REGULATING INSURANCE AS A PUBLIC UTILITY

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The modern property and casualty (P&C) insurance market has many problems. Climate change is increasing claims costs. Insurers excessively deny claims. They discriminate in their underwriting. Some insurers struggle with insolvency. And most importantly, in a trend that has gone largely unnoticed until this Article, they charge premiums that are over $100 billion too expensive. These trends affect both businesses and consumers alike.

This is despite the fact that unlike most markets, insurance prices are a matter of public policy. For much of American history, insurance was viewed as a quasi-public enterprise uniquely implicating public interests. Insurers, politicians, and Supreme Court Justices of the Progressive Era described insurance premiums as a "tax" citizens pay to take care of members of a community. Consequently, over a century ago policymakers enacted a set of policies that treat insurance as a public utility—akin to electricity or water—to ensure that everyone has fair and affordable access to this part of the economic safety net. The most important of these policies is rate-setting authority that tasks state insurance commissioners with reviewing prices to ensure premiums are neither too high nor too low.

In recent years, academics and industry advocates have called to unwind this regulatory framework by eliminating price-setting authorities in the P&C insurance market. They argue that insurance was regulated as a public utility because it was once a "natural monopoly," but because this is no longer the case, we no longer need public utility regulation.
This Article takes the opposite view. Insurance still resembles a "tax," and it is still prone to market failure. And these taxes are too high, even after accounting for rising costs due to climate change. Removing rate regulation would do nothing but raise prices even more. Instead, policymakers should find solutions from the public-utility toolkit to solve the endemic P&C insurance affordability crisis.

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Introduction

For much of American history, insurance was viewed as a quasi-public enterprise uniquely implicating public interests. "Insurance men" of the Progressive Era described insurance premiums as a "tax" citizens pay to take care of members of a community.[1] Consequently, over a century ago, policymakers passed a set of policies to regulate insurance to ensure everyone has fair and affordable access to this part of the social safety net. The most important of these tools is price-setting regulation, a common tool in public utility law applied to industries like electricity and water. State insurance commissioners review the premiums that insurers can charge to ensure that they are neither too high nor too low.

In recent years, academics and industry advocates have called to unwind this regulatory framework by eliminating price-setting authorities in the property and casualty (P&C) insurance[2] market.[3] They argue that public-utility-style regulation was originally justified because the insurance market was seen as a "natural monopoly"

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[1] State of N.Y., REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK, S. Doc. No. 30, at 38 (1911) [hereinafter *Merritt Committee Report*].

[2] Insurance is generally divided into three categories – life insurance, health insurance, and property and casualty (P&C) insurance. The focus here is on P&C insurance, which includes auto, homeowners, farm, fire, marine, flood, earthquake, professional liability, products liability, malpractice, mortgage, financial, warranty, workers' compensation, and title insurance. I focus on only P&C insurance for two main reasons. First, the call for deregulation that this paper is responding to is focused on P&C insurance. Second, life and health insurance are sufficiently distinct. Life insurance is generally not rate-regulated and has a unique slate of policy considerations (e.g., life insurance involves much longer terms and more predictable losses, meaning firm failures look very different). And health insurance is uniquely subject to federal regulation, including a federal loss-ratio floor as proposed in this article.

[3] Daniel Schwarcz, *Ending Public Utility Style Rate Regulation in Insurance*, 35 YALE J. REG. 941 (2018); Sharon Tennyson, *The Long-Term Effects of Rate Regulatory Reforms in Automobile Insurance Markets*, INS. RES. COUNCIL 17 (2012); Angelo Borselli, *Insurance Rates Regulation in Comparison with Open Competition*, 18 CONN. INS. L.J. 109 (2011); Richard Derrig & Sharon Tennyson, *The Impact of Rate Regulation on Claims: Evidence from Massachusetts Automobile Insurance*, 14 RISK MGMT. & INS. REV. 173, 174 (2011); Mary Weiss et al., *The Effect of Regulated Premium Subsidies on Insurance Costs: An Empirical Analysis of Automobile Insurance*, 77 J. RISK & INS., 597, 599 (2010); DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY (J. David Cummins ed., 2002); Lauren Regan et al., *The Relationship Between Auto Insurance Rate Regulation and Insured Loss Costs: An Empirical Analysis,* 27 J. INS. REG. 23, 27 (2009); Sharon Tennyson, *The Impact of Rate Regulation on State Automobile Insurance Markets*, 15 J. INS. REG. 502, 516 (1997). A recent slate of articles advocating for civil rights laws to prohibit discrimination in insurance, which is much needed, argues for deregulating insurance because deregulation would "make time and room for [civil rights] reforms." Jennifer Wriggins, *The Color of Property and Auto Insurance: Time for Change*, 49 FLA. ST. U. L. REV. 203 (2022); Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination Law*, 69 DEPAUL L. REV. 657 (2020).

