance rates and benefits[278] under existing state human rights and public accommodation statutes.[279] Although the women's groups achieved some initial successes before state administrative agencies and at the trial court level, the insurance industry later succeeded in persuading appellate courts that such state laws were inapplicable to sex-based insurance rates,[280] and

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[278] For a successful state law challenge to sex-based denial of access to fraternal benefits, see Franklin v. Order of United Commercial Travelers, 590 F. Supp. 255, 260 (D. Mass. 1984) (holding a fraternal benefit society in violation of a state statutory ban on sex discrimination when it denied the female plaintiff membership and insurance coverage not otherwise available to police force members through their municipal employer).

[279] *E.g.*, N.Y. EXEC. LAW § 296(2)(a) (McKinney 2014) (prohibiting any place of public accommodation from denying any of the accommodations, advantages, facilities or privileges thereof on the basis of, among other things, a person's sex); *see also* D.C. CODE § 2-1401.02(24) (2014) (defining an insurance company as a "place of public accommodation").

[280] Nat'l Org. for Women v. Metro. Life Ins. Co., 516 N.Y.S.2d 934, 397 (N.Y. App. Div. 1987) (reversing the trial court and dismissing the challenge to sex-based rates or benefits in life insurance and disability insurance); Thompson v. IDS Life Ins. Co., 549 P.2d 510, 513–14 (Or. 1976) (holding that sex-based rates could not be challenged under public accommodation statute because regulation of unfair discrimination in the business of insurance fell within the domain of the insurance commissioner); *see also* Nancy L. Ross, *Women's Groups Dealt Setback on Insurance*, WASH. POST, June 25, 1987, at F1 (reporting on appellate court in New York overturning trial court ruling in $21 million class action against Metropolitan Life Insurance Co.). *But see* Ins. Comm'r v. Equitable Life Assurance Soc'y of the U.S., 664 A.2d 862, 865, 873, 882 (Md. 1995) (discussing determinations below of Human Relations Commission and Insurance Commissioner that sex-based life insurance rates were inconsistent with the state Equal Rights Amendment, acknowledging relevance of human rights law, and remanding for further determinations by the Insurance Commissioner regarding applicable insurance law). Maryland's Commission on Human Relations began an investigation of Equitable Life in 1975 and thereafter issued a written finding that Equitable Life discriminated against blacks and females with respect to disability income, and health and life insurance policies. Equitable Life Assurance Soc'y of the U.S. v. State of Md. Comm'n on Human Relations, 430 A.2d 60, 61 (Md. 1981). The Commission next filed a statement of charges alleging various counts of discrimination in rate setting and underwriting practices. *Id.* Equitable Life filed a motion to dismiss, asserting the Commission's lack of jurisdiction, on the grounds that the practices placed in issue in the statement of charges were already subject to regulation by the Insurance Commissioner, and that Equitable Life was in full compliance with those regulations. *Id.* at

that if sex-based rates were actuarially justified, they were valid under state insurance laws.[281]

2. State Legislation Banning Sex-Based Life Insurance Rates or Benefits. Women's groups achieved an important state legislative success at the same time that they worked for legislation at the federal level.[282] Montana, another state with an Equal Rights Amendment,[283] was the first and only state to enact a statute banning sex-based rates and benefits for all types of insurance.[284] The insurance industry, including life insurance companies and industry trade organizations, actively lobbied against the legislation,[285] which was supported by key women's, civil rights, and labor groups within the state.[286]

61, 64, 66 (affirming ruling against insurance company below and holding that the Commission had jurisdiction to investigate discrimination in underwriting practices under public accommodations law despite concurrent regulation of insurance by insurance commissioner).

[281] Nat'l Org. for Women v. Mutual of Omaha Ins. Co., 531 A.2d 274, 276 (D.C. 1987) (affirming the dismissal of a challenge under D.C. human rights law of sex-based rates for health insurance as a violation of provisions requiring nondiscrimination in places of public accommodation).

[282] For discussion of proposed federal legislation, see *supra* Part III.A.

[283] MT. CONST. art. II, § 4.

[284] MONT. CODE ANN. § 49-2-309 (2013); *supra* note 257; *see, e.g.*, Nick Ravo, *Hartford Weighs Insurance Curbs*, N.Y. TIMES, Feb. 28, 1988, at 33 (reporting that in the previous year legislatures in twelve states had considered "unisex" insurance bills, that none advanced beyond initial hearings, and that proposed unisex legislation was opposed in Connecticut by the insurance industry).

[285] Minutes of the House Judiciary Committee, Jan. 28, 1983, Hearing on House Bill 358, at 10-11 and attached exhibits (Jan. 28, 1983) (listing the Northwestern Life Insurance Company, Montana Association of Life Underwriters, Independent Insurance Agents/ Association of Montana, American Council of Life Insurance, American Insurance Association and the Health Association of America as well as the Chief Deputy Commissioner of Insurance for the state Auditor's Office Insurance Division, as opponents of the proposed legislation); *see also* Minutes of the Senate Business and Industry Committee, Hearing on House Bill 358, 1-5 and attached exhibits (Mar. 19, 1983).

[286] Minutes of the House Judiciary Committee, Hearing on House Bill 358, at 9-10 and attached exhibits (Jan. 28, 1983) (listing the Women's Lobbyist Fund, the Montana League of Women Voters, American Association of University Women, the Montana Federation of Business and Professional Women's Club, the Montana Senior Citizen's Association, the National Organization for Women, the Montana Education Association, Montana Federation of Teachers, the American Civil Liberties Union, and the Associated Students of the University of Montana as supporters of H.358 to prohibit discrimination on the basis of sex or marital status in the issuance or operation of insurance policies and retirement plans); *see also* Minutes of the Senate Business and Industry Committee, Hearing on House Bill 358, 1-5 and attached exhibits (Mar. 19, 1983).

After the legislation was enacted in 1983, insurance companies engaged in a renewed lobbying effort to repeal it before it could go into effect in 1985.[287] Some life insurers threatened to withdraw their business from the state.[288] Although the industry successfully lobbied the Montana Legislature to repeal the unisex insurance provisions, the Governor vetoed the bill.[289] Since then, there have been periodic efforts to repeal the unisex insurance statute.[290] Nevertheless, the Montana unisex law remains in effect, and life insurers and members of the public generally appear to have adjusted to its requirements.[291]

E. LESSONS LEARNED

As the history of past reform efforts shows, threats by insurance companies to seek business opportunities in those states or markets without nondiscrimination provisions can make it politically difficult for state legislators and regulators to change industry pricing practices on their own. Even if those political obstacles can be overcome, state-by-state or market-by-market variation creates problems, including potential cost issues caused by a targeted selection of nondiscriminatory products by higher

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[287] *See* Ross, *supra* note 280 (discussing the fight to repeal the legislation).

[288] *See id.* (stating that only one insurer actually withdrew business from Montana).

[289] Jane Fitz Simon, *Who Wins with Unisex? Controversial Massachusetts Insurance Law May Finally Settle the Argument*, BOS. GLOBE, Aug. 27, 1987 (reporting that earlier in the year, "the Montana Legislature voted to repeal the unisex law, but Gov. Ted Schwinden vetoed the effort" and that a study conducted by the Montana state insurance department showed that prices for life insurance for women did increase after unisex became law, but paybacks to women also increased, effectively washing out the price jump, quoting Andrea Bennett, Montana commissioner of insurance and state auditor, on the findings as follows: "It was a very mixed bag. You can't say women were harmed or men were greatly harmed.").

