

Draft date: 8/2/2024

*2024 Summer National Meeting  
Chicago, Illinois*

**SPECIAL (EX) COMMITTEE ON RACE AND INSURANCE  
PROPERTY/CASUALTY WORKSTREAM**

Monday, August 12, 2024

9:00 – 11:00 a.m.

McCormick Place Convention Center—S102—Level 1

**ROLL CALL**

Scott Kipper, Co-Chair	Nevada	Pending	Massachusetts
Kevin Gaffney, Co-Chair	Vermont	Anita G. Fox	Michigan
Mark Fowler	Alabama	Andrew R. Stolfi	Oregon
Peni Itula Sapini Tea	American Samoa	Michael Humphreys	Pennsylvania
Barbara D. Richardson	Arizona	Cassie Brown	Texas
Timothy J. Temple	Louisiana	Mike Kreidler	Washington
Joy Y. Hatchette	Maryland		

NAIC Support Staff: Aaron Brandenburg

**AGENDA**

1. Hear Opening Remarks and the Purpose of the Session  
—*Commissioner Scott Kipper (NV) and Commissioner Kevin Gaffney (VT)*
2. Hear Definitions in the Legal Space—*Kay Noonan (NAIC)*
3. Hear Consumer Perspective—*Peter Kochenburger (Southern University School of Law)*
4. Hear Industry Perspective—*Robert Gordon (American Property Casualty Insurance Association—APCIA) and Tony Cotto (National Association of Mutual Insurance Companies—NAMIC)*
5. Discuss Casualty Actuarial Society (CAS) Paper Definitions  
—*Kenneth Williams (CAS)*
6. Discuss Any Other Matters Brought Before the Workstream  
—*Commissioner Scott Kipper (NV) and Commissioner Kevin Gaffney (VT)*
7. Adjournment

# Discrimination in Insurance Definitions

1

*Kay Noonan  
General Counsel  
National Association of Insurance Commissioners*

# DISCRIMINATION IN INSURANCE

2

- ▶ “In insurance, discrimination is not necessarily a negative term so much as a descriptive one.”
- ▶ NAIC regulatory guidance in the NAIC Product Filing Review Handbook includes the following:
  - “Unfairly discriminatory” is a concept often based on “cost-based pricing” with the key word being “unfairly.”
- ▶ State unfair discrimination laws and case law interpreting them recognize that only unfair discrimination is prohibited. Some measure of price differentiation is inherent in cost-based pricing.

# DISCRIMINATION IN INSURANCE

3

- ▶ Insurance regulators use existing statutory authorities to address the potential of unfair treatment of consumers in rating and underwriting, including discrimination based on protected classes.
- ▶ Insurance companies use rating factors that are correlated with the risks of the insurance policyholder in order to set actuarially sound pricing.
- ▶ States review rate filings to ensure that insurance companies are using rate factors that correlate with the risk of loss or expenses.
- ▶ The more underwriting factors that are used, the more accurate the risk assessment and rate is to a particular policyholder.
- ▶ Failure to adequately assess risk- in other words failure to discriminate- could trigger adverse selection on the one hand and opting out of needed coverage on the other.

# STATE UNFAIR DISCRIMINATION STATUTES

4

- The McCarran Ferguson Act (1945), with its limited antitrust exemption, directed that federal antitrust statutes would not apply to insurance if states occupied the field.
- The NAIC established a Robinson Patman Act Subcommittee which recommended that each state adopt a statute prohibiting unfair rate discrimination.
- The Model Unfair Trade Practices Act was first adopted by the NAIC in 1947 and subsequently adopted in substantially similar form by all states.
- From the NAIC Model:
  - G. Unfair Discrimination.
    - (1) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any life insurance policy or annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such policy.
    - (2) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.
    - (5) Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the sex, marital status, race, religion or national origin of the individual; however, nothing in this subsection shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependent benefits. Nothing in this section shall prohibit or limit the operation of fraternal benefit societies.

# STATE UNFAIR DISCRIMINATION STATUTES

5

## ▶ (215 ILCS 5/) Illinois Insurance Code.

It is an unfair method of competition or unfair and deceptive act or practice if a company makes or permits any unfair discrimination between individuals or risks of the same class or of essentially the same hazard and expense element because of the race, color, religion, or national origin of such insurance risks or applicants.

# STATE UNFAIR DISCRIMINATION STATUTES

6

- ▶ State Rating statutes- either “prior approval” or “file and use” – include tools to identify and address problematic rating practices.
- ▶ Most state rating laws provide state regulators with authority to ensure that rates are not “excessive, inadequate or unfairly discriminatory.”

# STATE UNFAIR DISCRIMINATION STATUTES

7

- ▶ On top of the general unfair discrimination regime in insurance law, state policy makers have identified certain factors as inappropriate for insurance rating- without regard to actuarial soundness.
- ▶ Certain factors are prohibited entirely and certain factors are prohibited as the sole basis for classification or denial of coverage.
- ▶ Public policy decisions have led to widespread barring of rating based on race, religion and national origin.
- ▶ Similarly, various degrees of prohibition are in place regarding gender, disability, sexual orientation, credit scores, foreign travel, genetic characteristics, etc.



# WHAT ABOUT DISPARATE IMPACT?

# DISPARATE IMPACT LIABILITY

- ▶ Disparate impact is a judicial theory that allows a challenger to prove illegal discrimination by a facially neutral practice because it allegedly disproportionately harms members of a protected class.
- ▶ The United States Supreme Court has recognized two ways to establish illegal discrimination against protected classes. The first is “disparate treatment” - which is established by showing that an actor intends to treat a protected class of persons differently from non-protected classes. The second way to establish illegal discrimination is to show that a business practice has a “disparate impact” or what the Supreme Court has called a “disproportionately adverse effect” on a protected class.
- ▶ Disparate impact theory was first developed in an employment law context. (Civil Rights Act of 1964- Title VII).

# Disparate Impact Liability

10

- ▶ In *Griggs v. Duke*, widely referred to as the first disparate impact case, an employer required a high school diploma or a skills test for certain jobs. It was shown that the requirement was applied equally to all races and that there was no racial purpose or invidious intent. The Supreme Court determined that the requirement was not related to job performance and that the requirement disproportionately made minorities ineligible for such jobs. The court said that “good intent or the absence of discriminatory intent” was not enough to save requirements that operate as “built-in headwinds for minority groups and are unrelated to measuring job capability.” The court held that, in enacting Title VII, Congress was focused on the consequences of employment practices, not just an employer’s motivation, and that Congress proscribed “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”
- ▶ The relevant language of Title VII prohibits an employer from classifying employees in a way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s race, color, religion, sex or national origin.

# DISPARATE IMPACT LIABILITY

11

- ▶ Disparate impact liability theory has also been used under other federal laws, including the Age Discrimination in Employment Act (ADEA) and the Fair Housing Act (FHA).
- ▶ Generally, a plaintiff must prove the challenged business practice caused the disparity and, when the defendant establishes a business justification for the practice, the plaintiff must prove there is an alternative practice that serves the business' needs with less disparate impact.
- ▶ In *Texas Dept. of Housing & Community Affairs v. Inclusive Communities*, 135 S. Ct. 2507 (2015), the Supreme Court interpreted language in the FHA to allow for disparate impact liability where the language made it unlawful to “refuse to sell or rent...or otherwise make unavailable or deny, a dwelling to a person because of race...”
- ▶ The Court found that provision of the law focused on the consequences of the action and not just the actor's intent.

# WHAT ABOUT PROXY DISCRIMINATION?

# Proxy Discrimination

- ▶ Proxy discrimination occurs when a facially-neutral trait is utilized as a stand-in—or proxy—for a prohibited trait.
- ▶ As with disparate impact, it is unclear what role potential proxy discrimination does or should play in the enforcement of state unfair discrimination statutes.
- ▶ The definition of proxy discrimination- and whether it can occur in the absence of intent- are the subject of dispute.
- ▶ Some argue that “proxy discrimination” can exist only if couple with intent.
- ▶ Others argue that proxy discrimination is a subset of disparate impact and doesn’t require affirmative intent to discriminate.
  - This is particularly troubling when coupled with the use of artificial intelligence which operates without “intent.”

