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The Elimination of Gender Discrimination in Insurance Pricing: Does Automobile Insurance Rate Without Sex?

In recent years, American society has increasingly scrutinized classifications based on gender. This social consciousness has produced federal legislation banning sex discrimination in housing,[1] credit,[2] and employment.[3] In these areas, Congress has demonstrated that equitable treatment of men and women is socially mandated.

This trend has also reached the insurance field. The United States Supreme Court first prohibited gender-based distinctions in insurance in 1978 with *City of Los Angeles, Department of Water and Power v. Manhart*.[4] In 1983, *Arizona Governing Committee for Tax Deferred Annuity And Deferred Compensation Plans v. Norris*[5] extended the *Manhart* rationale of equal treatment. The Court, however, restricted these cases to Title VII[6] violations in employer-sponsored pension programs which treated men and women differently.

Despite these decisions, laws outlawing gender-based discrimination have come slowly. Advocates of unisex insurance contend that the policy supporting Title VII's protection of the individual should extend with equal vigor outside the employment context to private markets such as automobile insurance.[7] Insurers, however, have resisted this extension of the *Manhart-Norris* rationale.[8] As a result, state legislatures have encountered effective lobbying against changes to unisex insurance and ineffective implementation

1 *See* Civil Rights Act of 1968, Fair Housing Act, tit. 8, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1977 & Supp. 1985)).

2 *See* Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (codified as amended at 15 U.S.C. §§ 1691-1691f (1980 & Supp. 1985)).

3 *See* Civil Rights Act of 1964, tit. 7, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. (1981)); Equal Employment Opportunities Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108, 5314, 5315, 5316; 42 U.S.C. §§ 2000e-1 to e-6, 2000e-8 to e-9, 2000e-13 to e-17 (1981)).

4 435 U.S. 702 (1978). *See* notes 12-15 *infra* and accompanying text.

5 463 U.S. 1073 (1983). *See* notes 16-18 *infra* and accompanying text.

6 Section 703(A)(1) of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1) (1981).

7 *See* notes 19-21 *infra* and accompanying text.

8 *See* notes 36 and 64 *infra* and accompanying text.

of unisex statutes once adopted.[9]

This note analyzes the issue of gender-based distinctions in automobile insurance classification. Part I examines the foundations of the unisex insurance argument and the current attempts to legislate this goal. Part II assembles the arguments voiced against proposed federal unisex legislation. Part II then applies these arguments to the automobile classification controversy, concluding that these objections are accurate in the broader insurance context but *not* for automobile classifications which do not consider sex. Part III focuses on the inadequacies of statutes which currently prohibit gender-based distinctions in automobile insurance and suggests a rating alternative. Part IV looks to the future of automobile insurance and predicts the manner in which changes are likely to come about.

I. Foundations of Unisex Insurance and Unisex Legislation

When assessing the positions of insurance lobbyists and those proposing change to the current classification system, the dual goals of actuarial validity and social fairness must be constantly balanced. While either objective may be achieved at the expense of the other, a system can be equitable to all participants only when both goals are met. The concept of unisex insurance rests principally upon the goal of social fairness. As drawn from changing social attitudes towards the elimination of sex-based classifications,[10] this position equates social fairness with *equal* treatment of the sexes.

The Supreme Court has mandated the equal treatment of the sexes in an insurance context in *Manhart* and *Norris*. In both of these instances, the Court drew support for its findings from the policy of Title VII.[11] In *Manhart*, the Court held that Title VII prohibited higher required monthly contributions by women to an employer-sponsored pension to obtain payments equal to those of men.[12] The Court stated that Title VII's "focus on the individual is unambiguous"[13] and that "[e]ven a true generalization about the class is an insufficient reason to disqualify an individual to whom the generalization does not apply."[14] Despite actuarial data which established that women live longer than men, the Court deter-

9 *See* notes 86-89 *infra* and accompanying text.

10 *See* notes 1-3 *supra* and accompanying text.

11 *See* notes 12-18 *infra* and accompanying text.

12 435 U.S. at 702.

13 *Id.* at 708. Title VII "makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin.'" *Id.*

14 *Id.*

mined that this statistical distinction could not serve as the basis for unequal treatment of the two groups.[15] In *Norris*, the Court found unfair discrimination where an employer paid lower pension benefits to women despite equal contributions by men and women.[16] Justice Marshall reasoned that "classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage."[17] In again rejecting the proffered actuarial data, the Court reemphasized Title VII's individual focus.[18]

Women's rights advocates contend that the social policy adopted by the Supreme Court in *Manhart* and *Norris* should extend outside the employment context to the insurance field. Analogies to racial distinctions, which are prohibited in insurance despite actuarial differences in racial groups, strongly support this theory.[19] Additionally, the very nature of insurance regulation recognizes that social goals may demand insurance practices which vary from purely economic considerations.[20] As our society and its attitudes toward social responsibility progress, insurers must reflect this change in insurance practices. While the *Manhart-Norris* prohibition of gender discrimination in employer-sponsored pensions is socially correct, it addresses a symptom of the problem but not the source. By applying its prohibition to employers but not insurers, the current treatment leaves the underlying problem unchecked.[21]

Lawmakers have responded to the pressures to extend the policy goal of equal treatment of the sexes by proposing unisex insurance legislation. While attempts to implement comprehensive unisex insurance statutes at the state level have generally failed,[22]

15 *Id.* at 707-08.

16 463 U.S. at 1074-75.

17 *Id.* at 1081.

18 *Id.* at 1083. The court stated that "[t]his underlying assumption—that sex may properly be used to predict longevity—is flatly inconsistent with the basic teaching of *Manhart*: That Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class.' " *Id.*

19 *See* Jerry & Mansfield, *Justifying Unisex Insurance: Another Perspective*, 34 AM. U.L. REV. 329 (1985).

20 Note, *Sex Discrimination And Sex Based Mortality Tables*, 53 B.U.L. REV. 624, 651 (1973).

21 *See Nondiscrimination In Insurance Act of 1981: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 45 (1981) (statement of Catherine East on behalf of the National Organization for Women) [hereinafter cited as *1981 House Hearings*]. *See also* Comment, *Banning "Actuarially Sound" Discrimination: The Proposed Nondiscrimination In Insurance Act*, 20 HARV. J. ON LEGIS. 631, 635 (1983) ("sex discrimination by private insurers is as offensive to concepts of individual equality as is sex discrimination by employers").

22 While stirring much activity, only Montana has enacted a statute which prohibits discrimination based upon sex in all types of insurance. MONT. CODE ANN. § 49-2-309 (1985). This provision, entitled "Discrimination in Insurance and Retirement Plans," states:

> (1) It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or opera-

unisex advocates have been successful in the narrower area of automobile insurance. Hawaii,[23] North Carolina,[24] Massachusetts,[25] and Michigan[26] have enacted statutes which prohibit discrimination by sex in automobile risk rating. These statutes supplement two types of laws currently existing in most states. The existing laws help prevent discrimination in limited areas of automobile insurance, but have failed to achieve the unisex rating goal. All fifty states, for instance, have statutes prohibiting insurance prices which are "unfair" within a class.[27] These statutes have not prohibited gender discrimination, however, because states have generally accepted the insurance justification that men and women do not occupy the same class for rating purposes.[28] Thus, insurers can

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tion of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

At least ten other states have proposed similar legislation. *See* Flaherty, *Insurance Goes Unisex Under Law in Montana*, Nat'l L.J., May 16, 1983, at 11, col. 1. This article quotes Celinda Lake of the Women's Lobbyist Fund as listing eight states which have recently considered, or are considering, bills similar to the Montana law: California, Connecticut, Massachusetts, New Jersey, North Carolina, Oregon, Texas, and West Virginia. *Id.* Additionally, Maryland and Missouri have introduced similar legislation.

23 HAWAII REV. STAT. § 294-33 (1976) ("No insurer shall base any standard or rating plan, in whole or in part, directly or indirectly, upon race, creed, ethnic extraction, age, sex, length of driving experience, credit bureau rating, or marital status.").

24 N.C. GEN. STAT. § 58-124.19(4) (1982) ("No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or sex of the persons insured.").

25 MASS. ANN. LAWS ch. 175E, § 4(d) (Michie/Law Co-op Supp. 1984) ("For motor vehicle insurance rates, risks shall not be grouped by sex or marital status. . . .").

26 MICH. COMP. LAWS ANN. § 500.2027(c) (West 1983) ("Unfair methods of competition and unfair or deceptive acts or practices in the business of insurance include . . . [c]harging a different rate for the same coverage based on sex, marital status, age, residence, location of risk, handicap, or lawful occupation of the risk unless the rate differential is based on sound actuarial principles, a reasonable classification system, and is related to the actual and credible loss statistics or reasonably anticipated experience in the case of new coverages.").

27 *See* Flaherty, *The "Unisex" Policy Uproar*, Nat'l L.J., Feb. 28, 1983, at 9, col. 3; Jerry & Mansfield, *supra* note 19, at 336 (stating that a majority of states have adopted a model statute formulated by the All-Industry Committee of the National Association of Insurance Commissioners (NAIC)). *See also* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MODEL INSURANCE LAWS, REGULATIONS, AND GUIDELINES (1977).

28 *See, e.g.*, *Simmons v. Continental Casualty Co.*, 285 F. Supp. 997 (D. Neb. 1968), *aff'd*, 410 F.2d 881 (8th Cir. 1969). *See also* Flaherty, *supra* note 27, at 9; Jerry & Mansfield, *supra* note 19, at 336.