[290] Avraham et al., *supra* note 14, at 250 n.142 (citing an online insurance newsletter for life and health insurance professionals that reported on an effort to repeal the Montana law in 2013, as well as in nearly every legislative session since the law's implementation).

[291] *See* Ross, *supra* note 280 (reporting on a survey of major life insurance company rates conducted by Montana in 1987 and noting that only one company, Aetna, pulled out of Montana and several new companies moved in); *see also* Anne Brodsky et al., *Effects of Montana's Non-Gender Law on Whole Life and Term Insurance and Annuities*, with transmittal letter by Marcia Youngman dated August 31, 1987 (on file at Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, NOW LDEF Collection, MC 623, Box 127, #4) (criticizing the state insurance department's study for failing to consider the positive benefit to women from increased annuity payouts and concluding that the increase in whole life premiums for women was almost completely counteracted in the long run by increases in cash values).

risk individuals or market segmentation by insurance product. Due to competitive pricing pressures, lasting change can occur only through uniform legal prohibition or some form of collective action by national associations of state insurance regulators and insurance industry professionals rather than through voluntary action by individual companies or by individual states.[292] Collective action problems, however, make it difficult for the industry itself to adopt uniform nondiscrimination requirements.

A number of factors finally combined to create a political consensus for change of race-based life insurance practices and ultimately led the industry to adopt race-merged mortality tables despite continuing race-correlated mortality differences.[293] At the time industry groups developed standard race-merged mortality tables in the 1960s, the insurance industry had been under pressure from civil rights groups for several decades, and political momentum was pointing toward the adoption of major civil rights reform legislation.[294] In addition, the industrial life insurance market, where higher "substandard" rates for blacks were most commonly found, was shrinking.[295] Other more integrated life insurance markets, by contrast, were growing and attracting the business of the biggest companies formerly active in the industrial insurance market.[296] Thus, the larger companies within the industry supported the prospective changes, and the smaller companies that remained in those markets were finally brought into compliance through state regulatory enforcement efforts and litigation many years later.[297]

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[292] *See* Abraham, *supra* note 26, at 408, 446 (discussing competitive pressures, skimming "good risks," and the need for some form of collective action for innovation to occur in classification systems).

[293] Heen, *supra* note 40, at 380.

[294] *Id.* at 369.

[295] *Id.* at 382.

[296] *Id.* (noting that the "Big Three" insurance companies had discontinued writing new industrial policies by the late 1960s). Recent reports suggest, however, that those trends may now be in the process of reversing, as companies experience declining ordinary life insurance coverage rates. Leslie Scism, *Struggling Life Insurers Seek a Middle-Class Revival*, WALL ST. J., July 25, 2014, at A1. MetLife, for example, has reportedly once again begun selling small individual life policies, with payouts as low as $2,500, decades after abandoning that business. *Id.*

[297] Heen, *supra* note 40, at 383.

Although the life insurance industry had a similar opportunity over thirty years ago to adopt a new gender-merged mortality table for life insurance, it opted instead to make its use of gender distinctions more consistent and pervasive by developing gender-distinct mortality tables for life insurance as well as for life annuities.[298] As more women entered the labor force following World War II, companies used lower life insurance rates for women as a marketing tool[299] in an expanding new market for life insurers.[300] By the late 1970s and early 1980s, it appeared that both the Equal Rights Amendment ratification effort and proposed federal legislation to ban discrimination in insurance would fail in the face of determined opposition, and the life insurance industry opted to formalize its gender-based pricing practices through the development of sex-segregated mortality tables to replace its use of age set-backs from the former gender-merged tables.[301]

The political momentum for change by then had stalled, making it difficult for women's groups to achieve additional legal prohibitions against gender-based insurance pricing.[302] Although comprehensive civil rights legislation banning discrimination in insurance is long overdue, enactment seems unlikely without

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[298] *See supra* Part III.A (discussing the development of the 1980 C.S.O. mortality tables).

[299] In 1958, for example, the John Hancock named its first woman Second Vice President in the company's history, Margaret Divver, formerly the company's advertising manager, to serve "in the field of special promotion as head of Women's Activities as they apply to the life insurance industry." Press Release, John Hancock Mutual Life Insurance Company, News Bureau (Tuesday, Feb. 11, 1958) (on file at Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Margaret Divvers, MC 337, Box 1, Folder 4). As part of her promotional activities, she held all-day women's forums in major cities aimed at working women and widows. Mary Fitzhenry, *Margaret Divver: Interpreter of Insurance*, 1 REALM FOR WOMEN OF ACCOMPLISHMENT 58 (Oct. 1963). A magazine profile described Divver as "an industry spokesman to the 'slighted' sex, now being sought as a market for life insurance," and that the marketing activities were promoted "in the hope that agents' sales will catch up with women's earning power." *Id.* at 56.

[300] INST. OF LIFE INS., LIFE INSURANCE FACT BOOK 16 (1954) (observing that "[w]hile life insurance has been written on the lives of women from the start of the business, it is only in the past generation that women have bought policies in any appreciable volume"). The 1954 Fact Book reports that "[a]t the end of 1953, men owned three-fourths of all life insurance in force in the United States" and "[f]rom 1948 to 1953, men increased their ownership 55%; women increased theirs 26% and children 42%." *Id.* Of the aggregate life insurance in force owned by women at the end of 1953, women owned $23.8 billion or thirteen percent of total regular ordinary insurance, $8.4 billion or twelve percent of total regular group, and $17.3 billion or forty-six percent of total industrial insurance in force. *Id.*

[301] *See* discussion *supra* Part III.A, B.

[302] *See supra* notes 223–26 and accompanying text.

renewed political effort by civil rights organizations and women's groups.

Incremental reforms in the United States provide a successful although somewhat limited experience with race-merged and gender-merged or "unisex" pricing of insurance products. A federalized approach to the civil rights principle of individual fairness worked very effectively in the context of insurance benefits provided by employers.[303] After the U.S. Supreme Court ruled that sex-distinct rates or benefits would not be permitted for employment-related retirement benefits, for example, employers and insurers throughout the country modified their practices in the employment setting by using sex-merged mortality tables to compute unisex rates and benefits.[304] In addition, some states have experience with nondiscrimination requirements as applied to various types of insurance sold to individuals outside of the employment setting.[305] Going forward, the experience with unisex rates in Europe, as discussed in greater detail in the next part,[306] will provide additional information about implementation issues and challenges for insurance provided outside of the employment relationship.

In sum, past efforts at reform, both successful and unsuccessful, establish the need for uniformity in the nondiscrimination rules applicable to insurers. Both the "public values" question of individual fairness and the technical issues related to adverse selection can be resolved most successfully if insurers are subject to mandatory nondiscrimination rules. However, in the absence of voluntary reconsideration of a unisex standard by groups of state regulators such as the NAIC and the uniform adoption of unisex tables by state regulators, federal legislation is needed to eliminate the remaining legal gaps. Comprehensive change will require coordinated federal leadership on these issues.