# Proxy Discrimination

14

- ▶ NAIC Principles on Artificial Intelligence
  - Consistent with the risk-based foundation of insurance, AI actors should proactively engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers and to avoid proxy discrimination against protected classes. AI systems should not be designed to harm or deceive people and should be implemented in a manner that avoids harmful or unintended consequences and corrects and remediates for such consequences when they occur.
- ▶ NAIC Model Bulletin
  - That means that an Insurer is responsible for assuring that rates, rating rules, and rating plans that are developed using AI techniques and Predictive Models that rely on data and Machine Learning do not result in excessive, inadequate, or unfairly discriminatory insurance rates with respect to all forms of casualty insurance—including fidelity, surety, and guaranty bond—and to all forms of property insurance—including fire, marine, and inland marine insurance, and any combination of any of the foregoing.

# CONCLUSION

15

- ▶ Insurance regulators have robust authorities to address potential instances of unfair treatment of consumers, including those related to protected classes.
- ▶ Technology advancements, including the use of big data and artificial intelligence, enhance the specificity of underwriting and rating practices but may also increase the likelihood of discrimination.
- ▶ Societal pressures to address what is viewed as bias and discrimination in the availability and affordability of insurance are likely to continue.
- ▶ Consensus on definitions will be essential to the development of any model laws, regulations or regulatory guidance.



# Proxy Discrimination and Insurance Regulation Insurance Exceptionalism in US Anti-Discriminatory Laws\*

NAIC Summer Meeting, SCORI – PC workstream  
August 12, 2024

Peter Kochenburger, [peter.kochenburger@sulc.edu](mailto:peter.kochenburger@sulc.edu)

Visiting Professor of Law, Southern Univ. Law Center  
Senior Research and Engagement Fellow, UConn Law School

\* BC Law Professor Patricia McCoy, *With All Deliberate Speed: Discrimination in U.S. Insurance Law*, pp. 11-14, *British Insurance Law Association*, 2022

# Proxy Discrimination

- Not a precise term or definition, but often used to describe the use of neutral rating classifications or factors that nevertheless disproportionately effect “protected classes” (as defined by federal and state laws). The existence of such a factor does not mean it is necessarily prohibited and can’t be used – “disparate impact” utilizes a more nuanced evaluation.
- By its very nature, demonstrating Proxy Discrimination does *not* require intent to discriminate against a protected class – intentional discrimination has long been prohibited by law, though a disparate impact analysis can also uncover intentional discrimination in the use certain proxies.

# Proxy Discrimination

The primary reasons:

- *The focus is on harm* – if a risk classification unfairly burdens a protected class, the economic harm is the same regardless of whether the actor intended to discriminate. This point has been made recently and repeatedly at the NAIC, including by several NAIC presidents.
- A major reason, centuries of intentional discrimination by the federal and state governments, along with private parties, has embedded discrimination and discriminatory practices in many areas of our economy, including financial services, housing, and employment.
- The growth of AI, data collection and data modeling, machine learning, and generative AI make proxy discrimination virtually inevitable, absent industry testing and specific regulations.

# Proxy Discrimination and Disparate Impact Analysis

Typically a three-step process:

1. The plaintiff or agency must demonstrate a prima facie case of disparate impact.
2. If relevant, the defendant demonstrates that the factor or classification is a necessary business practice.
3. If so, can the plaintiff provide alternative classifications or practices that provide similar results and have a less discriminatory effect.

These are often difficult cases to prove, and the existence of a disparate impact is only the first step in the analysis.

# Insurance Regulation- increasingly isolated in its failure to address proxy discrimination

## Federal:

- Disparate Impact analysis to identify and remedy unfair discrimination even when unintentional goes back more than 50 years: *Grigg v. Duke Power Company* - US Supreme Court, 1971 (employment discrimination)
- Utilized in many areas, including banking, consumer credit, housing, employment, and voting laws.
- President Biden's Jan. 26, 2021 order requiring HUD to reexamine the Disparate Impact Rule with the intent and ultimately the effect of reinstating the original 2013 Rule.

# The Federal Government & Disparate Impact

## Federal:

- HUD's 2023 Disparate Impact Rule applies a disparate impact analysis to the Federal Housing Act, which includes homeowners insurance.
- HUD's rule has been upheld by a federal district court which granted summary judgment to HUD, finding the Rule's application to insurers was within HUD's regulatory powers and consistent with the Supreme Court's decision in *Texas Dept. of Housing v. Inclusive Communities*, 576 US 519 (2015). *Nat'l Ass'n of Mut. Ins. Companies v. United States Dep't of Hous. & Urb. Dev.*, 693 F. Supp. 3d 20, 25 (D.D.C. 2023). This case is likely on appeal.

# The Federal Government & Disparate Impact

## Federal: Consumer Credit and Disparate Impact Analysis

- The 1974 Equal Credit Opportunity Act has long used disparate impact analysis in consumer credit transactions, including banks, credit unions, retailers, and finance companies, and in 2015, to the Fair Housing Act (*Inclusive Communities*).
- CFPB has primary jurisdiction in credit, but disparate impact analysis also recognized by the OCC, FDIC, and other federal financial services regulators.

# State Regulatory Actions, Examples

- NY DFS Insurance Circular Letter 7 (July 17, 2024): “Use of Artificial Intelligence Systems and External Consumer Data and Information Sources in Insurance Underwriting and Pricing.” Includes a disparate impact analysis.
- Colorado: SB 21-169, SB 24-205, apply disparate impact standard.
- Connecticut Bulletin No. MC-25, February 26, 2024, restricts discrimination “based on protected classes.”



# Actuaries and Actuarial Professional Associations

## Addressing fairness in broader contexts

- “Just because we don’t use someone’s race in the data doesn’t automatically allow us to say that it’s non-racially discriminatory, because there are proxies for race.” Sherry Chan, chief strategy officer for Atidot
- “My greatest concern is that actuaries are not really examining ... the social underpinnings of the data and what kinds of social policies and practices may have embedded bias into the data that they’re using in their models” Dorothy Andrews, NAIC senior behavioral data scientist, actuary
- “The ethical implications of algorithmic outputs, AI and big data usage [is] the most critical [point] of all.” Johan von der Embse, corporate vp, actuary, New York Life

*From AI and the Actuary of Tomorrow, January, 2024, pp. 8-9*

# And the NAIC (at least in 2020)

NAIC Principles of AI, adopted August 14, 2020, p. 1

Consistent with the risk-based foundation of insurance, AI actors should engage in responsible stewardship of trustworthy AI in pursuit of beneficial outcomes for consumers and to avoid proxy discrimination against protected classes. AI systems should not be designed to harm or deceive people and should be implemented in a manner that avoids harmful or unintended consequences and corrects and remediates for such consequences when they occur.

Since its adoption ... ?

# The Federal Government & Disparate Impact

Insurance and state insurance regulation is “exceptional,” as aside from some states, it does not recognize proxy discrimination and the tools that help identify and limit it within regulatory application. This is in contrast to how other financial services sectors are regulated in the United States and invites, for better or worse, a federal solution requiring proxy discrimination analysis in insurance. President Biden’s Jan. 26, 2021 memorandum and the HUD Disparate Impact Rule, are examples.

(the results of this year’s presidential election will likely be the most important determinant, at least for now)

## **Common reasons (excuses?) provided on why a disparate impact standard is not appropriate in insurance**

- 1. It is inconsistent with risk-based pricing, or alternatively, is the "end of risk-based pricing," as several trade associations have asserted.*

First, risk-based pricing is not the purpose of insurance regulation, but a tool or analysis that is often very important and useful, to regulatory and public policy goals. It is not enshrined in law, nor can it be. Second, this position is a good example of the fallacy of many slippery slope arguments. Restricting the use of actuarially valid risk factors or classifications because of more important public policy goals is common in insurance. For example, the ACA and community rating, the National Flood Insurance Program subsidies, residual markets that cap rates, and prohibitions on using specific factors, such as race, and in some states, income, education, marital status, credit scores, and gun ownership. Yet risk-based pricing continues today as a common used and important tool.