On this basis, at least three states have rejected Department of Insurance challenges to the "unfairness" of sex-differentiated rates as an improper exercise of delegated legislative authority. *See* State Dep't of Ins. v. Insurance Servs. Office, 434 So. 2d 908 (Fla. Dist. Ct. App. 1983) (court invalidated Department of Insurance order holding that applicable statutes do not authorize prohibition of the use of sex, marital status, and scholastic achievement as rating factors in automobile insurance), *pet. for review denied*, 444 So. 2d 416 (Fla. 1984); Insurance Serv. Office v. Commissioner of Ins., 381 So. 2d 515 (La. Ct. App. 1979) (court invalidated order of insurance commissioner requiring automobile insurers to desist from charging premiums based on rating plans using age and sex as criteria), *writ of review*

treat men and women, as members of separate classes, differently under these laws. A second type of state statute, which exists in about thirty-five states, purports to prohibit gender discrimination in all types of insurance.[29] While prohibiting some forms of sex discrimination with regard to the availability, coverage, and conditions of insurance, these statutes have little effect on discriminatory rates and costs.[30]

While proposed repeatedly, federal unisex insurance legislation has failed to gain the congressional support needed for passage. The federal bills have attempted to implement unisex insurance comprehensively, as Montana did in its state enactment of unisex legislation.[31] Comprehensive bills in both the House[32] and the Senate[33] failed to pass in the 98th Congress. These bills sought to apply the federal legislation to existing insurance contracts,[34] a provision which state legislation has specifically exempted.[35] In the mark-up of the House bill, its supporters compromised this controversial portion of the legislation in an

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denied, 382 So. 2d 1391 (La. 1979); Mortgate Guarantee Ins. Corp. v. Langdon, 671 P.2d 811 (Wyo. 1983) (dismissing appeals based on the regulatory authority of the Commissioner of Insurance in light of 1983 Wyoming Session Law chapter 186, which provided a presumption of competitive markets in insurance coverage and limited the authority of the Commissioner of Insurance to noncompetitive markets). *See also Who Pays the Bill for Unisex Auto Insurance*, BUS. WEEK, Oct. 15, 1984, at 42-43 (discussing developments in unisex automobile insurance).

The Pennsylvania Supreme Court reached a different conclusion when it read Pennsylvania's requirement of "fair" rates in conjunction with the state equal rights amendment. Unlike courts in other states interpreting this question, the Pennsylvania Court rejected the insurer's argument that "unfair" should be limited to "actuarially unfair." Hartford Accident and Indemnity Co. v. Insurance Comm'r, 505 Pa. 571, 482 A.2d 542 (1984).

The Pennsylvania state legislature, however, reversed the Supreme Court's declaration of unisex automobile rating statutorily. In 1985, the Pennsylvania Senate passed Senate Bill No. 745, which amended the Casualty and Surety Rate Act of June 11, 1947, P.L. 538, § 3(d), 40 PA. CONS. STAT. § 1183(d) (1971), to read:

> This section shall not be construed to prohibit rates for automobile insurance which are based in whole or in part on factors including, but not limited to, sex, if the use of such a factor is supported by sound actuarial principles or is related to actual reasonably anticipated experience.

The Pennsylvania House passed the identical House Bill No. 452 in February of 1986. Governor Richard Thornburgh vetoed the bill, however. The pro-industry forces in the House succeeded in overriding the Governor's veto with votes on April 8 and 9 achieving the necessary two-thirds majority. The veto override was then sent to the Senate, which took similar action. Pittsburgh Post-Gazette, Apr. 10, 1986, at 6, col. 1.

29 *See* Flaherty, *supra* note 27, at 9.

30 *Id.*

31 *See* note 22 *supra* and accompanying text.

32 Nondiscrimination in Insurance Act, H.R. 100, 98th Cong., 1st Sess., 129 CONG. REC. H42 (daily ed. Jan. 3, 1983) (introduced by Rep. Robert Dingell).

33 Fair Insurance Practices Act, S. 372, 98th Cong., 1st Sess., 129 CONG. REC. S795 (daily ed. Feb. 1, 1983) (introduced by Sens. Mark Hatfield, Ernest Hollings, and Robert Packwood).

34 *See* S. 372, 98th Cong., 1st Sess. § 4(c) (1983).

35 *See, e.g.*, MONT. CODE ANN. § 49-2-309(2) (1985) ("This section does not apply to any

amendment which stripped the bill of most of its substance.[36] The remaining bill, limited only to employer-sponsored plans, had no application to automobile insurance. Supporters introduced similar legislation in the 99th Congress.[37]

These efforts aim to reform insurance classification schemes by prohibiting the use of sex as a rating variable. Instead of combining the twin goals of actuarial validity and social fairness, the legislation has drawn from the analysis in *Manhart* and *Norris* and

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insurance policy, plan, coverage, any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.").

36 The House Commerce Committee amended H.R. 100 to exempt any insurance contract which was not a part of an employee benefit plan. HOUSE COMM. ON ENERGY AND COMMERCE, 98th Cong., 2d Sess., AMENDMENT OFFERED BY CONG. TAUZIN 1 (1984) (amending HOUSE COMM. ON ENERGY AND COMMERCE, 98th Cong., 2d Sess., SUBSTITUTE OFFERED BY CONG. DOWDY 7 (1984) as amending H.R. 100, 98th Cong., 1st Sess. § 4, 129 CONG. REC. H42 (daily ed. Jan. 3, 1983)). This provision for exemptions of private contracts would have excluded automobile insurance from the bill's mandate of unisex insurance. *See* Jerry & Mansfield, *supra* note 19, at 337-38 (stating that the House amendment would do no more than codify the *Manhart* and *Norris* decisions).

37 *See* H.R. 1798, 99th Cong., 1st Sess. (1985). *See also* Economic Equity Act of 1985, H.R. 2472, 99th Cong., 1st Sess. (introduced May 13, 1985, by Rep. Schroeder) (title 3 of the Act is the insurance portion of the bill containing the Nondiscrimination In Insurance Act, §§ 301-310); Economic Equity Act of 1985, S. 1169, 99th Cong., 1st Sess. (introduced May 20, 1985, by Sen. Durenberger) (title 3 of this act is the insurance portion of the bill containing the Fair Insurance Practices Act, §§ 301-310). The insurance provisions of the broad Economic Equity Act of 1985, which failed to pass in the 99th Congress, had compromised two controversial aspects of previous legislation in an effort to rally more support for the unisex objective.

First, unlike the bills proposed in the 98th Congress, the Economic Equity Act of 1985 was not comprehensive. *See, e.g.*, Economic Equity Act of 1985, H.R. 2472, 99th Cong., 1st Sess. § 303(b) ("Nothing in this part shall affect the amount or type of benefits due under a contract of insurance the terms of which provide for regular recurring periodic benefits if such regularly recurring periodic benefits have begun to be paid before the effective date of this part."). *See also* COMPTROLLER GENERAL OF THE UNITED STATES, ECONOMIC IMPLICATIONS OF THE FAIR INSURANCE PRACTICES ACT (Report to Sen. Orrin G. Hatch, et. al.) 5-6 (Apr. 6, 1984) [hereinafter cited as GAO REPORT] (concluding that the retroactive economic effect of S. 372 would bankrupt some insurers and recommending a clause exempting existing contracts).

Second, unlike the legislation in the 98th Congress which contained a 90-day transition period, the Economic Equity Act of 1985 would have taken effect one year after its date of enactment. *See, e.g.*, Economic Equity Act of 1985, H.R. 2472, 99th Cong., 1st Sess. § 310. *See also* GAO REPORT, *supra*, at 5-6 (concluding that the 90-day transition period of S. 372 is infeasible and recommending an implementation period of at least 18 months). Unlike the amended House bill of the 98th Congress and its current follow-up, the unisex mandate of the Economic Equity Act remained applicable to automobile insurance. *See, e.g.*, Economic Equity Act of 1985, H.R. 2472, 99th Cong., 1st Sess. § 303(f).

Finally, an alternative proposal introduced in the 99th Congress would federalize laws which prohibit sex discrimination in insurance availability. *See* H.R. 676, 99th Cong., 1st Sess. (introduced January 24, 1985, by Rep. Holt). *See also* notes 29-30 *supra* and accompanying text. Despite its purported objectives, this bill would have no effect on gender distinctions in insurance rating. *See* H.R. 676, 99th Cong., 1st Sess. ("Nothing in this Act shall prevent any person who contracts to insure another from setting rates for such insurance in accordance with relevant actuarial data, even if such rates differ with respect to the sex of the insured.").

focuses only on social fairness *at the expense of* actuarial validity. The resulting distinction between "unisex insurance alone" and "classification without regard to sex" is critical.[38]

II. Classification Without Sex in Automobile Insurance

The nature of insurance is risk-distribution. Insurance reduces the uncertainty of financial loss by transferring the risk of loss from individuals to an insurer. The insurer establishes groups which contribute premium payments to a common fund. The objective of the fund is to cover the aggregate losses and expenses of the classified group. To adequately fund its insurance pool, an insurer must accurately estimate losses of those classified in the insured group. This process is known as ratemaking. The greater the probability of loss, the greater the price of insurance for the classified group.[39] This grouping process presents the fundamental dichotomy between the insurance tradition and society's quest for civil rights. As emphasized in *Manhart*[40] and *Norris*,[41] civil rights legislation focuses on the fair treatment of *individuals*. Insurance, on the other hand, focuses on the *grouping* of people for risk classification. These principles clash only when groups are based on traditionally forbidden classifications—such as race, national origin, sex, and religion.[42]

The attitudes expressed towards proposed federal unisex legislation clearly shows this clash of principles. While applauded and endorsed by advocates of civil rights,[43] the insurance lobby has vehemently opposed the legislation. Opponents of proposed unisex

38 *See* notes 82-85 *infra* and accompanying text.