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[303] *See supra* notes 229–30 and accompanying text.

[304] *See* discussion *supra* Part III.C.

[305] *See* discussion *supra* Part III.D.

[306] *See* discussion *infra* Part IV.C.

IV. WHY NONDISCRIMINATION LEGISLATION IS TIMELY AGAIN

Civil rights issues connected with insurance classifications could become politically salient again for reasons related to recent developments in nondiscrimination law[307] and the reconsideration more generally of approaches to insurance regulation and risk sharing.[308] Those developments alter the policy landscape and background assumptions in a way that could lead to comprehensive federal nondiscrimination legislation in the future. In addition, current budgetary and demographic pressures[309] as well as major policy shifts abroad[310] may prompt renewed interest and increased federal expertise in insurance regulatory issues.

I discuss those developments in greater detail below, beginning first with a brief discussion of current domestic developments that could lead to a renewed civil rights focus on these issues. I then briefly highlight some evolving regulatory changes here and abroad that may prompt a more centralized or coordinated response to international developments by the federal government or by state regulators of the insurance industry in the United States. This part concludes with a description of how the European Union developed its unisex insurance mandate during the last decade, culminating in a 2011 ruling by the European Court of Justice that required member states to conform their laws to prohibit gender based pricing in all lines of commercial insurance beginning in 2012.

A. RENEWED FOCUS ON CIVIL RIGHTS

Congress has moved forward on several longstanding civil rights issues in the last several years,[311] including the passage of

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[307] *See* discussion *infra* Part IV.A.

[308] *See infra* notes 316–18 and accompanying text.

[309] *See* discussion *infra* Part IV.B.

[310] *See* discussion *infra* Part IV.C.

[311] After decades of advocacy by civil rights groups, for example, passage of civil rights legislation prohibiting discrimination in employment on the basis of sexual orientation may be within reach. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (adding discrimination based on sexual orientation to the list of prohibited employment practices under Title VII of the Civil Rights Act of 1964). The Act, as amended, passed the Senate 64–32, nearly twenty years after it was first proposed in 1994. S. REP. NO. 113-105, at 2–5 (2013); *U.S. Senate Roll Call Votes 113th Congress-1st Session*, SENATE.GOV, http://www.

important legislation involving discrimination in insurance. In a significant recent development, federal health care reform legislation, signed into law in 2010[312] and upheld by the U.S. Supreme Court in 2012,[313] banned discrimination in health insurance coverage,[314] and beginning in 2014, prohibits gender discrimination in setting certain health insurance rates and benefits.[315] The nondiscrimination provisions that Congress enacted in conjunction with health care reform, assuming they survive ongoing efforts to repeal the legislation, mark a significant recent step toward greater acceptance of the nondiscrimination principle as applied to gender-distinct insurance rates.

In adopting these and other requirements for health care coverage, Congress applied a hybrid approach to risk sharing. It departed in some respects from the approach to risk and cost allocation to risk classes typically encountered in private insurance markets. On the other hand, it rejected proposals for the type of single payer system found in governmental social insurance programs in countries with stronger traditions of social risk sharing.[316] Instead, Congress adopted a modified form of

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senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00232 (last visited Oct. 13, 2014). As of this writing, the House version of the bill, H.R. 1755, 113th Cong. (2013), has not moved forward to the floor for consideration by the House. *H.R. 1755 - Employment Non-Discrimination Act of 2013*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/houlse-bill/1755 (last visited Oct. 13, 2014). An earlier version of the bill passed the House in 2007. *H.R. 3685 — Employment Non-Discrimination Act of 2007*, CONGRESS.GOV, http://www.Congress.gov/bill/110th-congress/house-bill/3685?q=%7B"search"%3A%SB"Employment+non-discrimination+ act+of+2007"%SD%7D.

[312] Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 42 U.S.C.).

[313] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

[314] The PPACA provides that individuals shall not, on grounds prohibited under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act, or the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." Patient Protection and Affordable Care Act, § 1557(a), 42 U.S.C. § 18116 (2010).

[315] Beginning in 2014, in the individual and small group market, the health reform law will eliminate the ability of insurance companies to charge higher rates due to gender. Patient Protection and Affordable Care Act, § 1201, 42 U.S.C. § 300gg (2010).

[316] *See, e.g.*, Elizabeth Shilton, *Insuring Inequality: Sex-Based Mortality Tables and Women's Retirement Income*, 37 QUEEN'S L.J. 383, 432–34 (2011) (favoring the collective

"community rating" within an overall private market structure,[317] leading to more redistribution than would typically be found in private individual health insurance markets.[318] It remains to be seen whether the broad-based participation needed for that model to work well will be achieved as major health care reforms are implemented in the coming years. Nevertheless, the legislation marks a significant change in approaches to risk sharing and a willingness to impose civil rights limitations on insurers.

Congress also imposed nondiscrimination requirements on the insurance industry in 2008 when it enacted the Genetic Information Nondiscrimination Act (GINA), banning genetic discrimination in health insurance and in employment effective beginning in 2009.[319] However, GINA defines the term "genetic

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approach taken by post-war Canadian social insurance schemes that distributed welfare loss in retirement more broadly across the workforce).

[317] Patient Protection and Affordable Care Act, § 1201, 42 U.S.C. § 300gg-4 (2010) (amending § 2705 of the Public Health Service Act to limit the extent to which insurers can vary the rates they charge to customers based on actual or expected health status but permitting certain variation by age, family status, tobacco use, and state-approved rating areas).

[318] *See, e.g.*, Baker, *supra* note 117, at 1579–80, 1600–15 ("The act strongly reflects the belief that the distribution of health care costs should not depend on Brute Luck." (internal quotation marks omitted)); Nan D. Hunter, *Health Insurance Reform and the Intimation of Citizenship*, 159 U. PA. L. REV. 1955, 1956, 1974–75 (2011) (explaining that opening the insurance market to individuals of all health statuses required mandating healthy individuals to join insurance markets in order not to kill the private market).

[319] Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, 42 U.S.C.). GINA prohibits group health plans and health insurers from denying coverage to a healthy individual or charging that person higher premiums based solely on a genetic predisposition to developing a disease in the future. *Id.* § 101, 29 U.S.C. § 1182(b)(3). The legislation also prohibits employers from using individuals' genetic information when making employment decisions. *Id.* § 202, 42 U.S.C. § 2000ff-1. In enacting GINA, Congress made the following finding:

> Although genes are facially neutral markers, many genetic conditions and disorders are associated with particular racial and ethnic groups and gender. Because some genetic traits are most prevalent in particular groups, members of a particular group may be stigmatized or discriminated against as a result of that genetic information.

Id. § 2, 42 U.S.C. 2000ff note. Over half of the states have enacted similar legislation prohibiting or limiting insurers from requiring genetic testing of applicants or from requiring the results of tests done independently. KENNETH S. ABRAHAM, INSURANCE LAW & REGULATION 153–54 (5th ed. 2010). *See generally* Louise Slaughter, *Genetic Information Non-Discrimination Act*, 50 HARV. J. ON LEGIS. 41 (2013) (describing the enactment process, implementation since then, and gaps that remain).

information" to exclude information about the sex or age of any individual,[320] leaving many gender-based rating issues unresolved.