## **Common reasons (excuses?) provided on why a disparate impact standard is not appropriate in insurance**

- 2. It is inconsistent with the traditional understanding of the “unfairly discriminatory” prohibition, which is about actuarial fairness - does the risk factor accurately and consistently segregate risks by the classification utilized.*

We should avoid getting bogged down by this argument, which unnecessarily obfuscates the issue. First, “unfair discrimination” is not always limited to actuarial accuracy or fairness – state statutes may include specific prohibitions within it, such as prohibiting the use of race, even if otherwise “valid.” Second, and more important, the definition of “unfair discrimination” can be altered as a state legislature wishes, or simply supplemented by statutes that prohibit proxy discrimination generally. It is not a legal barrier and the industry’s understanding of what it means is always subject to legislative change, or federal preemption.

## **Common reasons (excuses?) provided on why a disparate impact standard is not appropriate in insurance**

3. *Federal involvement in insurance is restricted by the McCarran-Ferguson Act, which leaves this area to state insurance regulation.*

Thankfully, we don't hear this argument as frequently now. M-F is primarily a rule of statutory construction, not a substantive limitation. Congress can regulate insurance with the same authority it has over other commercial entities, when the statute specifically includes insurance within its ambit. Examples include the ACA, HIPAA, ERISA, TRIP, the NFIP, crop insurance, certain risk-pooling mechanisms, and Medicare and Medicaid. As a statute McCarran-Ferguson can also be amended, as it has been several times, repealed, or expanded by Congress; state insurance regulation does not have any constitutionally protected status.

# Finally

Perhaps the most important question is why should insurance consumers not have the same protections long afforded by federal and increasingly state laws in financial services regulation? Here “exceptionalism” by not considering or restricting proxy discrimination, is a detriment to consumers, regulators, and ultimately the industry.



# **NAIC SPECIAL (EX) COMMITTEE ON RACE AND INSURANCE PROPERTY/CASUALTY WORKSTREAM**

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Robert Gordon

Senior Vice President, Policy, Research & International

August 12, 2024





# APCIA/Industry Discrimination Analysis In Response to NAIC Leadership Request

- In 2020, NAIC leadership asked APCIA to work together on addressing racial equity & social justice issues & to analyze unfair discrimination
- APCIA committed extensive resources to constructively engage:
  - Special Board CEO Working Group on Social Equity & Inclusion
  - Established DEI voluntary reporting & diversity leadership programs
  - Hired expert data scientists and actuaries on unfair discrimination
  - Four years of ongoing policy and data analysis
  - Presented findings, peer-reviewed reports, and numerous studies to the NAIC
    - (See esp. “A Survey of Historical and Current Research Concerning Risk-Based Pricing and Unfair Discrimination” (Aug. 2023))



# Insurance-Specific Foundational Definition: Unfair Discrimination

- “Unfair discrimination” is the foundational test for insurance discrimination
- NAIC: “Unfair discrimination exists if, after allowing for practical limitations, price differentials fail to reflect equitably the differences in expected losses and expenses”
- Casualty Actuarial Society: “A rate is ... not ... unfairly discriminatory if it is an actuarially sound estimate of the expected value of all future costs associated with an individual risk transfer”
- NAIC Ratemaking Statement of Principles & the Actuarial Standard of Practice both define unfair discrimination by **comparing rates to costs**



# Historical Testing of Unfair Discrimination

- Federal/NAIC/states/APCIA have conducted numerous studies of insurance pricing to test for unfair discrimination
  - Overwhelming findings: rates are based on losses and do not unfairly discriminate against the tested protected classes
- “Place not race” => Densely populated urban areas have higher premiums, but the cost of coverage (risk-based) is not higher
  - A p/h paying \$120 is not paying \$20 more for the same product as another p/h paying \$100 => each is paying based on their expected loss proclivity
  - Insurance rates reflect the differences in expected losses and expenses



# Non-Insurance-Specific Civil Rights Terminology

- 60 years of civil rights jurisprudence = 2 separate/distinct categories of anti-discrimination protections have evolved:
  - **Intentional** discrimination against protected classes
    - Unlawful in every instance
    - Subject to various penalties
  - **Unintentional** discrimination
    - Courts use a balancing test to determine whether the practice is unlawful



# Intentional Discrimination Terms

- “Disparate treatment”:
  - Inquiry is whether the defendant adopted a policy or practice **intentionally because of** a discriminatory purpose against a protected class
- “Proxy discrimination” is a form of disparate treatment:
  - Requires intent to discriminate against and because of a protected class

Both “disparate treatment” and “proxy discrimination” require proof of discriminatory motivation:

- Valid business purpose is irrelevant
- The remedy is to eliminate the conduct (not mitigate it)