39 *See 1981 House Hearings*, *supra* note 21, at 178 (statement of Diana Lee on behalf of the National Association of Independent Insurers).

40 435 U.S. 702, 708 (1978).

41 463 U.S. 1073, 1083 (1983).

42 Gray & Shtasel, *Insurers Are Surviving Without Sex*, A.B.A. J., Jan. 1985, at 89. Other commentators have captured this conflict by stating that "[t]he insurance tradition analyzes risks, premiums, and benefit schedules in terms of groups; most actuaries cannot think of individuals except as members of groups. . . . [H]owever, the main civil rights tradition analyzes rights in terms of individuals." Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 508 (1980) [hereinafter cited as *A Legal and Demographic Analysis*].

Similarly, Bernstein argues that the application of civil rights analysis to insurance is fundamentally flawed. "In applying civil rights logic to insurance, which is grounded in discrimination—fair discrimination but discrimination nonetheless—either Congress or the Court created an irreconcilable conflict. The effect on the marketplace reflects this miscarriage of admirable intentions." Bernstein, *The Havoc in Retirement Benefits after Norris*, A.B.A. J., Feb. 1984, at 80-81.

43 Sen. Hatfield's statement introducing the Fair Insurance Practice Act, S. 372, in the 98th Congress listed the following groups as supporting the bill: the American Association of University Women, the AFL-CIO, the National Federation of Business and Professional Women, the Leadership Conference on Civil Rights, the Women's Equity Action League, the National Women's Political Caucus, and the National Organization for Women. 129 CONG. REC. S829 (daily ed. Feb. 1, 1983).

statutes have acknowledged the legitimate social goal served by such legislation,[44] but they continue to attack the proposed laws. Insurers, for example, claim that gender-based classification schemes are actuarially valid, and that the proposed legislation will create adverse economic effects. In 1984, the General Accounting Office (GAO) issued a report[45] analyzing the economic implications of the unisex legislation proposed in the 98th Congress. It predicted that both market imbalances and excessive costs would follow the implementation of comprehensive federal unisex legislation.[46] The claims of actuarial validity, market imbalances, and excessive costs deserve answering before the problems and benefits of implementing such legislation are presented.

A. *Objections to Unisex Insurance*

1. Actuarial Fairness

In *Manhart*, the Supreme Court acknowledged that women, on the average, live longer than men.[47] For this reason, private insurers charge women less on life insurance[48] while charging more for annuities.[49] Insurers use this same analysis in the automobile insurance market; women's insurance premiums are less than men's because men are involved in more accidents, cost more to insure per accident, and are more often fatally injured than women.[50] Thus, insurers maintain that classification according to gender is a statistically valid predictor of risk, and, because their livelihood depends upon predicting risk, they argue that it is necessary. According to

44 *See, e.g.*, Lautzenheiser, Roberts & Walters, *H.R. 100/S. 372: Are They Necessary?*, 2 J. INS. REG. 11 (1983).

45 *See* note 37 *supra*.

46 *See* GAO REPORT, *supra* note 37, at 4-6.

47 435 U.S. at 704. *See also* Comment, *Sex Stereotyping and Statistics—Equality in an Insurance Context*, 7 U. PUGET SOUND L. REV. 137 (1983) (quoting statistics supporting the proposition that women live longer than men).

48 Because the life expectancy of women is longer, their monthly premium payments are less in an effort to achieve the same total payout. *See generally* Bernstein, *supra* note 42; Christensen, *Reasonable Sex Discrimination*, TR. & EST., Oct. 1983, at 57.

49 Annuities function in a manner exactly opposite from life insurance. Because women are expected to live longer than men, their monthly payouts are less in an effort to equalize the total fund extended. *See generally* Christensen, *supra* note 48.

Women's groups note that the complimentary effects of life insurance and annuities are not achieved because differential setback rates are used in life insurance, as compared to annuities, to the disadvantage of women. *See 1981 House Hearings*, *supra* note 21, at 50 (statement of Mary Gray, President of the Women's Equity Action League); S. REP. No. 671, 97th Cong. 2d Sess. 12 (1982).

50 *See 1981 House Hearings*, *supra* note 21, at 199-203 (statement of the Alliance of American Insurers); *Fair Insurance Practices Act: Hearings on S. 372 Before the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 171-72 (1983) (statement of Thomas O'Day, Assistant Vice President, Alliance of American Insurers) [hereinafter cited as *1983 Senate Hearings*].

this argument, not only is it statistically valid to differentiate on the basis of sex, but it would be unfair not to do so.[51] As the Attorney General for the state of Washington noted in an opinion: "[E]quality of treatment may be denied as much by equal application of a single standard to persons unequally situated as by application of unequal standards to persons equally situated."[52]

2. Market Imbalances

The effect of imposing unisex legislation on contracts in the private market differs from the effect of implementing the same requirements in an employment context. Unlike recipients of employee pension benefits, insurance purchasers in the open market are free to alter their insurance purchases in accordance with market incentives. Critics of unisex insurance claim that prohibiting classification by sex disrupts economic efficiency. They contend that because unisex legislation forces insurers to charge rates that are inconsistent with the risks involved, unfair subsidization results.[53] In automobile insurance, for example, critics claim that imposition of unisex insurance will cause women's rates to rise unnaturally in proportion to their risk.[54] According to the theory of adverse selection, insurance customers in the private market, motivated by self interest, will respond to the change in insurance pricing by altering their buying patterns.[55] Those who are undercharged will buy more, and those who are overcharged will buy less.[56] This process would lead to further market distortions and force insurers to leave the market because of rising costs.[57]

3. Costs

The most controversial aspect of proposed unisex legislation is the costs of such a wholesale change in the insurance market. Insurers argue that the adoption of unisex insurance will result in increased costs to both insureds and insurers. Individual premium increases resulting from market imbalances are an initial measure

51 *See generally* Miller, *How to Discriminate By Sex: Federal Regulation of the Insurance Industry*, 17 CONN. L. REV. 567 (1985); Miller, *Discrimination by Gender in Automobile Insurance: A Note on* Hartford Accident and Indemnity Co. v. Insurance Commissioner, 23 DUQ. L. REV. 621 (1985); Bernstein, *supra* note 42; *1981 House Hearings*, *supra* note 21, at 209, 231.

52 1973 Op. Wash. Att'y Gen. No. 21. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits:* Manhart *Revisited*, 49 U. CHI. L. REV. 489, 542 (1982).

53 *See generally* Bernstein, *supra* note 42.

54 *See, e.g.*, N.Y. Times, Apr. 6, 1984, at 34, col. 4 (late city final edition); Wallace, *Unisex Automobile Rating: The Michigan Experience*, 3 J. INS. REG. 127 (1984) [hereinafter cited as *The Michigan Experience*].

55 *See* GAO REPORT, *supra* note 37, at 25 app.; Comment, *supra* note 47, at 144.

56 *See* GAO REPORT, *supra* note 37, at 25 app..

57 *See id.*; Comment, *supra* note 47, at 143.

of the costs of unisex insurance. As a result of the predicted subsidization which would result from the elimination of sex as a rating variable, the American Academy of Actuaries estimates that women's automobile insurance premiums would increase by $700 million.[58] Individually, the predicted increase in premiums for women has ranged from twenty to thirty percent.[59] Data from the states which have implemented unisex automobile insurance support these predictions. In Michigan, for example, the change to unisex rating caused the average annual premium for single women under twenty-five to rise by approximately twenty percent, while premiums of single males in the same category fell by fifteen percent.[60] Insurance premiums in Montana have reacted similarly.[61]

Unisex insurance would also increase the financial burden on insurers. One form of increased costs results from the imposition of unfunded liabilities. Because insurance companies are required to keep the present value of their liabilities in reserve funds, an increase in an insurer's liability because of unisex mandates would require a corresponding increase in required reserves. The GAO Report predicted that insurer bankruptcies could result from the added financial burden of unfunded liabilities.[62] Requiring insurers to implement unisex insurance retroactively would magnify this problem.[63] Objections to the extreme costs of such a provision re-

58 *1981 House Hearings*, *supra* note 21, at 177 (American Academy of Actuaries study).

59 *See, e.g.*, *1981 House Hearings*, *supra* note 21, at 178, 209 (citing cost increase predictions of 22 and 26%).

60 *See The Michigan Experience*, *supra* note 54, at 129. The author cautions that it is incorrect to conclude that the price changes cited result totally from unisex implementation, as an inflation factor and the effect of rate surcharges based on driving record are not accounted for. *Id.* Whether or not the *full* increase in women's premiums can be attributed to unisex implementation, it is clear that much of the increase resulted from the change.

61 *See* Great Falls Tribune, Oct. 6, 1985, at 1-B ("In general, auto insurance premiums have increased for women and married couples under 25 and decreased for men under 25. Rates for people over 25 were not affected.").

62 GAO REPORT, *supra* note 37, at 3. The severity of the insurers resulting liability depends, to a great extent, on how a company chooses to meet the unisex requirement. Opposing sides disagree as to whether "topping up" of the lower of men's and women's benefits is required or whether a middle ground between currently varying benefits would be allowed. *See id.* at 6, 17-18 app.