Focus on the fiftieth anniversary of the enactment of the Civil Rights Act of 1964 provides policymakers with renewed opportunities for reflection about nondiscrimination as a matter of principle and morality. Debates during the past decade about black reparations[321] and disclosures at the state level concerning slavery era[322] insurance practices have generated renewed interest in the history of race-based insurance practices.[323] Although the

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[320] Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881, 885, 890, 898, 901, 906 (codified in scattered sections of 26, 29, 42 U.S.C.).

[321] *E.g.*, Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135, 1135–38 (2004); *see, e.g.*, *In re* African-Am. Slave Descendants Litig., 304 F. Supp. 2d 1027, 1075 (N.D. Ill. 2004) (dismissing plaintiffs' slave reparations claims against various large corporations); *see generally* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (First Beacon Press 2003) (1973) (focusing on the effects of then living Afro-Americans who had been compelled by state law to attend segregated public schools); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014) (arguing that America will never be whole until it reckons with its compounding moral debts), http://www.theatlantic.com?features/archive/2014/05/the-case-for-reparations/361631.

[322] State laws enacted in the last ten to fifteen years require companies to make certain slavery era disclosures, comprising a "slavery era insurance registry," which have been summarized in reports compiled by state insurance departments. *See, e.g.*, Cal. Dep't of Ins., Slavery Era Insurance Registry Report to the California Legislature, at 7–8 (May 2002), http://www.insurance.ca.gov/01-consumers/150-other-prog/10-seir/upload/Slavery-Report.pdf (reporting, for example, that the predecessor of New York Life began writing policies in 1845; of the first thousand policies sold, about a third were on the lives of slaves); Ill. Dep't of Ins., Slavery Era Policies Report (Aug. 2004), http://insurance.illinois.gov/Consumer/SlaveryInformation/SlaverySummaryReport.asp (disclosing the slavery-era policies of five different insurers as required by legislative action).

[323] Some states have required more comprehensive disclosure of race-based practices. For example, in 2000, the State of New York Insurance Department directed each domestic and foreign life insurer and fraternal benefit society to review its past and current underwriting practices regarding race-based underwriting and to report its findings to the Department no later than August 15, 2000. Memorandum, Supplement 1 to Circular Letter No. 19, from N.Y. Ins. Dep't, to All Licensed Life Insurers and Fraternal Benefit Soc'ys (June 22, 2000), http://www.dfs.ny.gov/insurance/circltr/2000/c100_19_s1_00.htm. The Department specified that all relevant documents should be included in such a review, "including, but not limited to, rate charts, mortality tables, labor negotiation documents with distribution force unions, agent and broker contracts, compensation schedules, underwriting and agent manuals, applications, policy form filings, board of directors (and committee) minutes, and internal memoranda." *Id.*

The Department defined race-based underwriting as including but not limited to one or more of the following practices:

> refusing to insure; refusing to continue to insure or limiting of the amount, extent or kind of coverage available; charging or collecting higher premiums or rates; making or requiring any rebate upon the amount paid; assigning of substandard risk classifications; crediting of or providing lower

slavery era is long past, the Jim Crow era is not, and there have been continuing effects from Jim Crow era practices on some individuals currently living.[324] Revisiting these issues provides renewed impetus for scrutiny of other classification practices, including gender-based pricing practices.

In coming years, budget-driven concerns about Social Security and other proposed entitlement reforms may lead to increased reliance on tax-funded or tax-favored private individual investment accounts for future retirement savings.[325] The question of how those accumulations at retirement might be converted into lifetime annuity benefits raises important issues of government policy.[326] Although employment-related pensions have been subject to the sex discrimination prohibitions under civil rights statutes since the 1970s and 1980s,[327] whether lifetime annuities purchased by individuals with funds accumulated in personal tax-favored or funded accounts would be made available on a sex neutral basis remains to be established. Under current practices in the market for individual annuities, women receive lower benefits than men when sex-based actuarial tables are used

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> dividends, policy benefits or nonforfeiture values; making any distinction as to policy terms or conditions; imposing greater underwriting requirements (medical vs. non-medical); and fixing of any fees or commissions in a manner as to encourage or discourage the writing or renewing of a specific type of policy.

Id.; Heen, *supra* note 40, at 367 n.46.

[324] *See generally* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1376–78 (2004) (distinguishing between the rationale for slavery-era and Jim Crow-era reparations).

[325] There were a number of proposals made during the second Bush presidency. *See*, e.g., Growing Real Ownership for Workers Act of 2005, H.R. 3304, 109th Cong. (dedicating Social Security revenue surpluses to personal accounts); *see also* Memorandum from Stephen C. Gross, Soc. Sec. Admin. Chief Actuary, and Alice H. Wade, Deputy Chief Actuary, to Representatives McCrery, Shaw, Johnson, Ryan, and Shadegg, at 2 (July 15, 2005), http://www.ssa.gov/oact/solvency/McCrery_20050715.pdf (assuming that inflation-indexed lifetime annuities would be made available for purchase from accumulated funds but not specifying the actuarial assumptions used to compute benefits).

[326] For an example of an economic model for estimating the efficiency and distributional effects of shifting to gender neutral retirement annuities in the United Kingdom, see Amy Finkelstein, James Poterba & Casey Rothschild, *Redistribution by Insurance Market Regulation: Analyzing a Ban on Gender-Based Retirement Annuities* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 12205, 2006) (noting that their analysis "may also have broader implications for the design and regulation of annuitized payout structures associated with defined contribution Social Security systems") .

[327] *See* discussion *supra* Part III.C.

to compute lifetime benefits. Once the pocketbook implications of such ongoing reform proposals are more widely understood, women's rights organizations might press again for legislation banning sex discrimination in annuity payouts.

In the future, demographics favor reform. Baby boomers born after World War II are beginning to enter their retirement years.[328] This group promises to put unprecedented strain on the Social Security and Medicare systems;[329] as a result, commercial annuities will likely grow in importance as a source of retirement income for boomers and the following generation of retirees.[330] Many baby boomer women, who won hard-fought rights to equal treatment in employment, credit, housing, and education during the 1970s and 1980s, will suffer the bottom-line pocketbook implications of higher rates or lower sex-based benefits when purchasing life annuities from private commercial insurance companies.[331] Receiving lower benefits than similarly situated men with funds they have accumulated outside of employer provided pension plans might be unacceptable to them.[332] If women's organizations and civil rights groups successfully

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[328] SOCIAL SECURITY ADMINISTRATION, ANNUAL PERFORMANCE PLAN FOR FY2012 AND REVISED FINAL PERFORMANCE PLAN FOR FY2011, *Strategic Goal, Improve our Retiree and Other Core Services,* 35–36 (noting that baby boomers are reaching their retirement years and estimating that nearly 80 million boomers will file for retirement benefits over the next twenty years—an average of 10,000 per day).

[329] *Id.*

[330] *See, e.g.*, Jeffrey R. Brown, *Rational and Behavioral Perspectives on the Role of Annuities in Retirement Planning* 26 (Nat'l Bureau of Econ. Research, Working Paper No. 13537, 2007) (describing new annuitization products and stating that with the approaching retirements of baby boomers, "the issue of how to convert wealth into a secure stream of retirement income is increasingly on the minds of individuals, insurance companies, and policy makers").