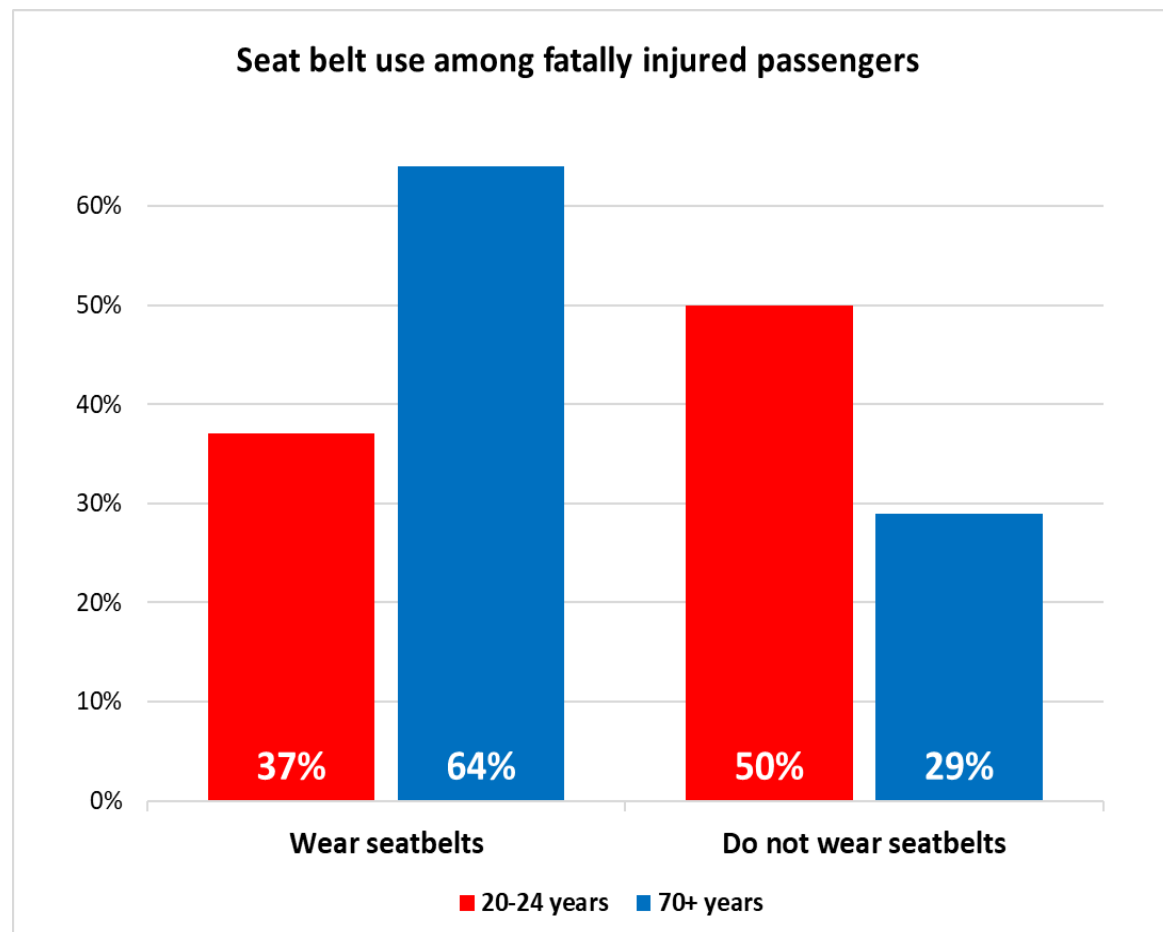
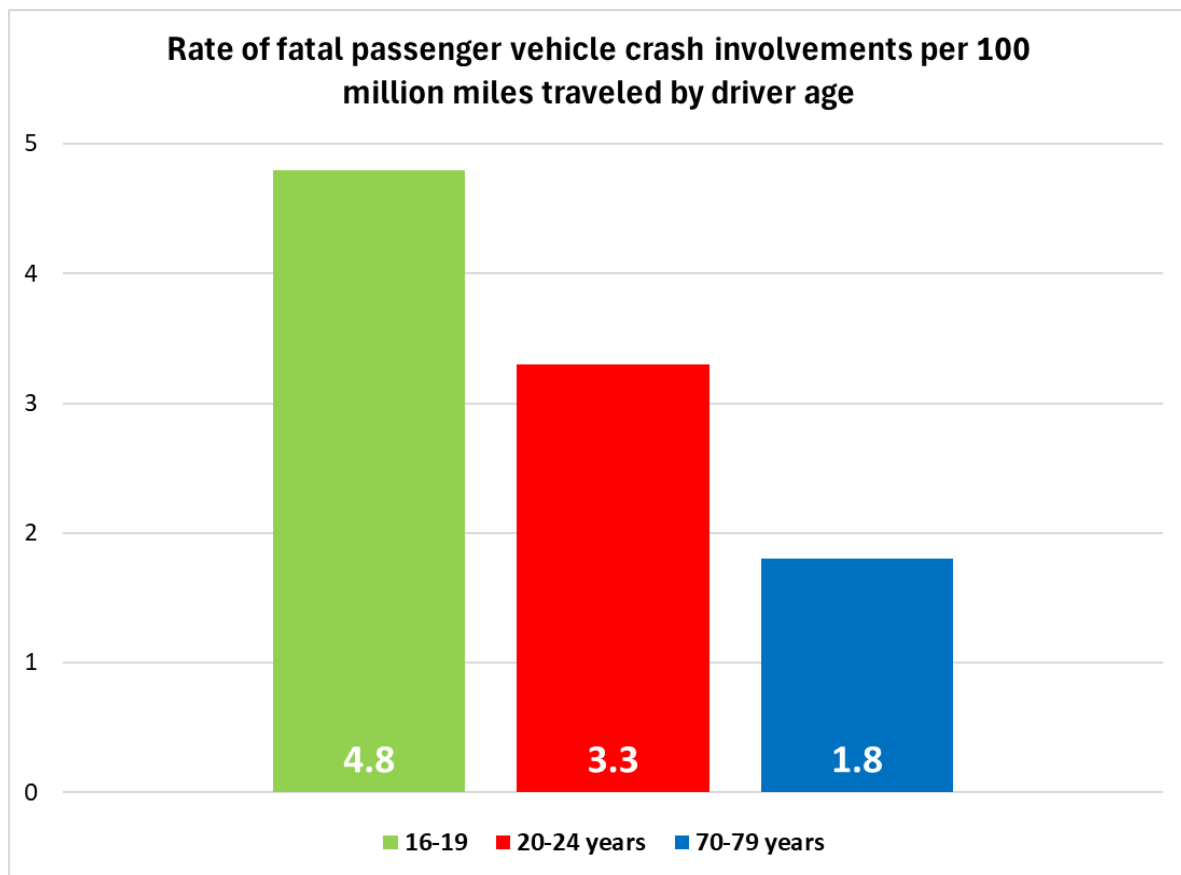
# Unintentional Discrimination

- “Disparate impact”
  - Motivation/intent to discriminate because of a protected class is irrelevant
  - U.S. Supreme Court in *Inclusive Communities* established the inquiry for disparate impact:
    - Is there an adverse outcome for a protected class?
    - If so, then is there a valid business purpose?
    - If so, then is there an equally effective alternative?



# Understanding the Differences

## Example: Fatal Crashes/Seat Belt Usage by Age

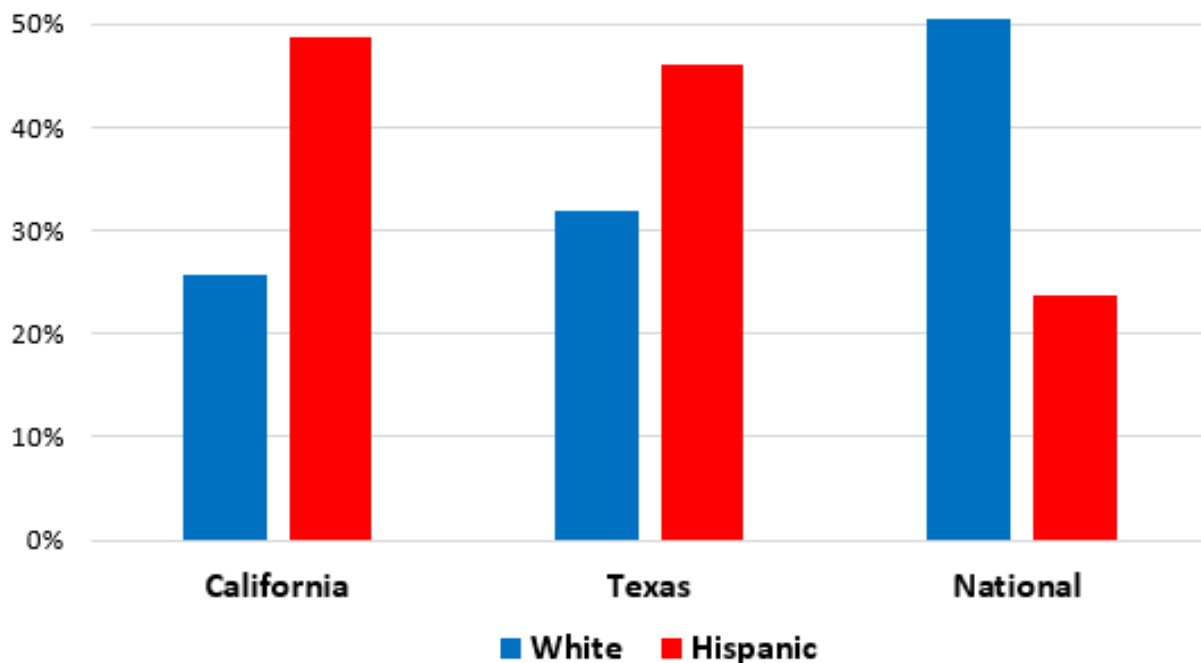


Source: Insurance Institute for Highway Safety (IIHS)  
<https://www.iihs.org/topics/fatality-statistics/detail/teenagers>



# Percentage of 19-24 year-olds by race

Largest Ethnic Group 19-24 Year old Drivers



Source: NSC Injury Facts Report 2022

## California:

Nearly 49% Hispanic or Latino  
Nearly 26% White

## Texas

Just over 46% Hispanic or Latino  
32% White

## Nationwide:

Just over 50% White  
Nearly 24% Hispanic or Latino

Source: National Safety Council/U.S. Census Bureau  
<https://www.census.gov/library/visualizations/interactive/exploring-age-groups-in-the-2020-census.html>





# Ongoing Efforts to Undermine the Civil Rights Laws / Distinctions

- Activists often try to create new terminology to confuse and conflate the two distinct anti-discrimination categories and tests
- **Intentional** discrimination is unlawful in every instance
  - Including “disparate treatment” and “proxy discrimination”
- **Unintentional** discrimination may not be unlawful
  - Disparate impacts are not prohibited for insurance unless it is unfair discrimination (when similar risks are treated differently – which would occur if an insurer tried to correct for protected class characteristics)
  - HO insurance is also subject to the *Inclusive Communities* balancing test: (1) There must be a valid business interest served by the challenged practice and (2) An equally effective alternative that serves the valid interest while mitigating adverse outcomes.