63 Even the terminology concerning "retroactivity" has spurred conflict between insurers and women's rights advocates. For the purposes of this note, three alternative measures of relief are possible when addressing unisex legislation. First is legislation which would affect payments already made on an insurance or pension contract. This is retroactive in the true sense of the word. Extension of legislation this far has not been proposed. The second type is legislation which exempts all existing contracts from a statute's requirements. This is not retroactive in any sense. The Montana state unisex statute, *supra* note 22, and the Economic Equity Act of 1985, *supra* note 37, illustrate this alternative.

Between these extremes, insurers and women's rights advocates have debated as to the semantic classification of legislation which affects future payments of existing contracts. H.R. 100 and S. 372, *supra* notes 32-33, are examples of this alternative. Those opposing unisex legislation have labeled the effects of such statutes as retroactive. *See, e.g.*, Bernstein,

sulted in the failure of unisex legislation proposed in the 98th Congress.[64]

Another source of insurer costs is the administrative costs required to implement unisex legislation. The GAO Report stated that "costs of revising old policies, . . . developing new policies, . . . obtain[ing] state insurance department approval of the new policies, . . . and verifying rating data"[65] would be substantial. Thus, insurers conclude that unisex insurance is a costly alternative which is not actuarially justified.

B. *Application to Automobile Insurance*

These arguments raise valid concerns as to the problems of unisex insurance generally. They do not, however, impose any barriers to insurance classifications which do not consider sex in the factually distinct setting of automobile insurance.

In terms of the actuarial validity of sex as a rating variable, the prediction of risk in life insurance and pensions and the prediction of driving risk are factually distinct. For life insurance and pensions, sex is the primary rating variable. While it is true that sex-based mortality tables have been criticized,[66] no rating variable has accurately replaced sex in assessing mortality rates. While still open to debate, it is possible that sex alone explains the different life expectancy of men and women. In any event, it is undoubtedly the best *predictor* of this variance in longevity. On the other hand, an individual's sex does not affect his driving ability. This factor is not even a valid predictor of risk. Other factors used in determining driving premiums, when substituted for sex, do explain the gender difference in insurable risk.[67] Thus, sex is not as important to

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supra note 42, at 82. Proponents of this same legislation counter that the provisions apply only prospectively to benefits and premiums paid after the effective date of the bill. *See, e.g.*, Gray, *The Case for Nondiscrimination In Insurance*, 2 J. INS. REG. 3 (1983). For the purpose of conformity with the majority of writings on the subject, such a provision is labeled retroactive in this note.

64 Those lobbying against the federal unisex legislation often cited the 1984 GAO Report, which estimated the total unfunded liabilities of retroactive application of unisex insurance in life insurance and pensions to range from $16.0 to 32.2 billion. *See* GAO REPORT, *supra* note 37, at 15. Objections to these purported costs resulted in the amendment to H.R. 100 and its ultimate failure. *See* note 36 *supra* and accompanying text.

65 GAO REPORT, *supra* note 37, at 15.

66 Professor Brilmayer makes several arguments: that the male/female mortality tables are not stable, that women's longevity is not uniform throughout the world, and that socio-economic factors account for the mortality differences which will change as soon as the rates of women reflect their increasingly pressurized lifestyle (on account of the increase in working women) and the effects of the number of women who began to smoke after the 1940s. *A Legal and Demographic Analysis*, *supra* note 42, at 539-59. *See also* S. REP. No. 671, 97th Cong., 2d Sess. 11 (1982).

67 *See* notes 97-98 *infra* and accompanying text.

actuarial validity in the automobile insurance area as it is in other areas of insurance.

Likewise, the insurance argument of predicted market imbalances does not apply to automobile insurance because it fails to account for the substitution of other rating variables. If automobile rates were adjusted to reflect valid differences in insurable risk, rather than left artificially neutral, no unfair subsidization between classes would result. Moreover, two studies in Michigan indicate that even where the adoption of unisex insurance was *not* accompanied by a substitution of rating variables for drivers under twenty-five, the predicted market imbalances did not occur.[68] Claims that unisex insurance would decrease insurance availability[69] and flood applications into the state residuary insurance market[70] proved unfounded.[71]

Furthermore, analogizing life insurance to automobile insurance shows the weakness of the market imbalance argument. If the premise of adverse selection were true, the same market defect would result whenever the insurance industry failed to calculate separate actuarial tables for groups whose life expectancies differ.[72] The differences between life expectancies for whites and blacks, rich and poor, and single and married men, however, have not caused the favored groups to quit buying life insurance. Additionally, eliminating race as a rating variable did not result in the predicted adverse selection consequences, adding historical support to the argument against the theory of adverse selection.

The substitution of rating factors would also refute the cost arguments of unisex insurance opponents. The GAO Report concluded that the American Academy of Actuaries overstated the estimate of the increase in women's automobile insurance as a result of unisex implementation because it assumed that insurers

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68 *The Michigan Experience*, *supra* note 54; INSURANCE BUREAU, MICHIGAN DEP'T OF COMMERCE, A YEAR OF CHANGE: THE ESSENTIAL INSURANCE ACT IN 1981 (1982) [hereinafter cited as ESSENTIAL INSURANCE].

69 The theory of adverse selection contends that unisex automobile rating would "artificially depress rates for young men to the point that insurers would be unwilling to sell them insurance." *The Michigan Experience*, *supra* note 54, at 136. *See also Retirement Equity Act of 1983: Hearings on S. 19 Before the Senate Comm. on Labor and Human Resources.* 98th Cong., 1st Sess. 225 (1983).

70 *See The Michigan Experience*, *supra* note 54, at 134; *1981 House Hearings*, *supra* note 21, at 257.

71 *See The Michigan Experience*, *supra* note 54, at 135-36 ("The data . . . [does] not support the notion that eliminating sex as a rating factor caused insurers to stop writing young drivers in Michigan. . . . [T]he change to unisex rating did not cause a disproportionate number of young men without bad driving records to be denied insurance in the voluntary market."); ESSENTIAL INSURANCE, *supra* note 68, at 37 ("Contrary to some predictions, very few insurers withdrew from writing private passenger automobile . . . insurance when the Essential Insurance Act took effect.").

72 *See* GAO REPORT, *supra* note 37, at 25 app.; Comment, *supra* note 47, at 143.

would not use factors other than sex more extensively.[73] Studies which supplement unisex implementation with the introduction of other valid rating factors conclude that womens' rates will actually decrease. The National Insurance Commissioners Organization (NICO), for example, concluded that the net savings to women would amount to $795 million.[74] Other Studies have supported the NICO findings.[75]

In addition to the reduced costs from the substitution of rating variables, implementation costs in unisex automobile insurance are less than in the field of life insurance and pensions. Automobile insurance presents no problem of insurer bankruptcies through unfunded liabilities. In life insurance, where funding for payouts is accumulated through long-term contracts, insurers might have problems immediately funding their increased liabilities.[76] In automobile insurance, however, the frequency of contract renewal would allow companies to adjust premiums and coverage in a way that avoids significant unfunded liabilities.[77] Similarly, the short-term nature of automobile insurance contracts precludes any need for retroactivity in implementing a unisex basis.[78]

In addition, administrative costs of compliance with unisex legislation pose no obstacles to successful implementation of the law. Again, the specific effects on automobile insurance in terms of the costs of restructuring contracts are minimized because of the short-term nature of automobile policies. The changeover to unisex requirements could occur gradually as policies are renewed. Furthermore, administrative costs are no justification for discrimination based upon immutable characteristics. In *Frontiero v. Richardson*,[79] the Supreme Court stated that "any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution]. . . .' "[80]

73 GAO REPORT, *supra* note 37, at 4.

74 D-3 Advisory Committee Report, Private Passenger Automobile Insurance Risk Classification, Report of the D-3 Advisory Committee to the Task Force on Rates and Rating Procedures of the National Association of Insurance Commissioners (May 1979). *See also* GAO REPORT, *supra* note 37, at 22 app.

75 In testimony before Congress in 1981, the New Jersey Commissioner of Insurance detailed a plan to implement unisex insurance in New Jersey. With the substitution of other rating variables, women's rates decreased in every county. *1981 House Hearings*, *supra* note 21, at 172 (statement of James Sheeridan, Commissioner of Insurance, state of New Jersey).

76 *See* note 62 *supra* and accompanying text.

77 *See* GAO REPORT, *supra* note 37, at 4 app.

78 *See 1983 Senate Hearings*, *supra* note 50, at 199.

79 411 U.S. 677 (1973).

80 *Id.* at 690 (quoting Reed v. Reed, 404 U.S. at 71, 77 (1971)).

While it is easy to refute the insurer's justifications for sex differentiation in automobile insurance, it cannot be denied that they need some way to evaluate risk. Insurers do not object to the removal of sex itself as a rating criterion but do object to the removal of an effective rating criteria altogether. Substituting a socially neutral classification for the sex classification mitigates or even eliminates most of the insurer's objections.