[331] *See* James M. Poterba, *Retirement Security in an Aging Society* 39, 41 (Nat'l Bureau of Econ. Research Working Paper No. 19930, 2014) (describing current annuity payout rates for men and women and the trend in retirement planning focusing on the need to generate a secure income stream in retirement).

[332] Gender-based benefits can also occur with funds accumulated in employment-related retirement plans. Although most employment-related retirement plans such as 401(k) plans provide lump sum payouts at retirement, a much smaller percentage of plans provide annuity payout options. Brown, *supra* note 330, at 8, 29–30 (noting also that it has been estimated by the Congressional Research Service that eighty-five percent of the workers included in a retirement plan at work participated in a plan that offered a lump-sum distribution at retirement). A female retiree who uses all or a part of a lump-sum plan distribution to purchase a private commercial lifetime annuity will pay higher premium rates or receive lower lifetime periodic annuity benefits than a similarly situated male retiree.

mobilize women's growing political clout on this issue, the women's movement could receive another opportunity to accomplish a major unfinished part of its agenda for economic equality.

B. GREATER FEDERAL REGULATORY ROLE IN INSURANCE

In the past, the American insurance industry generally has objected to proposed federal intrusions[333] into the states' regulation of the business of insurance.[334] For over a century, the business of insurance has been subject to state, not federal, regulation.[335] However, in response to new competitive pressures[336] and opportunities posed by national and international financial markets, the insurance industry has modified its longstanding opposition to federal regulation.[337] Important components of the life insurance industry support the adoption of an optional federal regulatory regime for the business of insurance,[338] modeled on the regulatory regime applied to the

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[333] HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 442 (1999). For a brief period in the mid-nineteenth century, leading figures in the insurance industry favored federal regulation when compliance with state regulations became more burdensome. According to a leading historian of the insurance business, the movement for federal regulation of insurance failed, however, for three main reasons: (1) it was opposed by an influential state regulator, New York's Commissioner of Insurance; (2) in the late 1860s, the U.S. Supreme Court ruled in *Paul v. Virginia*, 75 U.S. 168 (1868), that an insurance policy was not a transaction in commerce; and (3) the organization of the National Convention of Insurance Commissioners in 1871 provided a mechanism for more uniform state regulation. R. CARLYLE BULEY, THE AMERICAN LIFE CONVENTION, 1906–1952, A STUDY IN THE HISTORY OF LIFE INSURANCE, vol. 1, at 83–84 (1953).

[334] *See* United States v. SouthEastern Underwriter's Ass'n, 322 U.S. 533, 546–53 (1944) (rejecting the insurers' argument to deem the insurance market beyond the regulatory power of Congress by holding that the business of insurance constituted interstate commerce, thereby overturning *Paul v. Virginia*, 75 U.S. 168 (1868)).

[335] In 1945, Congress enacted the McCarran Ferguson Act, 15 U.S.C. § 1012(a) (2011), which provided that the states would have primary authority for regulation of the business of insurance.

[336] *See, e.g.*, Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (codified in scattered sections of 12, 15, 16 and 18 U.S.C.) (enhancing competition in the financial services industry).

[337] *E.g.*, Danielle F. Waterfield, *Insurers Jump on Train for Federal Insurance Regulation: Is it Really What They Want or Need?*, 9 CONN. INS. L.J. 283, 292–93 (2002) ("Many insurance groups believe that insurers should have the same advantage of a single supervisory body as their competitors have.").

[338] *See Insurance Regulation*, AMERICAN COUNCIL OF LIFE INSURERS, http://www.acli.com/Issues/Insurance%20Regulation/Pages/65.aspx (last visited Oct. 13, 2014) (outlining two

banking industry.[339] This may eliminate the broader objection "in principle"[340] to federal regulation of insurance and focus the debate more clearly on the specific issues raised by federal civil rights legislation.

In addition, as a practical matter, federal legislators and regulators are acquiring greater experience with the regulation of private insurance in the context of health care reform. In recognition of the states' history and expertise in regulating the insurance industry, the Affordable Care Act adopted a federal and state cooperative model of regulation by leaving to the states the enforcement of the Act's insurance regulatory reforms, the review of health insurance premiums, and assistance with consumer complaints against insurance companies.[341] In addition, the Act requires consultation with the National Association of Insurance Commissioners (NAIC)[342] before the federal Department of Health and Human Services (HHS) takes action in several key areas.[343] HHS must consult with NAIC, for example, before issuing regulations for the establishment and operation of health insurance exchanges and determining the requirements for the

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separate tracks for improving insurance regulation: to work with the National Association of Insurance Commissioners to make the state-based system more uniform; and to support federal legislation that provides an optional federal charter for insurance companies); Press Release, Broad Coalition Asks Congress for an Optional Federal Charter for Insurers and Insurance Agents (June 14, 2005), http://www.bipac.net/afc/insurance_agents.pdf (stating that "135 national and regional insurance companies and agencies, banks, and trade associations asked the U.S. Senate to enact optional federal insurance charter legislation").

[339] *See* OPTIONAL FEDERAL CHARTERING AND REGULATION OF INSURANCE COMPANIES 1, 150 (Peter J. Wallison ed., 2000) ("[I]ncreasing segments of the insurance industry favor a federal chartering option so that the insurance industry will have a dual chartering option that has long been available to banking.").

[340] *Id.* at 11.

[341] Timothy Stoltzfus Jost, *Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 2043, 2044 (2010); *see also* 42 U.S.C. § 18041(b)(2) (2010) (granting states the right to adopt regulations that implement Federal standards); 42 U.S.C. § 300gg-93(c) (2010) (concerning the authority to educate and assist consumers on health care plans); *id.* § 300gg-94(a)(1) (granting authority of the Secretary and the States to review insurance premiums).

[342] For a brief description of the NAIC, see *supra* note 148 and accompanying text.

[343] *See* Jost, *supra* note 341, at 2045–46 (noting certain actions requiring consultation with the Department of Health and Human Services).

offering of qualified health plans through the exchanges.[344] In contemplating a continuing role for the states and state insurance interest groups in the implementation of the federal health care reform legislation, the legislation follows a hybrid model in which federal regulation does not completely supplant state regulation of insurance.[345] Congress may or may not opt to follow a similar model in the context of civil rights reform. As noted earlier, prior proposed federal nondiscrimination legislation contained a requirement that state-based remedies be exhausted within a specified time period before filing a federal complaint.[346]

Other more general regulatory reform in the United States and in Europe related to concerns about "too-big-to-fail" financial companies, including insurance companies, may result in the development of greater expertise within the federal government on insurance regulatory matters and a larger insurance regulatory role for the federal government. In 2010, the Dodd-Frank Act established the Federal Insurance Office (FIO) within the United States Department of the Treasury.[347] Although the FIO does not currently play a regulatory or supervisory role[348]—a role that under current law is left to the states—it remains to be seen what role the federal government will play in the future. In any event, the FIO marks a recent, important step toward a greater federal governmental role with regard to insurance.

Most relevant to civil rights issues, under the Act, the FIO monitors the availability and affordability of insurance for underserved communities, minorities, and low and moderate

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[344] *Id.*; *see also* 42 U.S.C. § 18041(a)(2) (2010) ("In issuing the regulation under paragraph (1), the Secretary shall consult with the National Association of Insurance Commissioners . . . .").