# Additional Developments in Discrimination Law – Unconstitutionality of Racial Balancing

- *Students for Fair Admissions v. Harvard* (2023): Supreme Court held that racial balancing is patently unconstitutional and violates constitutional equal protection
- Attorneys General letter from 13 states: “the Supreme Court’s recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences”
  - Followed by an opposing letter from 21 state AGs
- *Alliance for Fair Board Recruitment v. SEC* (2024): Fifth Circuit *en banc* vacated a lower court opinion and reinstated a review of Nasdaq’s rule requiring listed companies to explain their rationale for not having at least two diverse directors on their boards



# Additional Developments in Discrimination Law – Ongoing Industry Litigation against HUD

- APCIA & NAMIC separate litigation versus HUD:
  - HUD promulgated a new “disparate effects” test for housing (2013)
    - APCIA and NAMIC each filed suit
    - HUD amended its disparate impact standard to reflect *Inclusive Communities* (2020)
    - HUD restored its 2013 rule under the current Administration (2023)
    - APCIA/NAMIC lawsuits/appeals are continuing
    - Appellate review likely to consider McCarran-Ferguson, *Inclusive Communities* and *Loper Bright Enterprises* (Supreme Court this June overturned Chevron deference to government agencies, ruling that courts are required to exercise their independent judgment in determining whether an agency has acted within its statutory authority)

Huskey: Court is analyzing algorithmic tools used in claims settlement to determine actuarial bases vs. potential disparate impact (2022)



# NAIC AI Bulletin (Dec. 2023)

- NAIC AI bulletin requires:
  - Compliance with applicable existing state unfair trade practices, unfair claims settlement practices, and unfair discrimination laws
  - Governance procedures
    - Goal of mitigating risk of adverse consumer outcomes, which is defined as a violation of existing state regulatory standards in a manner adversely impacting consumers
  - Regulatory oversight underscores the importance of discussions between DOIs and insurers on governance
  - Review of 3<sup>rd</sup> party systems used by insurers contemplated (APCIA working with vendors on potential certification program)

**\*Bulletin recognizes flexibility in insurers' compliance practices**



# Additional Complications: Extensive Categories of Protected Classes (CA)

- Race (10 sub-categories)
- Color
- Religion
- Sex/gender
- Gender ID/ expression
- Sexual orientation
- Marital status
- Medical condition
- Military/veteran status
- National origin (incl. language use)
- Ancestry
- Disability (mental & physical)
- Genetic information
- Age (over 40)
- Related to reporting patient abuse
- Related to requests for family care leave; health leave; or pregnancy leave



# Key Takeaways

- Intentional discrimination (“disparate treatment” or “proxy discrimination”) is unlawful
- Unintentional discrimination (unfair discrimination or disparate impact) may not be unlawful
  - Instead, courts and regulators oversee that actions are actuarially based
  - Numerous regulator/academic/industry studies demonstrate no unfair discrimination
  - Several studies have also been completed showing negative societal impacts of limiting actuarial, risk-based pricing
- Application of federal anti-discrimination standards to insurance is currently being litigated
- Protected class rebalancing is a potential equal protection violation





# Conclusions

- **To adopt long-standing definitions of key terms is . . .**
  - To adopt a nomenclature familiar to consumers
  - To mitigate the risk that insurers will be held to different standards in federal v. state courts for the same policy or practice
  - To minimize the risk of federal intrusion in state regulation as a result
  - In no way limits a state regulator's options for addressing unintentional discrimination
- **To adopt new terms and redefine existing key terms results in unintended consequences – essentially the opposite of what adhering to long-standing definitions produces**



## FOUNDATIONAL TERMS OF LEGAL SIGNIFICANCE RELATING TO UNFAIR DISCRIMINATION

### Key Definitions

**DISPARATE TREATMENT DISCRIMINATION** is a form of intentional discrimination directed at a member of a protected class. The primary inquiry in a “**Disparate Treatment Discrimination**” claim is whether in adopting a challenged policy or practice the defendant acted because of a discriminatory purpose. Compensatory and even punitive damages are available for “**Disparate Treatment Discrimination**” claims because the defendant’s conduct is motivated by an intent to discriminate.

**PROXY DISCRIMINATION** is a form of “**Disparate Treatment Discrimination**.” “**Proxy Discrimination**” is intentional discrimination directed at a member of a protected class where a defendant uses a technically neutral classification as a proxy for the protected class.

**PROXY THEORY** was adopted by courts to recognize that a defendant should not be able to use a technically neutral classification as a proxy for evading the prohibition against intentional discrimination directed at a member of a protected class.

**DISPARATE IMPACT DISCRIMINATION** is a form of unintentional discrimination involving policies and practice that are technically neutral but produce a disproportionately adverse outcome for members of a protected class, which is otherwise unjustified by a valid business purpose or for which no reasonable alternative exists. “**Disparate Impact Discrimination**” is not motivated by a discriminatory intent. Neither compensatory nor punitive damages are available for “**Disparate Impact Discrimination**” claims because there is no intentional conduct to punish.

**PROTECTED CLASS** was originally introduced in the Civil Rights Act of 1964 and included five classifications: race, color, religion, sex, and national origin. Congress has expanded the classifications to include disability, age, gender identity, sexual orientation, pregnancy, military status, and genetic information. “**Protected class**” does not include marital status or socio-economic status (including in the form of credit history). Some states have expanded the definition to include other groups.

**UNFAIR DISCRIMINATION** as uniformly used in the context of insurance ratemaking laws means treating policyholders with similar risk profiles differently. States have adopted varying stances on whether to allow the use of certain protected classes

*continued*

### FOUNDATION LEGAL TERMS *continued*

(such as sex and age) as rating factors for insurance pricing. “**Unfair discrimination**” as defined in insurance regulatory law is distinct from the term’s usage in the civil rights context, where it typically refers to “**Disparate Impact Discrimination**.”

**STATISTICAL BIAS** occurs when methods used to gather data or generate statistics result in findings that do not accurately represent the sample population. “**Statistical Bias**” can occur in the absence of prejudice, partiality, or discriminatory intent.

Other terms often used in connection with insurance but that have **no legally established definitions or significance** include unintentional proxy discrimination, disparate intent, bias or disproportionate impact.

### Disparate Treatment Discrimination v. Disparate Impact Discrimination

	DISPARATE TREATMENT DISCRIMINATION	DISPARATE IMPACT DISCRIMINATION
Did the challenged policy or practice have an adverse effect on a protected class?	YES	YES
Did the Defendant intend to discriminate against a protected class?	YES	NO
Can Proxy Theory apply?	YES Proxy Discrimination may be an element of a Disparate Treatment Discrimination claim	NO Proxy Discrimination is <b>never</b> an element of a Disparate Impact Discrimination claim
Can the Plaintiff be entitled to compensatory and/or punitive damages?	YES In addition to injunctive relief and attorneys’ fees, Plaintiff may be entitled to compensatory and even punitive damages because of the Defendant’s intentional conduct	NO Plaintiff is not entitled to compensatory or punitive damages because there is no intentional conduct by the Defendant; Plaintiff may be entitled to injunctive relief and attorneys’ fees
Is a public policy goal to eliminate the challenged policy or practice?	YES The goal is to eliminate intentionally discriminatory policies and practices	NO The goal is to <b>mitigate adverse outcome</b> of unintentionally discriminatory policies and practices where a valid interest is served







# Questions?

Robert Gordon

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Policy, Research & International