III. Unisex Problems and Proposed Solution

A. *Inadequacies of Current Unisex Automobile Insurance Alternatives*

Unlike the limited classification scheme used in life insurance rating, gender-based distinctions account for only one of many classification variables used in assessing automobile risk.[81] Unisex legislation does not fundamentally alter the current classification system; it merely prohibits the use of sex as a factor in the insurer's pool of available rating variables. This leaves the insurer with two options—flat rate pricing without substituting other rating variables ("unisex insurance alone"),[82] or cost-based pricing, accomplished by substituting valid rating variables for sex ("classification without regard to sex").[83]

Unisex insurance alone results in exactly what its name implies; equal (or unisex) rates for men and women. While this option achieves the social policy goal of equitable treatment of the sexes, it fails at achieving the equally important goal of actuarial validity. In fact, given the variance in driving statistics of men and women as groups,[84] unisex rates merely substitute one form of discrimination

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81 *See, e.g.*, COMPTROLLER GEN. U.S. GEN. ACCOUNTING OFFICE, ISSUES AND NEEDED IMPROVEMENTS IN STATE REGULATION OF THE INSURANCE BUSINESS 102 (1979) [hereinafter cited as COMPTROLLER GEN. REPORT]. The plan of the Insurance Services Office (ISO), which is used with variations in each state, currently consists of either 161 or 217 classes. Rating factors are separated into primary and secondary classes. Primary factors, such as age and sex, establish a base insurance rate. To this primary classification, secondary classifications, based on merit, characteristics of the vehicle, vehicle use, and geographic location, are then added or subtracted. An insurer calculates an individual's premium by multiplying the base rate times the adjusted rating factor. *Id.* at 104-11. *See also* Abramoff, *Rating the Rating Schemes: Application of Constitutional Equal Protection Principles to Automobile Insurance Practices*, 9 CAP. U.L. REV. 683, 689 (1980) [hereinafter cited as *Rating the Rating Schemes*].

The actual number of rating classes used varies by insurer. As a general rule, most companies classify by age, vehicle use, and driving record for adults. The additional factors of sex and marital status, as well as discounts for scholarship and driver training, are applied only to drivers under thirty. Thus, the elimination of sex as a rating variable primarily affects younger drivers, who are currently grouped according to this rating variable. *See* COMPTROLLER GEN. REPORT, *supra*, at 105-11.

82 *See* text accompanying note 38 *supra*.

83 *See* text accompanying note 38 *supra*. *See also 1981 House Hearings*, *supra* note 21, at 124 (statement of Ray Woodall, Vice President of National Association of Life Companies).

84 *See* note 97 *infra* and accompanying text.

for another.[85] Just as unequal treatment of the sexes constitutes unfair discrimination according to social mandates, equalized rates between groups whose insurable risks differ constitutes actuarially unfair discrimination.

In the five states which have adopted statutes eliminating sex as a rating variable,[86] insurers have adjusted to the legislation by implementing undifferentiated flat prices for drivers under twenty-five.[87] Women's rates in these states have risen unnaturally to the level of men's, fulfilling insurance industry predictions of undesirable results from unisex legislation.[88] Contrary to insurance industry contentions, however, these results are not the natural consequences of eliminating sex as a rating variable, but result from the failure of insurance companies to substitute other rating factors for the eliminated variable.

The choice by insurers to implement flat-based pricing is inconsistent with the industry's justifications for the retention of actuarial distinctions based upon sex. The insurance lobby has maintained that sex-based distinctions are needed to ensure cost-based pricing.[89] Insurers abandon this "commitment" to cost-based pricing, however, when social policy demands eliminating one rating variable from the pool of rating factors. The abandonment of cost-based pricing cannot be tolerated when insurers can implement other factors to account for the loss of sex in classification; other factors which can achieve the actuarial validity of the sex classification without the social unfairness.

B. *Mileage as a Rating Variable*

Since early studies first called for eliminating sex as a rating variable,[90] research has sought rating factors that satisfy the goals of social acceptability and statistical validity. Mileage rating can achieve both goals. Professor Regina Austin argues that mileage rating, and other proposed classification schemes based on individual characteristics, fail because they are "subject to value judgments that cannot be avoided by resort to a concensus agreed upon by all

85 *See* notes 51-52 *supra* and accompanying text.

86 *See* notes 22-26 *supra* and accompanying text.

87 *See Essential Insurance*, *supra* note 68, at 25 ("Rather than rating young drivers under the new law on the same factors used for adult drivers, most insurers chose simply to drop sex and marital status as rating factors and not replace them with other variables."); GAO REPORT, *supra* note 37, at 29 app. ("factors have not been substituted for sex in the four states with unisex rates") (this report was submitted prior to the passage of the Montana unisex legislation).

88 *See* notes 58-59 *supra* and accompanying text.

89 *See* notes 50-52 *supra* and accompanying text.

90 *See* notes 92-95 *infra* and accompanying text.

interested parties."[91] But just as the reality of imperfect markets does not impair the benefits of the economic model, the limitations of the political process should not preclude the quest for more equitable and actuarially sound rating practices.

Despite their competing political goals in the unisex insurance controversy, insurers and insureds agree on some criteria for the evaluation of rating variables. The most crucial of these criteria is causation. Studies on the causation of variances in driving statistics by sex have long suggested that mileage driven, not driver sex, explains the difference in insurable risk. A 1978 study by the National Association of Insurance Commissioners stated that:

> In terms of simplicity and consistency (i.e., stability and ease of verification), age, sex, and marital status receive high marks as rating factors. This is not the case from the viewpoint of causality. Causality refers to the actual or implied behavioral relationship between a particular rating factor and loss potential. The longer a vehicle is on the road, for example, the more likely it is that the vehicle may be involved in a random traffic accident; thus, daily or annual total mileage may be viewed as a causal rating factor. To the extent that sex and marital status classifications may be defended on causal grounds, the implied behavioral relationships rely largely on questionable social stereotypes.[92]

State Department of Insurance Studies in Massachusetts,[93] New Jersey,[94] and Florida[95] have come to similar conclusions. In addition, driving statistics reveal that the differences in actual miles driven between males and females explains the difference in accident rates.[96] Male accident rates remain higher than those of female drivers because men, as a group, drive twice as many miles as women.[97] When accident figures are calculated on a per-mile basis, the rates are comparable.[98]

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91 Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 568 (1983).

92 National Association of Insurance Commissioners, Report of the Rates and Rating Procedures Task Force of the Automobile Insurance (D-3) Subcomm. 5-6 (Nov. 1978).

93 COMMONWEALTH OF MASSACHUSETTS, DIV. OF INS., AUTOMOBILE INSURANCE RISK CLASSIFICATION: EQUITY AND ACCURACY (1978) [hereinafter cited as EQUITY AND ACCURACY]. *See also* COMMONWEALTH OF MASSACHUSETTS, DIV. OF INS., OPINION, FINDINGS AND DECISION ON 1978 AUTOMOBILE INSURANCE RATES (Dec. 28, 1977).

94 NEW JERSEY DEP'T OF INS., HEARING ON AUTOMOBILE INSURANCE CLASSIFICATIONS AND RELATED METHODOLOGIES: FINAL DETERMINATION—ANALYSIS AND REPORT (1981).

95 FLORIDA'S AUTOMOBILE INSURANCE RATE CLASSIFICATION: REPORT TO THE INSURANCE COMMISSIONER AND THE COMMISSIONER'S ORDERS AND FINDINGS (Oct 1, 1979).

96 Testimony of Patrick Butler, NOW, before the Human Rights Commission and the State Auditor and Commissioner of Insurance, State of Montana, NOW transcript at 8 (September 13, 1985) (available from the files of the Notre Dame Law Review).

97 *Id. See also* Note, *Ending Sex Discrimination In Insurance: The Nondiscrimination In Insurance Act*, 11 J. OF LEGIS. 457, 468 (1984).

98 The greater weight of the evidence states that women actually have a higher per-mile accident ratio. *See, e.g., Nondiscrimination In Insurance Act of 1983: Hearings on H.R. 100 Before*

Other criterion for the evaluation of rating variables may satisfy the competing concerns of insurers and insureds. Natalie Shayer identified five such criteria in her research paper presented to the Massachusetts Division of Insurance for its 1978 rate classification hearings.[99] The criteria are admissibility, separation, homogeneity, reliability, and incentive value. Substituting miles driven for sex in automobile classification satisfies all five criterion.

Shayer defines the admissibility of a rating variable in terms of a standard of social acceptability. She states that "distinctions are best able to meet the test of admissibility if they are within an individual's ability to control and are causally related to the probability of loss."[100] Clearly, the driver controls the number of miles driven. In addition, expert testimony establishes that, other factors being equal, the most accurate measure of risk of collision is mileage.[101]

Separation in a rating variable exists "if there is a practically and statistically significant difference in the mean expected losses"[102] of the classes it separates. Professor Jean Lemaire, in a mathematical study, recently confirmed the utility of mileage as an accurate variable in separating driving risks.[103] Professor Lemaire isolated thirty-eight potential rating variables and analyzed the accuracy of each variable on automobile risk classifications using regression analysis.[104] His findings supported the contentions that mileage is a statistically significant rating variable,[105] while sex is not.[106] He states that "the fact that policyholders who cause many accidents where they are at fault have, on average, more accidents where they are not at fault seems to be on account of higher exposure to risk in terms of total distance travelled."[107] Thus, mileage

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the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 144 (1983) (testimony of Wyona M. Lipman, chair, New Jersey Commission on Sex Discrimination in the Statutes) [hereinafter cited as *1983 House Hearings*]; J. LEMAIRE, AUTOMOBILE INSURANCE: ACTUARIAL MODELS 77 (1985); *1981 House Hearings*, *supra* note 21, at 193; S. REP. No. 671, 97th Cong., 2d Sess. 13 (1982). *But see 1983 House Hearings*, *supra* at 312-14 (statement of the Alliance of American Insurers) (contradicting the statement of Ms. Lipman on the basis of the same data); U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION (with California Department of Public Works), THE EFFECTS OF EXPOSURE TO RISK ON DRIVING RECORD (June 1973).