[345] For a discussion of transparency concerns about the role of state interest groups, including the NAIC, in federal administration of health care reform legislation, see generally Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014).

[346] *See supra* note 128 and accompanying text.

[347] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Title V, § 502, 124 Stat. 1376, 1580 (2010) (codified in scattered sections of 31 U.S.C.) (establishing the office). The Federal Insurance Office's authority extends to all lines of insurance except health insurance, long-term care insurance (except that which is includes life or annuity insurance components), and crop insurance. 31 U.S.C. § 313(d) (2012).

[348] *See* Elizabeth F. Brown, *Will the Federal Insurance Office Improve Insurance Regulations?*, 81 U. CIN. L. REV. 551, 581–85 (2012) (discussing the functions of the insurance office).

income consumers.[349] In its 2013 report to Congress,[350] the FIO included among the areas it identified for direct federal involvement in regulation "the manner in which personal information is used for insurance pricing and coverage purposes."[351] In its discussion of risk classification issues, the report noted that important questions regarding the boundaries or limitations on the use of personal information should be answered in the context of insurance, and "regulatory policy and practice must clarify that the criteria and methodologies actually used by insurers not rely on impermissible or discriminatory factors."[352] It observed that "[r]isk classification factors may be an appropriate subject for binding, uniform federal standards, particularly to the extent that insurance scoring methodologies involve factors that implicate rights secured under federal law."[353] The report also acknowledged that the "technical evolution of insurance pricing has been driven by advances in data mining and technological capability," and that "responsible use of . . . techniques that impose[ ] higher prices on truly risky behavior should be permitted."[354] Nevertheless, according to the report, the availability of data "does not mean that any data is relevant to determining the insurance premiums they pay."[355] The report announced that, "[i]n support of its responsibility to monitor access

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[349] 31 U.S.C. § 313(c)(1)(B) (2012).

[350] The Act required FIO to submit a report to Congress on how the insurance regulatory system in the United States can be modernized and improved. *Id.* § 313(p). In 2011, the FIO invited public comments on the planned coverage of the report, to be submitted by December 16, 2011. Public Input on the Report to Congress on How to Modernize and Improve the System of Insurance Regulation in the U.S., 76 Fed. Reg. 64,174 (Dep't of Treas. Oct. 17, 2011) (notice and request for comment) (inviting comment on, among other topics, the "costs and benefits of potential Federal regulation of insurance across various lines of insurance (except health insurance)"). Although the report was due in January 2012, it was finally issued nearly two years later. FEDERAL INSURANCE OFFICE, U.S. DEP'T OF THE TREAS., HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES, http://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/How%20to%20Modernize%20and%20Improve%20the%20System%20of%20Insurance%20Regulation%20in%20the%20United%20States.pdf [hereinafter FIO, HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES].

[351] FIO, HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES, *supra* note 350, at 7–8.

[352] *Id.* at 57.

[353] *Id.*

[354] *Id.*

[355] *Id.*

to affordable insurance to traditionally underserved communities, FIO will study the appropriate boundaries of use of personal information for insurance pricing and coverage purposes."[356] Although the Treasury did not specifically raise the issue of gender-based or race-based pricing in connection with its concern about the types of personal data used in insurance pricing, the area carved out in its report for additional study is broad enough to encompass the use of gender or race in risk classification systems.

The FIO also advises the Treasury on other domestic and international insurance issues—in part to identify issues in that sector that could contribute to a broader systemic financial crisis[357]—and in part to respond to the need for a centralized governmental role in international negotiations. The FIO, for example, has the authority to represent the federal government at meetings of the International Association of Insurance Supervisors (IAIS) and similar international organizations.[358] The FIO develops and coordinates federal policy on international insurance regulatory matters.[359] Significantly, Dodd-Frank also provides the FIO with authority under limited circumstances to preempt state insurance measures if they conflict with certain covered international agreements.[360]

Developments in Europe related to insurance financial solvency requirements or solvency equivalence standards under European Commission directives[361] and by the IAIS[362] require negotiation

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356 *Id.*

357 The Dodd-Frank Act created a new "Financial Stability Oversight Council" with authority to identify systemically risky nonbank financial companies that will be subject to enhanced supervision by the Federal Reserve. 12 U.S.C. §§ 5321–5322 (2012); Financial Stability and Oversight Council, Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637 (Apr. 11, 2012) (final rule and interpretive guidance). The Secretary of the Treasury serves as one of ten voting members of the council and the Director of the FIO serves as one of five nonvoting members, as does a state insurance commissioner designated by a selection process determined by the state insurance commissioners. 12 U.S.C. § 5321(b) (2012).

358 31 U.S.C. § 313(c)(1)(E) (2012).

359 *Id.* § 313(c)(1)(E)–(H).

360 *Id.* § 313(c)(F), (f), (j) (regarding state insurance measures that involve the less favorable treatment of foreign insurers but providing in a savings provision that the FIO may not preempt state measures that govern rates or premiums).

361 *See, e.g.*, Council Directive 2009/138, 2009 O.J. (L 335) (EC), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0138 [hereinafter Council Directive

and response from the U.S. government as well as representatives from state regulatory bodies if U.S. insurance companies are to continue to compete effectively in global insurance markets. For example, one of the objectives of the European Commission's "Solvency II" directive includes international regulatory convergence of equivalent standards.[363] Thus, the United States and the European Union have been in bilateral transitional conversations about how the insurance regulatory system in the United States relates to those European solvency requirements.[364] Both the federal government (through the Treasury and the FIO) and representatives of state regulators from the National Association of Insurance Commissioners have been involved in the discussions with the European Commission in attempts to translate the very different regulatory system in the United States into European language.[365]

In sum, how the state regulatory system of insurance in the United States fits within the regulatory systems developing abroad in the globalized insurance market remains to be seen; in any event, in the meantime, international negotiations require a more active role and development of expertise by the federal government in the business of insurance—an overall trend that may fit as well within a more active civil rights role for the federal government in the domestic insurance sector.

2009/138]; Council Directive 2014/51, 2014 O.J. (L 153/1) (EU), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.153.01.0001.01.ENG.

[362] The IAIS, a voluntary association of insurance regulators from 140 countries, has advanced several initiatives, including non-binding insurance core principles, a common framework for the supervision of internationally active insurance groups, and proposed global financial stability determinations, known as G-SIFI (for globally systemically important financial institutions), analogous to the determinations to be made by Dodd-Frank's Financial Stability Oversight Council in the United States. *Insurance Core Principles, Standards, Guidance, and Assessment Methodology*, INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS 4–9 (Oct. 1, 2011, as amended), http://www.iaisweb.org/Insurance-Core-Principles-material-adopted-in-2011-795.

[363] Council Directive 2009/138, *supra* note 361, at 11.

[364] *EU-U.S. Insurance Project: The Way Forward*, at 2 (July 2014), *available at* http://ec.europa.eu/internal_market/insurance/docs/solvency/201407-way-forward_en.pdf.

[365] *Id.* at 3.