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# Casualty Actuarial Society Defining Discrimination In Insurance

**Ken Williams**  
**Staff Actuary - Chief of Advocacy**  
**Casualty Actuarial Society**



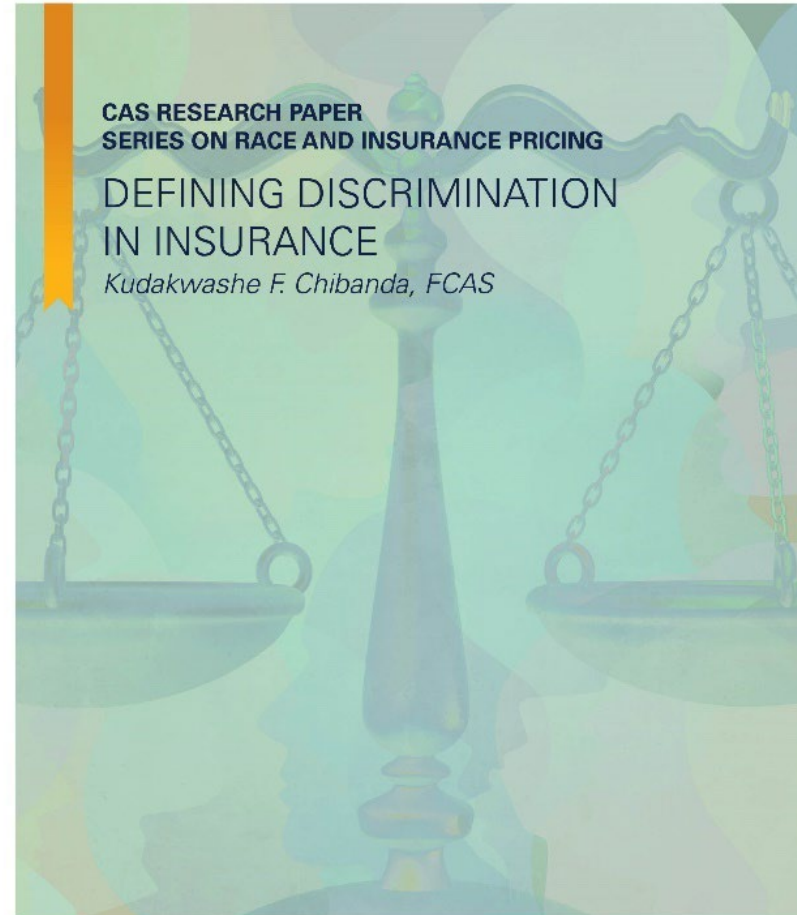


# CAS Approach to Race and Insurance Pricing





# Defining Discrimination In Insurance



CASUALTY ACTUARIAL SOCIETY






# Why Actuaries Should Care



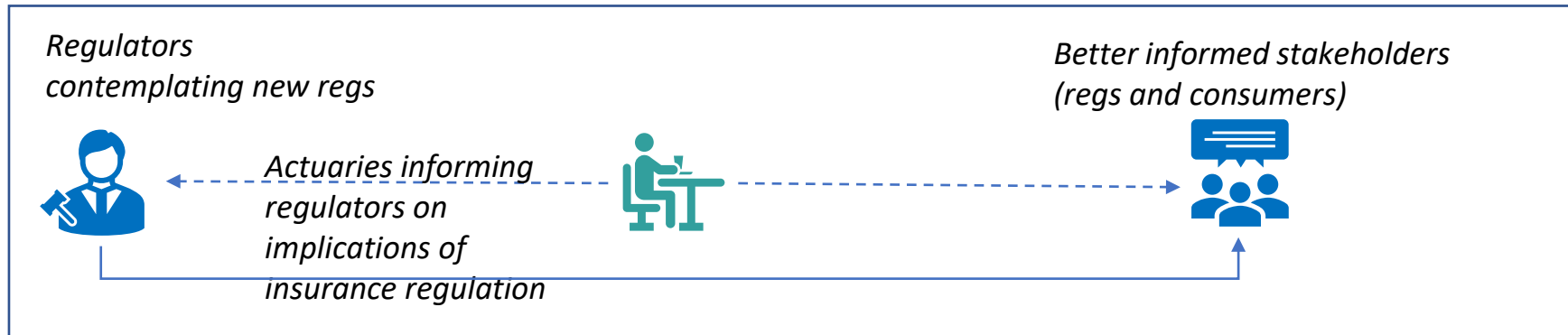
*Regulators determined what is acceptable for rating*



*Actuaries determine rates based on regulatory guidance*



*Confused consumers*



# Why This Matters

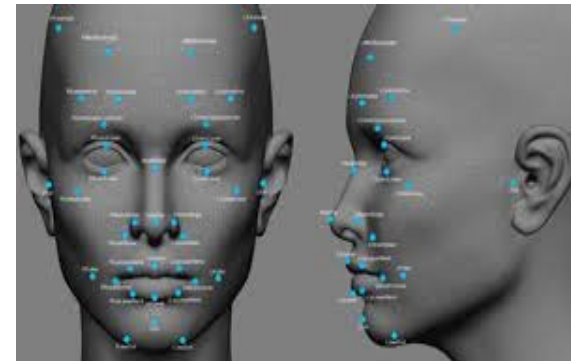
ATLANTA Black Star

**Despite Good Driving Records, African-Americans Still Face Higher Insurance Premiums, Expert Blames Variables Used In Formula to Determine Rates**

Jul 23, 2020, 04:53pm EDT

**Insurance Regulators Pledge To Address Racism And Discrimination Within The Industry**

Vs.



- Consistently Judgmental
- Hard to understand
- Auditable



# Setting The Stage

**01** Are You Sure You Know What **Protected Class** Is?

**02** Revisiting **Unfair Discrimination**

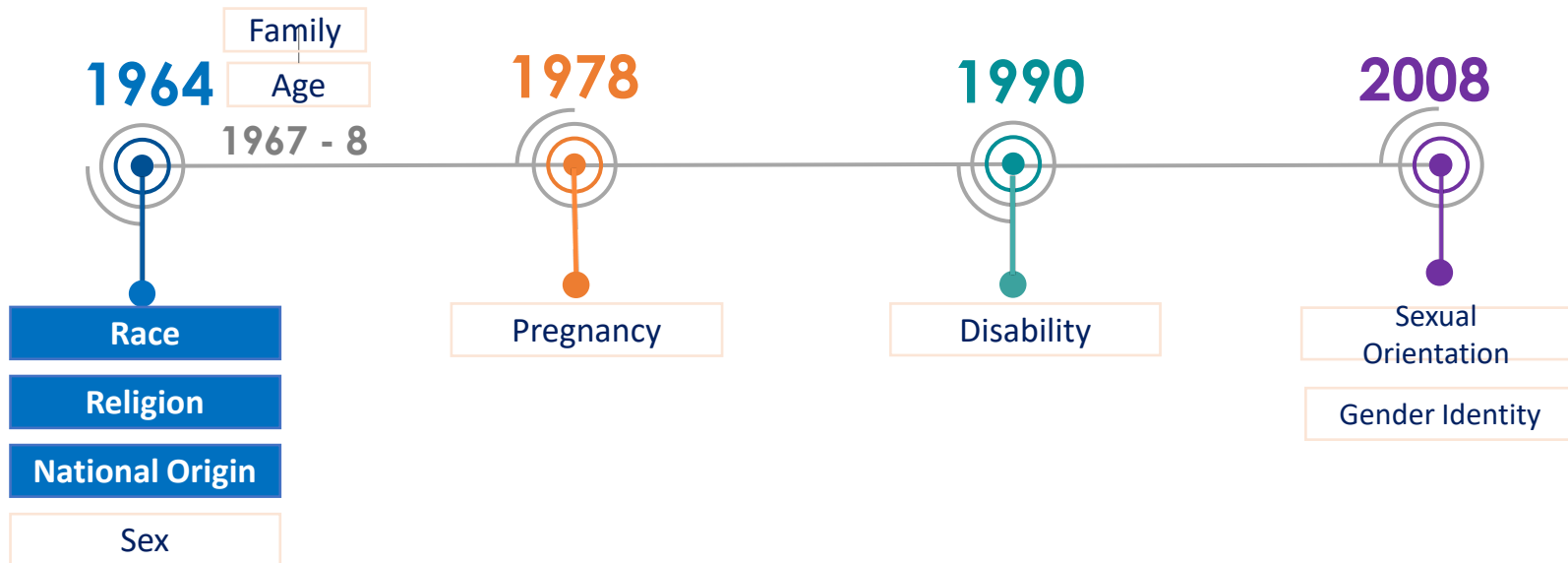
**03** The **Proxy Discrimination** Debate

**04** What Is **Disparate Impact** Anyway?

# Protected Class

**Protected Class**

A protected class is a group of people who share a **common characteristic**, for whom federal and state laws have created protections that prohibit against discrimination because of that trait.