99 *See* EQUITY AND ACCURACY, *supra* note 93, at 2-6.

100 *Id.* at 4.

101 *See* Testimony of Patrick Butler, *supra* note 96, at 9 (quoting estimates from the National Safety Council, published by the Insurance Information Institute in the 1984-85 Property/Casualty Fact Book at 69). *See also* note 103 *infra* and accompanying text.

102 EQUITY AND ACCURACY, *supra* note 93, at 3.

103 J. LEMAIRE, *supra* note 98.

104 *Id.* at 96.

105 *Id.* at 99.

106 *Id.* at 90 ("Among the variables that do not appear in the solution is . . . the driver's sex. As a result, no sex discrimination should be allowed although the tables of claim frequencies showed that women produced 6% more accident claims.").

107 *Id.* at 99.

successfully separates classes of drivers who will have different amounts of loss.

Closely related to separation is homogeneity. Where separation refers to the differences between insurance classes, homogeneity refers to differences within an established class.[108] One of the strongest arguments against sex as a valid rating criteria is its failure to account for the wide individual variances within a class. Indeed, the backbone of the unisex insurance movement is the quest for *individual* treatment rather than broad brushed group classifications.[109] While the very concept of risk distribution prevents any factor from achieving perfect homogeneity with a group, the use of mileage as a rating variable moves closer to this goal through its emphasis of *individual* driving characteristics instead of group stereotypes.

A variable is reliable, according to Shayer, if it is "easy to administer and not readily susceptible to clerical error or fraud."[110] Insurers have used administrative convenience as the primary justification for the retention of sex-based distinctions in the majority of automobile classification schemes. As noted in a GAO report to Congress, "State insurance departments have unquestionably accepted pricing schemes that are convenient for insurance companies, rather than effectively protecting the legal rights of their citizens."[111] Though mileage rating is not as simple as categorization based on sex, it is administratively feasible. Data compiled by Professor Lemaire on the automobile actuarial models used abroad indicate that France,[112] Sweden,[113] and the Netherlands[114] rate according to the annual distance which a vehicle travels.

Patrick Butler, of the National Organization for Women (NOW), has proposed a similar plan for use in the United States.

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108 EQUITY AND ACCURACY, *supra* note 93, at 3.

109 *See* notes 11-18 *supra* and accompanying text.

110 EQUITY AND ACCURACY, *supra* note 93, at 4.

111 *See 1983 Senate Hearings*, *supra* note 50, at 60 (statement of Johanna Mendelson on behalf of American Association of University Women) (quoting a 1979 GAO Report to Congress).

112 J. LEMAIRE, *supra* note 98, at 17. Under the French system, insurers are free to devise their own premiums, but computation of the basic premium is limited to specific criteria, including characteristics of the car, geographic area, vehicle use, and annual mileage. *Id.*

113 *Id.* at 31. In Sweden, all insurance companies are obliged to use identical risk factors and identical classification of these factors. The classification factors mandated are geographic area, annual distance traveled, vehicle model, and bonus-malus system. *Id.* at 31-32. A bonus-malus system establishes a basic premium which is adjusted upward or downward depending upon whether claims are presented. In its rewarding of claim-free drivers and punishment of drivers who present claims, it operates similar to a merit system. *Id.*

114 *Id.* at 27-29. The Netherlands allows insurers the freedom to set up their own premiums and conditions. An extensive statistical study in that country recommended vehicle weight, geographic area, a bonus-malus system, age, and distance traveled as exclusive rating variables. *Id.*

Butler's plan is a per-mile rating system which divides insurance premiums into two parts. The first part determines comprehensive insurance premiums, independent of mileage, through a flat service charge assessed at initiation and at each renewal.[115] The per-mile factors alone would determine the premium for driving coverages.[116] Thus, a car not driven would not be assessed for these insurance coverages. Butler further suggests a reduction in the per-mile rate as mileage increased.[117] Under such a system, insurers could approximate mileage before starting a new policy year. Such a system has operated effectively in Sweden since 1961.[118] In Sweden, if a driver's actual mileage differs from his estimated amount, the driver receives a premium rebate for the conserved mileage or pays an extra premium for the added travel.[119] Professor Lemaire reports that anticipated problems of underreporting were avoided through periodic reporting requirements and an annual inspection.[120] In the United States, the administrative machinery for such a system to function on the state level already exists.[121] In addition, statutes exist both federally and at the state level to control odometer tampering and fraud.

Mileage rating also meets Shayer's last criteria, the installation of proper incentives. First, it would induce people to drive less and reduce their exposure to risk.[122] Fixing insurance premiums to gasoline coupons had the same effect during World War II.[123] In addition, possibilities for conservation are enhanced when tied to controllable factors rather than an immutable gender classification.[124] Insurance commissioners recognized this fact in the 1970s

115 *See* Testimony of Patrick Butler, *supra* note 96, at 10.

116 *Id.*

117 *Id.* This provision recognizes that the risk of accident does not increase in proportion with miles driven, because much high mileage driving is accumulated on expressways, which have lower accident rates than other roads. *Id.*

118 *See* J. LEMAIRE, *supra* note 98, at 31-32.

119 *Id.*

120 Specifically, four safeguards were implemented in 1961 along with the mileage rating system which ensure accurate estimation and reporting of mileage accrual. These safeguards are:

(1) The insured has to report his odometer reading on request.

(2) At the annual motor vehicle inspection (compulsory for vehicles more than two years old), the reading of the odometer is registered.

(3) When a claim arises and the vehicle is left at a garage for repair, the odometer reading is reported to the insurer.

(4) If a claim arises and it emerges that the annual distance class has been too low, the amount of the indemnity will be reduced.

Id.

121 Butler reports, for instance, that odometer readings can be tied to state safety inspections or license renewals. Testimony of Patrick Butler, *supra* note 96, at 12.

122 *See* GAO REPORT, *supra* note 37, at 26 app.

123 *See* COMPTROLLER GEN. REPORT, *supra* note 81, at 102.

124 "The incentive for any individual male to alter his behavior is weak as long as he has

when they ordered insurers to reduce rates, adapting to reduced consumer driving because of the energy crisis.[125]

A final justification for the upheaval of current rating practices in favor of mileage-based rating is efficiency. A 1979 Stanford Research Institute report found that the ISO class plan, which included sex as a rating variable, achieved thirty percent predictive accuracy.[126] While seventy percent of the variance in inherent risk remained unexplained, criticism was limited because no other efficiency rating was available for comparison. One study even stated that thirty percent efficiency of the sex-based rating system was "the best process now known."[127] Recent actuarial data, however, suggests that these figures can be improved. A model which used mileage and seven other factors achieved a seventy-eight percent efficiency rating over a test period of two and one-half years.[128]

In sum, mileage rating can replace sex in insurance classification systems. Mileage rating attains the broad goals of social admissibility and actuarial validity, while also satisfying the narrower objectives mandated by political process compromises. In addition, its use in foreign countries demonstrates its feasibility. While many rating schemes do use mileage as a secondary variable for adult drivers, its rating use has not been increased when sexual distinctions are abandoned, and it is not used at all for drivers under twenty-five. Without the substitution of this rating factor, the prohibition of sex-differentiation prices results in an extreme price bias against all low mileage drivers and the gross overcharging of women, as a class, relative to men.[129]

IV. The Future of Unisex Automobile Insurance

While federal unisex legislation remains stalled in Congress,[130] women's groups are expected to shift their emphasis to the courts

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no way of extracating himself from the group and obtaining more favorable treatment short of altering his sex." Austin, *supra* note 91, at 558.

125 Testimony by the Pennsylvania National Organization for Women at Public Hearing before the Pennsylvania House Insurance Committee, NOW transcript at 3, November 14, 1985 (available from the files of the Notre Dame Law Review).

126 STANFORD RESEARCH INSTITUTE, THE ROLE OF RISK CLASSIFICATIONS IN PROPERTY AND CASUALTY INSURANCE (May 1976) (supplement).

127 Aetna Life and Casualty Co., A Report on Automobile Insurance Affordability 78 (March 1978).

128 To form his rating scheme, Professor Lemaire picked the seven most statistically valid rating factors out of 38 variables tested. These factors were age, the bonus-malus system, vehicle power, geographic information, marital status, nationality, and mileage. *See* J. LEMAIRE, *supra* note 98, at 100.

129 Testimony of Eleanor Smeal, President of NOW, before the New York Assembly Task Force on Women's Issues, NOW transcript at 2 (October 8, 1985) (available from the files of the Notre Dame Law Review).

130 *See* note 37 *supra* and accompanying text.

and the state legislatures.[131] The first shot in this political battle was fired recently when the Superior Court for the District of Columbia dismissed a National Organization for Women (NOW) suit challenging sex discrimination in medical and disability insurance.[132] NOW has also filed suit against Metropolitan Life Insurance Company in New York Supreme Court, alleging discrimination against women in life and disability insurance policies.[133] These challenges of insurance practices signal a renewed effort to implement unisex insurance in targeted state forums. Key victories in the courts or in the state legislatures will not only extend the unisex mandate on a case-by-case basis, but will also rally additional support needed to pass the desired federal legislation.