C. UNISEX INSURANCE RATES IN EUROPE

In 2004, the Council of the European Union[366] issued a directive implementing the principle of equal treatment between women and men[367] in the "access to and supply of goods and services," with specific reference to insurance and related financial services.[368] The directive found that the "use of actuarial factors related to sex is widespread in the provision of insurance"[369] and that to ensure equal treatment between men and women, it provided in Article 5(1) that "the use of sex" as an actuarial factor should "not result in differences in individuals' premiums and benefits."[370] This has since been referred to as the directive's "unisex rule" of premiums and benefits.

The directive initially applied to new contracts issued after December 21, 2007, with a limited deferral period permitted[371] under a modification of an earlier draft of the directive, which would have outlawed the practice of gender-based differential pricing in

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[366] The European Council of Ministers is composed of ministers of member state governments who have the authority to bind their member states. *See* ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 46–47 (2004). The Council, whose members are required to act independently and to promote the EU's interests, acts on proposals of the European Commission, which has the power to draft and propose legislation and to implement EU policy. *Id.* The Treaty on the Functioning of the European Union authorizes the Council to issue a Directive when "acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU, previously the Treaty Establishing the European Economic Community), arts. 13(1)), 19(1), Mar. 30, 2010, 2010 O.J. (C 083/56), *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML.

[367] The principle of equal treatment between men and women can be found, among other places, in the Charter of Fundamental Rights of the European Union, arts. 21, 23, 2000 O.J.

[368] Council Directive 2004/113, 2004 O.J. (L. 373) 38 (EC) [hereinafter Council Directive 2004/113].

[369] *Id.*

[370] *Id.* at 41.

[371] The Directive applied to "new contracts concluded after the date of transposition" of the Directive. *Id.* at 38. The Directive provided for a transposition date of December 21, 2007, though that date could be deferred for an additional two years. *Id.* at 41, 43. Requiring women to pay more for insurance coverage for "[c]osts related to risks of pregnancy and maternity" was to be considered a form of "direct discrimination" and was expressly prohibited by the Directive. *Id.* at 39.

insurance by the summer of 2005.[372] The final modified version of the directive, following an active lobbying campaign by the insurance industry,[373] observed that "[c]ertain categories of risks may vary between the sexes," and in Article 5(2), allowed member states "to permit exemptions from the rule of unisex premiums and benefits."[374] The directive specified that the exemptions were to be based on reliable data made available to the public, and any exemptions must be regularly reviewed.[375] Furthermore, exemptions were not permitted where legislation in individual countries has barred sex-based premiums and benefits.[376]

Legislation enacted by Belgium in 2007 to exempt life insurance from the application of the directive was challenged in the constitutional court of Belgium by a non-profit consumer organization and two private individuals.[377] Because their action

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[372] Several major member countries objected to the earlier proposal. *See, e.g.*, Robert Watts, *EU Forced to Drop Plans for Unisex Premiums*, TELEGRAPH (June 14, 2004, 10:51 AM), http://www.telegraph.co.uk/finance/personalfinance/insurance/2888015/EU-forced-to-drp-plans-for-unisex-premiums.html (discussing the elimination of the insurance clause from the EU's proposed gender directive). For background on prior consideration of this issue in Europe, including discussion of member country provisions and a "missed opportunity" by the European Community Court of Justice to eliminate gender discrimination in occupational pension plans, see generally Wouter P.J. Wils, *Insurance Risk Classifications in the EC: Regulatory Outlook*, 14 OXFORD J. LEGAL STUD. 449 (1994). *See also* DAVID PANNICK, SEX DISCRIMINATION LAW 189–96 (1985) (discussing the exception for insurance in sex discrimination statutes enacted during the 1970s and early 1980s in the United Kingdom, New Zealand, Canada, and Australia); Matthias Jestaedt, *Protection Against Discrimination and Private Autonomy*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1027, 1032 (2005) (discussing European antidiscrimination law that prevents sex discrimination in access to goods and services); Matthias Mahlmann, *Prospects of German Antidiscrimination Law*, 14 TRANSNAT'L L. & CONTEMP. PROB. 1045, 1048, 1062 (2005) (discussing Germany's post-war antidiscrimination policies and prevention of differing treatment for pregnancy and motherhood in insurance).

[373] For a discussion of the lobbying campaign by insurance companies and the internal inconsistency in the directive resulting from those modifications, see Geert De Baere & Eveline Goessens, *Gender Differentiation in Insurance Contracts After the Judgment in* Case C-236/09, Association Belge Des Consommateurs Test-Achats ASBL v. Conseil Des Ministres, 18 COLUM. J. EUR. L. 339, 360 (2012). Business interests in the United States also weighed in by expressing their concerns about the EU proposals. *See Position Paper on Gender Discrimination* (American Chamber of Commerce to the European Union), Aug. 2, 2004, at 5 (arguing that the proposed directive would "explicitly . . . undermine the principle of risk-based pricing," which would prove, "over the long-term . . . to be socially inequitable").

[374] Council Directive 2004/113, *supra* note 368, at 39.

[375] *Id.*

[376] *Id.*

[377] Case C-236/09, Ass'n Belge des Consommateurs Test-Achats ASBL and Others, Opinion of Advocate General Kokott (Sept. 30, 2010), *available at* http://curia.europa.eu/juris/docume

for annulment questioned the validity of Article 5(2) of the directive, the court referred the case to the European Court of Justice (ECJ) for a preliminary ruling.[378] The ECJ in *Association Belge des Consommateurs Test-Achats ASBL v. Council* declared Article 5(2) invalid effective beginning on December 21, 2012. It held that Article 5(2), by allowing member states to maintain without temporal limitation an exemption from the unisex rule of Article 5(1), was inconsistent with the purpose of the directive as defined by the legislature—to achieve the objective of equal treatment between men and women in relation to the calculation of insurance premiums and benefits—and thus, was incompatible with the Charter of Fundamental Rights of the European Union.[379]

Commenting on the significance of the ECJ's ruling in *Test-Achats*, the European Commission Vice-President Viviane Reding, the EU's Justice Commissioner, began by referring to landmark rulings by the U.S. Supreme Court involving employee retirement contributions and benefits:

> Today is an important moment for gender equality in the European Union. 30 years ago, the Supreme Court of the United States ruled that the Civil Rights Act of 1964 prohibits different treatment of insured persons on the basis of their sex in connection with pension funds. Today, the EU's Court of Justice ruled that different insurance premiums for women and men constitute sex discrimination and are not compatible with the EU's Charter of Fundamental Rights. Member States are not allowed to derogate from this important principle in their national legislation. The relevant "opt out" clause in the Council's 2004 Directive on gender equality is thus illegal.[380]

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[378] *Id.*

[379] Case C-236/09, Ass'n Belge des Consommateurs Test-Achats ASBL v. Council (Mar. 1, 2011), http://curia.europa.eu/juris/document/document.jsf?text=&docid=80019&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=910025.