# Revisiting Unfair Discrimination

## Unfair Discrimination

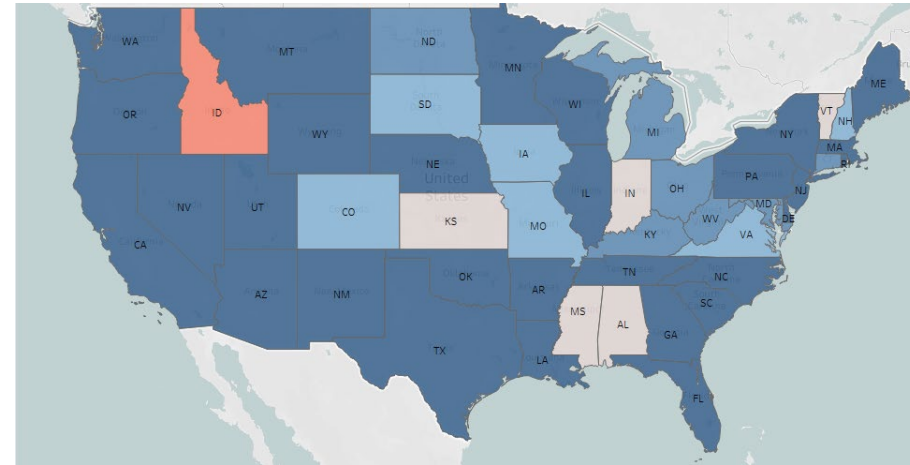


*rates must not be excessive, inadequate, or unfairly **discriminatory***<sup>1</sup>

Established in McCarran Ferguson Act (1945)

- Discrimination ~ Differentiation
- No protected class mention
- Most states define protected class as part of unfair discrimination, but not all!

*1. Race was prohibited for the purposes of accepting a risk*








- Dark blue = restrict protected class in classification and rating
- Lighter colors → less restrictive of protected class in classification (or silent)

*Unfair Discrimination does not directly govern discrimination against protected class*

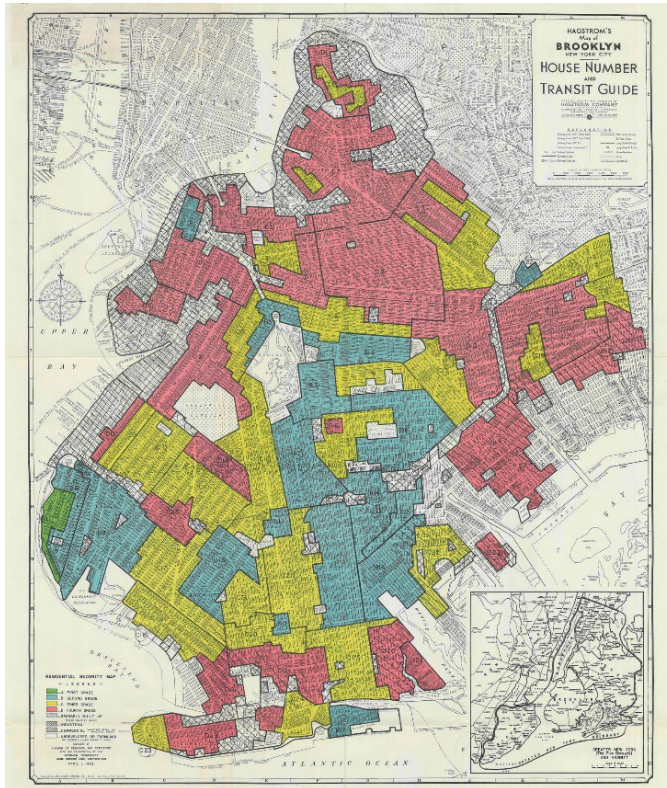
# The Proxy Discrimination Debate

## What Is Proxy Discrimination?

				
<p>“Proxy theory” was adopted by the courts as an <b>element of disparate treatment</b> to recognize a policy should not be allowed to use a technically neutral classification as a proxy to evade Title VII’s prohibition</p>	<p>Proxy Discrimination means <b>the intentional substitution of a neutral factor</b> for a factor based on color, creed...for the purpose of discriminating against a consumer</p>	<p>Whether an included variable acts in whole or in part as a <b>statistical proxy</b> for excluded variables such as race, ethnicity and income</p>	<p><b>Principles on AI:</b> “AI actors should...avoid proxy discrimination against protected classes. AI systems should...<b>avoid harmful or unintended consequences</b>”</p>	<p>Use of a non-prohibited factor that, due in whole or in part to a <b>significant correlation with a prohibited class</b> causes unnecessary, disproportionate outcomes</p>
<p><b>Intent Required</b></p>	<p><b>Intent Required</b></p>	<p><b>Unclear</b></p>	<p><b>Intent Not Required</b></p>	<p><b>Intent Not Required</b></p>
<p>Assert this is the legal definition</p>	<p>Assert this is a type of unfair discrimination</p>	<p>What counts as a statistical proxy?</p>	<p>How do insurers avoid unintended consequences?</p>	<p>How do you determine an outcome is unnecessary?</p>



# An Example Of Proxy Discrimination



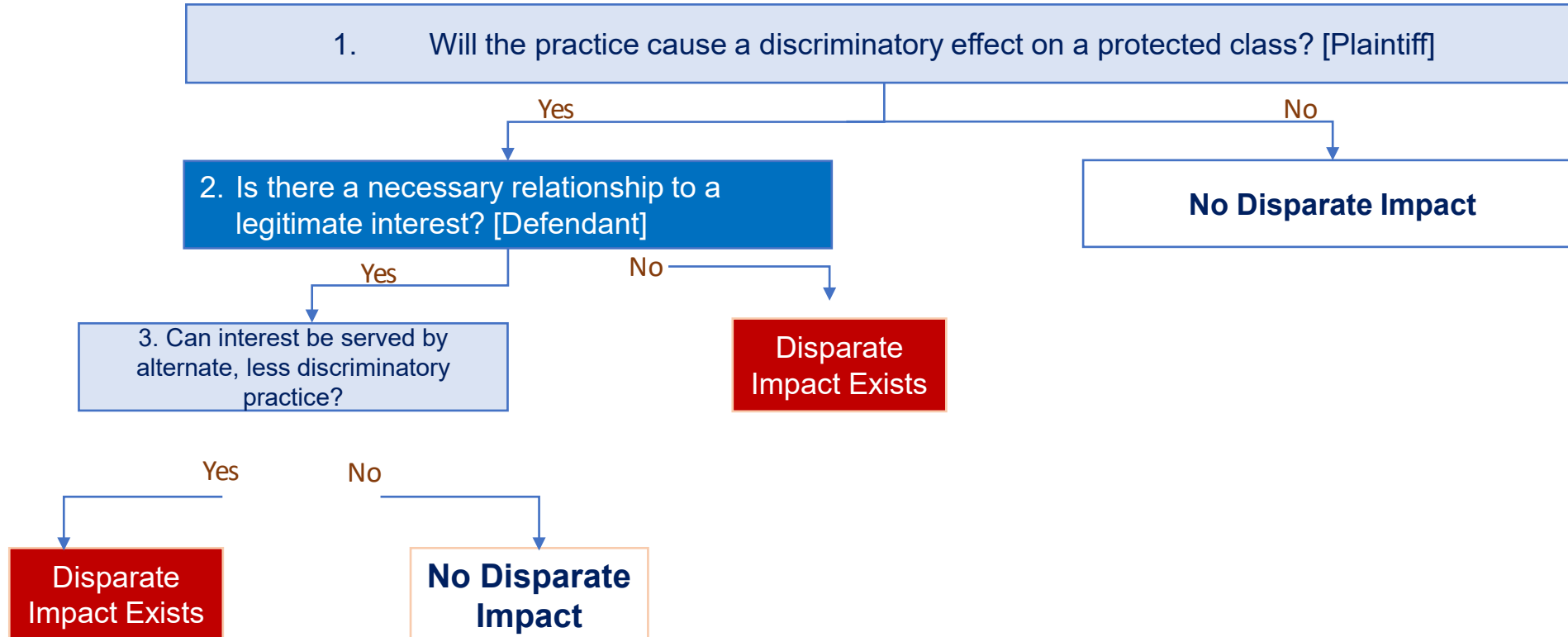
## What Is Redlining?