A. *Action in State Courts*

The state courts should anticipate continued litigation as a result of the decentralized attack strategy. Two variables are critical to the legal analysis of the anticipated unisex litigation. First, the standard of protection assigned to plaintiffs in discrimination actions is vital. Second, uncertainties involved in the state action doctrine are important considerations in the assessment process.

Whether insurance practices are challenged under state equal protection clauses or state equal rights provisions, the standard of protection adopted by the state courts will substantially shape the outcome of the litigation. The Supreme Court has traditionally viewed equal protection challenges in one of two ways. Where a "fundamental right" is violated or a "suspect classification" is employed, the Court has applied a standard of strict scrutiny.[134] Under this test, a "compelling state interest" is required and the means employed must be "necessary" to achieve the legislative goals.[135] Conversely, classifications which are not suspect and do not involve fundamental rights are treated under the "rational basis" test. Here, the state's means need only be "appropriate" to carry out a "legitimate government objective."[136]

131 Calmes, *"Unisex" Insurance Fight Shifting Locale*, CONG. Q., Jan. 26, 1985, at 148.

132 National Organization for Women v. Mutual of Omaha, No. 10023-84 (D.C. Cir. Oct. 28, 1985). *See also* State Div. of Human Rights v. Prudential Ins. Co. of Am., 273 N.W.2d 111 (S.D. 1978) (business of insurance was not a covered public accommodation under the Human Rights Act of 1972); Thompson v. IDS Life Ins. Co., 274 Or. 649, 549 P.2d 510 (1976) (pubic accommodations act did not cover the sale of insurance).

133 Lyons & Fisher, *NOW Sues Met Life In N.Y. for Sex Bias*, NAT'L UNDERWRITER: LIFE & HEALTH INS. EDITION, Oct. 12, 1985, at 1.

134 *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 590-99 (2d ed. 1983).

135 *Id.* at 591-92.

136 *Id.* at 591.

In *Craig v. Boren*,[137] the Court created a middle level of scrutiny for gender classifications. While not elevated to the level of a suspect class, distinctions based upon sex are subject to a more searching inquiry than the rational basis test. Specifically, under the Court's middle standard of scrutiny, the governmental objectives must be "important" and the means "substantially related" to carrying out these objectives.[138] Under this standard of review, then, the question is whether traditional sex distinctions in insurance premiums are substantially related to the important governmental objectives of equitable treatment of its citizens and proper regulation of the insurance industry.[139] One commentator has answered this question negatively, claiming that the classification system employed in automobile risk classification "fails to have even a 'rational basis.' "[140] The alternatives to current rating schemes suggested earlier in this note also suggest that the traditional approach fails to pass the enunciated constitutional standard.

The Supreme Court's constitutional interpretation, however, prescribes only the *minimum* level of rights which its citizens are afforded. State courts may expand the individual liberties of their citizens beyond those conferred by the federal constitution.[141] In the controversy presented above, *any* state may choose to provide greater protection for sex discrimination claimants under its equal protection clause than is mandated under the fourteenth amendment. Thus, the courts of any state could require a strict scrutiny analysis in cases challenging discriminatory insurance practices. The seventeen states with constitutional equal rights provisions[142]

137 429 U.S. 190 (1976).

138 *Id.* at 197.

139 *See* Comment, *An Appraisal of Sex Discrimination in Setting Automobile Insurance Rates*, 10 PAC. L.J. 201 (1976) (discussing the standard of strict scrutiny applied in California). The author framed the issues as follows:

> If elimination of the sex classification would severely restrict competition and marketability of insurance policies, this may be a sufficient compelling state interest to continue allowing companies to utilize the sex classification. This seems to presume, however, that no other variables exist that could be used to predict the risk of loss. . . . If it could be established that insurance companies would face seriously diminishing returns by having to use other variables in the rate setting process, then this may also be an interest to consider. It should be borne in mind, however, that spreading the risk over a larger segment of the population would not appear to result in lower profits but merely a reevaluation of available risk classifications. Thus, unless a compelling state interest is shown in allowing this type of discrimination, the California Supreme Court could strike the use of the classification as unconstitutional under the California equal protection clause.

Id. at 216-17.

140 *See Rating the Rating Schemes*, *supra* note 81, at 693.

141 Cologne v. Westfarm Assocs., 37 Conn. Super. Ct. 90, 442 A.2d 471, 477 (1982). *See also* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

142 *See* ALASKA CONST. art. I, § 3 (1972); COLO. CONST. art II, § 29 (1972); CONN. CONST. art. I, § 20 (1974); HAWAII CONST. art. I, § 21 (1972); ILL. CONST. art. I, § 18 (1971); LA.

seem the most likely forums for such broad interpretations, as the enactment of ERAs to state constitutions connotes a sensitivity to the issue of sex discrimination not displayed in the other thirty-three states. This is why women's groups have promised to focus their reform efforts in these states.[143] California adopted this approach in 1971 when its Supreme Court announced in *Sail'er Inn v. Kirby*[144] that "classifications based upon sex would be treated as suspect"[145] and that a strict scrutiny test would apply. Two years later, the Supreme Court of Washington adopted the same approach in *Hanson v. Hutt*.[146] In a further extension of the doctrine of expanded state protection, the Washington Supreme Court later rejected the *Hanson* strict scrutiny approach in favor of a *more* penetrating standard of review. In *Marchioro v. Chaney*,[147] the court held that the passage of the state ERA required that *no* sexual classifications would be tolerated regardless of the governmental interest involved.[148] Such an interpretation of state equal rights provisions would clearly prohibit the current disparate treatment of men and women in automobile insurance. Furthermore, such a reading is correct since any other, more limited, interpretation does not do justice to the sweeping mandatory language of the majority of state equal rights provisions.[149] Thus, additional state protection from gender-based distinctions, through the application of strict scrutiny or a more penetrating standard of review, would enhance the success rate of challenges to automobile insurance rating practices.[150]

CONST. art. I, § 3 (1974); MD. CONST. art. 46 (1972); MASS. CONST. pt. 1, art I. (1976); MONT. CONST. art II, § 4 (1973); N.H. CONST. pt. 1, art 2 (1974); N.M. CONST. art II, § 18 (1973); PA. CONST. art. I § 28 (1971); TEX. CONST. art I, § 3a (1972); UTAH CONST. art IV, § 1 (1896); VA. CONST. art. 1, § 11 (1971); WASH. CONST. art. XXXI, § 1 (1972); WYO. CONST. art. I, §§ 2, 3, art VI, § 1 (1890).

143 *See* Calmes, *supra* note 131, at 148.

144 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

145 485 P.2d at 539.

146 83 Wash. 2d 195, 517 P.2d 599 (1973).

147 90 Wash. 2d 298, 582 P.2d 487 (1978).

148 582 P.2d at 491. The court stated that the state ERA requires that "the equal protection/suspect classification test [be] replaced by the single criterion: Is the classification by sex discriminatory? or, in the language of the amendment, has equality been denied or abridged on account of sex?" *Id.*

149 *Id.*

150 State court interpretations of the equal rights provisions have been far from predictable, however. One commentator noted four different approaches employed by state courts in construing state equal rights provisions. First, some courts avoided interpretation of the state ERA altogether. Second, some courts have applied a standard of rational basis to questioned classifications under the state ERA, despite the clear state constitutional policy requiring equal rights. Third, some states adopt the strict scrutiny approach and treat sex as a suspect classification, as the current California standard illustrates. Finally, two states, Pennsylvania and Washington, have applied a standard of review more penetrating than even strict scrutiny. Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CAL. L. REV. 1086 (1977).

The state action doctrine raises another question of state interpretation. It is well settled that the fourteenth amendment applies only to government action; it does not protect "private conduct, however discriminatory or wrongful."[151] Like the flexibility in choosing a standard of protection,[152] a state may give its state constitution a broad or limited scope through its application of the state action doctrine. Generally, state clauses parallel to the fourteenth amendment have required state action to enforce challenges of equal protection.[153] Likewise, courts have applied state ERAs only to discrimination conducted by the state itself or by entities whose activities so involve the state as to establish the required governmental nexus.[154]

Because automobile insurance is primarily a private industry, the requirement of state action has often prevented courts from considering challenges to discriminatory insurance practices. The current Supreme Court has reinforced this obstacle. By encouraging state resolution of individual rights issues, the Court has narrowed the state action requirement.[155] The traditional view of federalism currently adopted by the Court holds that a state is not responsible for the discriminatory acts of private parties unless the state, through regulation, compelled the act.[156] In *Blum v. Yaretsky*,[157] for example, the Supreme Court espoused a three-part test to determine whether state regulation of private industry satisfied the state action requirement. In each prong of the *Blum* test, the Court emphasized that significant state involvement is needed to satisfy the required governmental nexus.[158]

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151 *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

152 *See* note 141 *supra* and accompanying text.

153 *See, e.g.*, Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 915 (E.D. Mich. 1978) (Mich. Const. equal protection clause has state action requirement); Schreiner v. McKenzie Tank Lines & Risk Management Servs. 408 So. 2d 711 (Fla. Dist. Ct. App. 1982) (Fla. Const. equal protection clause has state action requirement), *aff'd*, 432 So. 2d 567 (Fla. 1983); Lockwood v. Killian, 172 Conn. 496, 375 A.2d 998, 1001-04 (1977) (Conn. Const. requires state action); Holy Spirit Ass'n for Unification of World Christianity v. New York State Congress for Parents and Teachers, Inc., 95 Misc. 2d 548, 408 N.Y.S.2d 261, 265 (N.Y. Sup. Ct. 1978) (N.Y. Const. equal protection clause requires state action).