[380] Sex Discrimination in Insurance Contracts: Statement by European Commission Vice-President Viviane Reding, the EU's Justice Commissioner, on the European Court of

In addition, after noting that all EU member countries currently permitted insurers to use sex as a risk-rating factor in life insurance and annuities, she observed that in auto insurance, unisex premiums were already applied in Belgium, Bulgaria, Cyprus, Estonia, Latvia, Lithuania, the Netherlands, and Slovenia.[381] She announced that she would meet in the coming months with the insurance industry to discuss the implications of the ECJ's judgment.[382] She ended by observing "[f]ollowing today's judgment, it is now clear that an insurance company must not distinguish between women and men; all customers must be treated equally. This is a matter of respect for fundamental rights. It is now also becoming a matter of good business practices."[383]

After meetings with representatives of the insurance industry and other interested groups, the European Commission issued guidelines on its directive in light of the ECJ's judgment in *Test-Achats*.[384] In general, the guidelines specify that the "unisex rule" would apply to contracts entered into after December 20, 2012, and that after that date, any opt-out in national law under Article 5(2) would cease to be effective.[385] They offer detailed guidance on what constitutes a "contract" or "new contract" for that purpose, after stating that uniform application requires a conception of contract that might be different from the contract laws of the member states.[386]

The guidelines also describe the ways that sex can be used for purposes of overall cost and solvency determinations. Thus, although sex cannot be used as a factor for calculating an *individual's* premiums or benefits, it may be used in rating the risk of a group in the aggregate.[387] Accordingly, information on sex may still be collected and used for risk assessment and overall cost monitoring purposes, including the following: internal risk

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Justice's ruling in the *Test-Achats* case, Brussels (Mar. 1, 2011), *available at* http://europa.eu/rapid/press-release_MEMO-11-123_en.htm.

381 *Id.*

382 *Id.*

383 *Id.*

384 EC Guidelines, *supra* note 22.

385 *Id.* ¶¶ 5, 6, 24.

386 *Id.* ¶¶ 9, 10–12.

387 *Id.* ¶ 14.

assessment, particularly to comply with solvency rules and in monitoring their portfolio mix from an aggregate pricing perspective; setting the price of reinsurance so long as it does not affect the price for an individual; and in certain targeted marketing and advertising to influence their portfolio mix as long as they do not refuse access to a specific product because of a person's sex.[388] The Commission also clarified that the unisex rule does not extend to other factors independent of sex such as family history or health status.[389] Factors correlated with sex may be used so long as they do not put one sex at a particular disadvantage; such indirect discrimination is permissible if there is a legitimate aim[390] or the sex-correlated factor is a risk in its own right.[391]

The guidelines clarify that the Directive applies only to insurance and retirement annuities or pensions which are private, voluntary, and separate from the employment relationship since another directive deals with the equal treatment of men and women in relation to occupational pensions.[392] In addition, the directive notes that it has no application to the use of age and disability, factors that the Directive classifies as not correlated with gender.[393]

Finally, the Commission announced that it will be monitoring the implementation of the guidelines[394] and urged the insurance industry "to make the necessary adjustments and offer attractive unisex products to consumers without an unjustified impact on the overall price levels."[395] It closed by noting that it would remain

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[388] *Id.*

[389] *Id.* (relating to life and health underwriting, where certain physiological differences may have an impact that is different for each sex).

[390] *Id.* ¶ 16.

[391] *Id.* ¶ 17; *see also id.* ¶ 17 n.15 (giving an example of permissible differentiation in auto insurance based on the size of a car engine even if statistically men drive cars with more powerful engines; but providing a contrary impermissible example of differentiation based on the size or weight of a person in that context).

[392] *Id.* ¶¶ 21–23; *see* Shilton, *supra* note 316, at 416 (stating that the status in Europe of sex-based mortality tables within employment-related pensions "continues to be governed directly by article 119 and *Directive 86/387*, which combine to outlaw [sex-based mortality tables] that produce sex-differentiated employee contributions and benefits, but leave loopholes for [sex-based mortality tables] to continue affecting transfer/commuted values. . . .").

[393] EC Guidelines, *supra* note 384, ¶¶ 18–20.

[394] *Id.* ¶ 24.

[395] *Id.* ¶ 25.

"vigilant" to detect any such unjustified rise in prices, including under the tools "available under competition law in the event of alleged anti-competitive conduct,"[396] and that it would report on the implementation of the unisex rule in 2014 in a report on the implementation of the Directive.[397]

In summary, a uniform "unisex rule" was achieved in Europe through unified legislative action. Despite the insurance lobby's success in adding an "opt-out" provision for member countries, the European Court of Justice invalidated the opt-out provision, holding that such a provision undermined the legislation's purpose of achieving equal treatment of men and women. Now all member countries must conform their national legislation to the unisex standard for insurance rates and benefits. Time will tell how the insurance markets in Europe will adjust to the unisex rule and how the pricing changes will affect men and women in different lines of insurance.

Because of globalized markets and trends toward regulatory convergence abroad, it is likely that the developments in Europe will provide those U.S. companies with foreign business and foreign affiliates[398] an incentive to accommodate their international operations to the new rules and to gain familiarity with the European standard of equal treatment of men and women. The enactment of comprehensive civil rights legislation banning discrimination in insurance would not only create domestic uniformity on these issues, but it would also create greater international uniformity and result in a stronger commitment to equal treatment of men and women.

V. CONCLUSION

Previous domestic and international efforts to eliminate insurance rates based on race or gender provide valuable lessons about the principles and practicalities of future reform. Common

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396 *Id.*

397 *Id.* ¶ 26. As of this writing, the Commission has solicited comments on implementation by member states from a network of equality bodies in member states and from various stakeholders and nongovernmental organizations, but the report has not yet been issued.

398 *See* Scism, *supra* note 296, at A10 (reporting that "Prudential, the nation's second largest life insurer, earns about half its operating income in other countries" and that "about 30% of MetLife's operating income now comes from outside the U.S.").

themes run through the history of reform efforts extending from the last century to the last few years: first, there must be a regulatory structure available to achieve uniform application of nondiscrimination rules; and second, after political consensus has been reached to use that structure to put the nondiscrimination principle into action, experience shows that the insurance industry has the practical capacity to adapt its pricing practices to such a principle while maintaining its overall solvency or profitability.

Pricing practices can be successfully changed, as shown by the transition under federal law over thirty years ago to unisex rates and benefits in employment-related insurance and retirement plans, by the implementation of state-level antidiscrimination provisions applicable to different lines of insurance, and more recently, by the on-going transition to unisex rates in the context of private, voluntary commercial insurance in Europe. The nondiscrimination rules generally have been applied prospectively rather than retroactively, giving the insurance industry time to adjust to the new rules without unsettling past contractual expectations. In both domestic and international settings, solvency issues have been addressed under new unisex rules by permitting the use of actuarial statistics and well-developed methodologies to determine overall costs and reserves for the insurer's business in the aggregate but not to determine rates or benefits that differ for similarly situated individual men and women.

Given these principles and practicalities of reform, it is time for Congress to write another chapter of civil rights law by enacting comprehensive federal civil rights legislation to ban discrimination in insurance. As Martin Luther King, Jr. said a half century ago, before Congress enacted the Civil Rights Act of 1964, "The arc of the moral universe is long, but it bends toward justice."[399]

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[399] King paraphrased the words originally attributed to an American abolitionist minister, Theodore Parker, from a sermon originally published in 1853:

> I do not pretend to understand the moral universe, the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. But from what I see I am sure it bends towards justice.

THEODORE PARKER, TEN SERMONS OF RELIGION 84–85 (1853); *see also Theodore Parker and the "Moral Universe,"* NPR (Sept. 2, 2010, 3:00 PM), http://www.npr.org/templates/story/story.php?storyId-12960946.