- Policy instituted in 1933 as part of the New Deal (created Federal Housing Authority, FHA)
- Determined eligibility for mortgage loans
- UW Manual identified rating characteristics on which to classify neighborhoods (Property, Location, Borrower)

## Why Is It Proxy Discrimination?

- *No explicit use of race*
- *Used various “proxies” e.g. moral character, adverse infiltrations*
- *Effect: inability for African Americans to get loans*

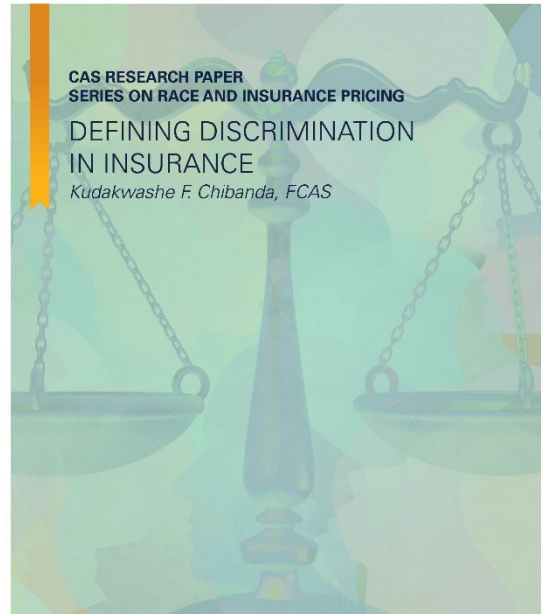
# Disparate Impact



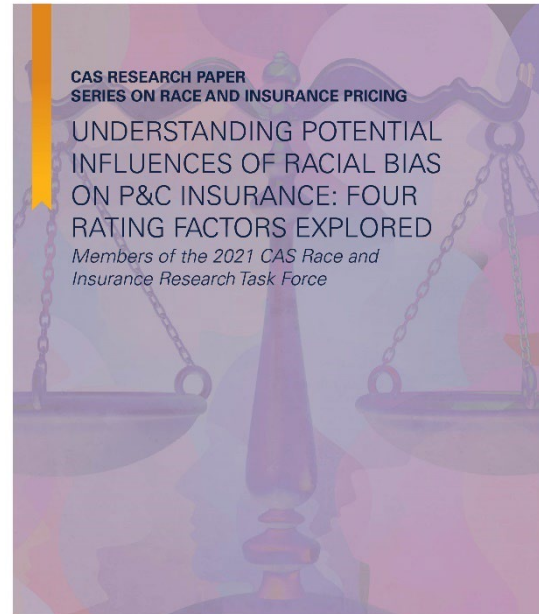


# CAS Research Series on Race and Insurance Pricing – Phase I

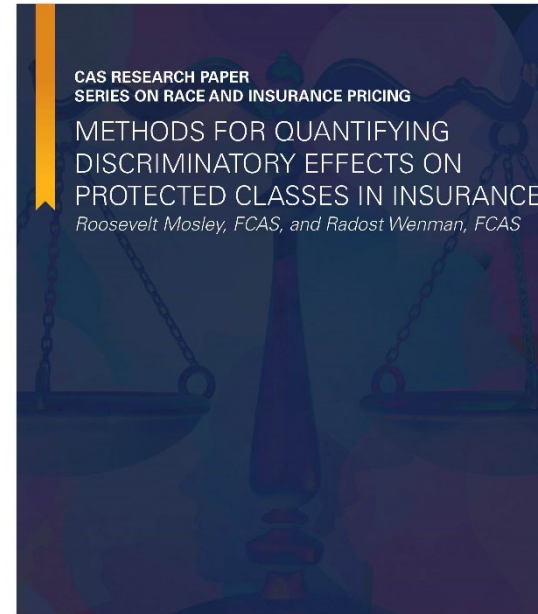
<https://www.casact.org/publications-research/research/research-paper-series-race-and-insurance-pricing>



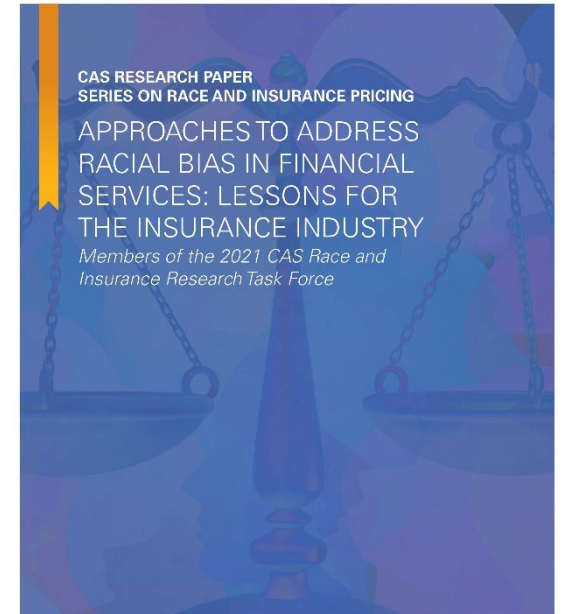
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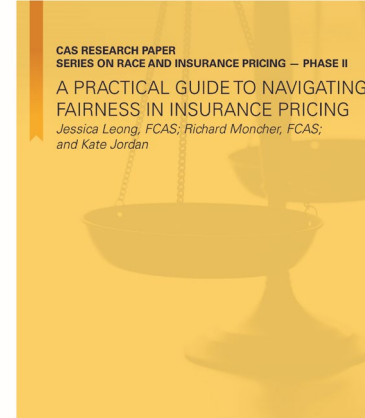
# Phase 2 - Preparing for Tomorrow: Regulatory Insights and Strategies for Mitigating Potential Bias in Insurance Pricing



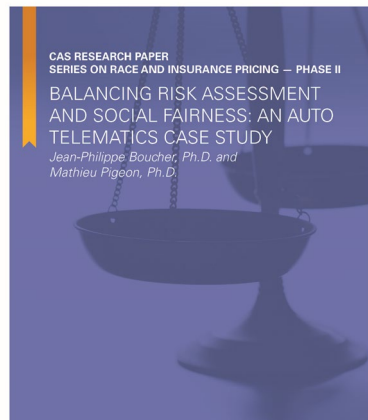
Comparison of Regulatory  
Framework for Non-  
Discriminatory AI Usage in  
Insurance  
August | 2024



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Practical  
Applications of  
Bias Measurement  
and Mitigation  
Techniques

Potential  
Unintended  
Impacts of Bias  
Mitigation on  
Other Protected  
Classes



# Q&A

Contact us: [diversity@casact.org](mailto:diversity@casact.org)

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