154 *See* U.S. Jaycees v. Massachusetts Comm'n Against Discrimination, 391 Mass. 594, 463 N.E.2d 1151 (1984); Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Ct. App. 1979); MacLean v. First N.W. Indus. of Am., 24 Wash. App. 161, 600 P.2d 1027 (1979), *rev'd on other grounds*, 96 Wash. 2d 338, 635 P.2d 683 (1981). *See also* Md. Op. Att'y Gen., slip. op. (March 7, 1983) (Md. ERA carries state action requirement). *But see* Hartford Accident and Indemnity Co. v. Insurance Comm'r, 505 Pa. 571, 482 A.2d 542 (1984); notes 168-69 *infra* and accompanying text.

155 *See* Comment, *supra* note 139, at 211.

156 *Id.*

157 457 U.S. 991 (1982).

158 The *Blum* test provides that:

> First, . . . [t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth

The method by which state insurance commissions participate in the automobile rate setting process varies from state to state.[159] In the majority of states, insurers submit rate proposals to the insurance department in advance of use.[160] The department reviews the proposals with the authority to force changes if the rates meet the state's definition of "unfair" discrimination.[161] Such a system has not established the required state nexus in the Supreme Court's application of the *Blum* standard. In *Jackson v. Metropolitan Edison Co.*,[162] for example, the Court held that a public utility proposal to discontinue service on reasonable notice for nonpayment of bills did not satisfy the state action requirement. The Court deemed critical the fact that the state involvement constituted mere approval of termination procedures initiated by the private utility

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Amendment. . . . The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". . . . The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct which the plaintiff complains. . . .

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state. . . . Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment. . . .

Third, the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State."

Id. at 1004-05.

159 *See* J. LEMAIRE, *supra* note 98, at 41-42. Professor Lemaire summarized the varying levels of state involvement as follows:

1. State-made rates laws. Rates are set by the state with strict adherence by all insurers. Insurers are permitted to pay dividends to policy holders. Only a few states have enacted this type of law.
2. Mandatory bureau membership laws. Rates are made by rating bureaus to which all companies must belong. Companies may deviate from bureau rates only with specific approval of the state insurance department. . . . Only a few states have enacted this type of law.
3. Prior approval laws. Rates must be approved by the state insurance department before they can be used. Bureau membership generally is permitted but not required. Insurers may also file their own rates independently. The majority of states have enacted this type of law.
4. Modified prior approval laws (use and file). Prior approval of rates is not required. However, rates must be filed with the state insurance department before they can be used. The state insurance department retains the right to subsequently disapprove rates.
5. File and use. Rates may be used and then filed with the state insurance department, which retains the right to subsequently disapprove rates.
6. No file. A few states do not require any rate filings.

Id.

160 *Id.*

161 *See* note 27 *supra* and accompanying text.

162 419 U.S. 345 (1974).

rather than action officially instigated by the state regulatory authority.[163] The Pennsylvania Superior Court employed similar reasoning in *Murphy v. Harleysville Mutual Insurance Co.*[164] In *Murphy*, the court rejected a challenge to the state's automobile insurance rate setting procedures. Thus, the majority of state ratemaking procedures fail the second part of the *Blum* state action standard because the state's prior approval scheme does not involve "coercive power" or "significant encouragement" by the state.[165] In states that either require membership in rating bureaus or determine insurance rates themselves,[166] however, the level of state involvement is increased to the point where the state action requirement may be satisfied.

In Pennsylvania, claims brought under the state ERA no longer require averment to state action. Two recent decisions have reversed a line of cases expousing the traditional requirement of governmental activity in claims brought under the state ERA. As stated in *Hartford Accident and Indemnity Co. v. Insurance Commissioner*[167] and affirmed in *Welsch v. Aetna Insurance Co.*,[168]

> [t]he rationale underlying the "state action" doctine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The lan-

163 *Id.* at 357. In holding the requisite state action was not met, the Court noted that:

> The nature of governmental regulations of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the state, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

Id.

164 282 Pa. Super. 244, 442 A.2d 1097 (1980), *cert. denied*, 454 U.S. 896 (1981). The requirement in *Murphy* that state action must be alleged under the Pennsylvania ERA was overturned in Welsch v. Aetna Ins. Co., 343 Pa. Super. 169, 494 A.2d 409 (1985). *See* notes 167-69 *infra* and accompanying text.

165 *See* note 158 *supra*. *See also* Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (no state action found under prior approval insurance scheme); Broaderick v. Associated Hosp. Servs., 536 F.2d 1 (3d Cir. 1976) (state approval of health insurance contracts and rates not state action); Jackson v. Associated Hosp. Servs., 414 F. Supp. 315 (E.D. Pa. 1976) (claim against state and private insurers alleging discrimination in maternity benefits rejected because no state action), *aff'd*, 549 F.2d 795 (3d Cir.), *cert. denied*, 434 U.S. 832 (1977).

166 *See* note 159 *supra*.

167 505 Pa. 571, 482 A.2d 542 (1984).

168 343 Pa. Super. 169, 494 A.2d 409 (1985).

guage of that enactment, not a text used to measure the extent of federal constitutional protections, is controlling.[169]

These rulings may have an enormous impact on the unisex battles conducted in state forums. If other states follow suit in affirming the independent significance of their ERA's as statements of intended policy, the traditional hurdle of showing state action to the level of "coercive power" or "significant encouragement" is removed. Coupled with the possibility for courts to invalidate automobile rating schemes under a "middle-level scrutiny," or even a more protective standard of review,[170] the potential for judicial reform at the state level is real. If accomplished even in limited target areas, such developments would be major victories for those lobbying for insurance reform, as strong regional triumphs would only add support for those continuing the struggle in Congress.

B. *Action in the State Legislatures*

Many state legislatures have proposed unisex automobile legislation similar to the statutes enacted in Hawaii, North Carolina, Massachusetts, Michigan, and Montana.[171] While further enactments of such legislation would affirm the policy goals behind the unisex objective, any statute which addresses only the prohibition of rating variables confronts merely one-half of the problem. The implementations of unisex automobile insurance in the states which have adopted these statutes demonstrates that the insurance response has consisted of an affirmance of flat-based pricing.[172] Such a result can only be expected; insurers are merely following the letter of the law in enacting rating schemes which prohibit the use of sex as a rating variable. The title usually given to such legislation, unisex insurance, suggest that the flat-based cost schemes implemented for men and women under thirty are acceptable—even desired.

For this reason, the distinction between "unisex insurance alone" and "classification without regard to sex" is proposed.[173] If states are to adopt a policy forbidding gender-based distinctions, they must substitute other rating variables for the sexual classifications. States could implement mileage rating as a *mandatory* rating variable as a part of a newly enacted classification system or as an amendment to a state's rate regulation statute. NOW made such a proposal in public hearings before the Pennsylvania House Insur-

169 *Welsh*, 494 A.2d at 412.
170 *See* notes 137-50 *supra* and accompanying text.
171 *See* notes 22-26 *supra* and accompanying text.
172 *See* notes 86-89 *supra* and accompanying text.
173 *See* notes 82-85 *supra* and accompanying text.

ance Committee in 1985.[174] Key aspects of this provision mandating the use of mileage rating are (1) a flexibility to allow for the administrative expenses in automobile insurance rating; and (2) rating calculation proportionally dependent upon the number of miles driven.[175] Under such a scheme, insurers would still have considerable freedom in determining the market price of per-mile driving by using any justifiable rating variable.

Such a legislative proposal corrects the deficiencies of current unisex statutes which fail to require cost-based calculations. The resulting transition to cost-based insurance rating can be actuarially efficient and socially equitable to all parties involved in the automobile rating controversy.

V. Conclusion

Changes in social attitudes and pressures from interest groups have forced a reexamination of the methods used to rate insurable risk. The Supreme Court's spark in the *Manhart* and *Norris* decisions ignited many unisex insurance proposals, which have kindled into a flame of legislative reform that challenges the very nature of current insurance practices. Social policy concerns have demanded that the focus of insurance rating shift from group classifications to individual attributes. The elimination of sex-based distinctions in automobile insurance rating is an attempt to legislate this goal.

Fueled by several state legislative enactments and judicial declarations, the quest for social equity has come at the expense of statistical validity in automobile insurance rating. Specifically, the elimination of sex as a rating variable without the corresponding substitution of other rating characteristics has resulted in a shift from cost-based to flat-based automobile insurance pricing in jurisdictions adopting unisex rating schemes. While the initial objective of eliminating unfair sexual distinctions is admirable, these changes *must* be accompanied by the implementation of mileage rating to achieve accuracy and fairness in automobile insurance practices. Without future emphasis on the goal of accuracy in automobile rat-

174 *See* Testimony by the Pennsylvania National Organization for Women at Public Hearing before the Pennsylvania House Insurance Committee, NOW transcript at 3, Nov. 14, 1985 (available from the files of the Notre Dame Law Review). The NOW proposal stated that:

> For the purposes of the [Casualty and Surety Rate Regulatory] act in its application to all insurance of a *motor vehicle* against losses resulting *only* from its operation, a standard for measure that shall be used to compare *individual risks* in the same class in what is termed "expected losses," "loss exposure," and "variations in hazards" is either the amount of time the motor vehicle is driven or the distance it travels, *starting from zero* and continuously increasing.

Id. (emphasis in original).

175 *See* notes 115-17 *supra* and accompanying text.

ing techniques, the fires of reform, fueled only by the social policy of equality, will burn out of control.

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