requiring data sharing and rate coordination in order to produce actuarially sound pricing.[4] However, they claim the market is now competitive and insurers now share loss data without colluding on rates. Therefore, they conclude that rate regulation is no longer needed.[5] Practically, they argue that allowing insurers to raise prices is worth it because it would offset several unintended consequences, including that rate regulation compresses rates among low and high risk customers, leading to moral hazard, and that caps force higher-risk customers to obtain insurance from lower quality "residual markets" set up by states to insure people who private insurers won't cover.[6] And lastly, deregulation advocates question the expertise of government employees[7] and criticize the paperwork burdens of filing prices for approval.[8]

This Article takes the opposite view. It argues that state and federal governments should not deregulate, but instead, should add new public-utility authorities and use existing authority more forcefully. Contrary to the assertions of deregulation proponents, the original reason for public-utility-style regulation had little to do with whether insurance was a "natural monopoly." As Part I shows, policymakers and jurists during the Progressive Era applied public-utility-style regulations to the sector because they viewed insurance as a quasi-public enterprise warranting heightened accountability and control by the public.[9] As the Supreme Court in 1914 said when upholding rate-regulation of insurance, "business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."[10] The Court "assimilate[ed] insurance to a tax," arguing that insurance was "the mere machinery by which the inevitable losses . . . are distributed so as to fall as lightly as possible on the public at large."[11]

When policymakers first applied rate regulation to insurers in the early twentieth century,[12] they recognized that an unregulated insurance market was prone to both

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[4] Daniel Schwarcz, *Ending Public Utility Style Rate Regulation in Insurance*, 35 YALE J. REG. 941, 945-46 (2018).

[5] Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination*, 69 DEPAUL L. REV. 657, 671-673 (2020).

[6] Schwarcz, *supra* note 4, at 985-86.

[7] Schwarcz, *supra* note 5, at 672-73.

[8] Schwarcz, *supra* note 4, at 986.

[9] German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 411 (1914) ("The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.").

[10] *Id.* at 411.

[11] *Id.* at 412-413.

[12] An Act Relating to Fire Insurance, and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein, 1909 Kan. Sess. Laws 279; Fire Insurance Companies-

underpricing and overpricing. For almost a century, the industry and policymakers had battled a cyclical pattern of "ruinous competition." Maverick insurance companies would enter a market, underprice the established industry, and rapidly gain market share. Because their low prices did not leave enough money to maintain enough reserves and surplus, when a major disaster arose the maverick firms would file for bankruptcy and refuse to pay customer claims.[13] But starting at the turn of the twentieth Century, policymakers driven by a series of industry scandals began to focus more on affordability as part of the Progressive Era populist movement.[14] Thinkers of the time recognized that competition among insurers could cause not just insolvency, but price *increases* because insurers would compete for business by increasing commissions paid to independent insurance agents to drive referrals.[15] In short, policymakers from 100 years ago did not view this tendency to both over- and under-price to be the result of unsophisticated actuarial practices or a natural monopoly.[16] Rather, the process of competition itself is what caused prices to deviate from actuarially correct rates.[17] Policymakers established rate regulation to solve that problem.

Prescribing Conditions for Transacting Business, 1910 Tex. Gen. Laws 311. In the early years, there were two strands of state legislation – the more populist form of price setting regulation championed by Kansas and Texas, and anti-discrimination-only laws that some argued were attempts by the insurance industry to preempt more comprehensive regulation. Marc Schneiberg and Tim Bartley, *Regulating American Industries: Markets, Politics, and the Institutional Determinants of Fire Insurance Regulation*, 107 AM. J. SOC. 101, 128 (2001).

[13] KATHERINE HEMPSTEAD, UNCOVERED: THE STORY OF INSURANCE IN AMERICA, 11 (2024); Stephen P. D'arcy, *Insurance Price Deregulation: The Illinois Experience*, *in* DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY, 251 (J. David Cummins ed., 2011); Spencer L. Kimball and Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 547-549 (1958).

[14] During this time, populist fervor was at a peak, resulting in two nationally followed investigations in the New York legislature that caused every major life insurance CEO to resign. State of N.Y., REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK, S. Doc. No. 41 (1905) [hereinafter *Armstrong Committee Report*]; *Merrit Committee Report,* supra note 1; Hempstead, *supra* note 13, at 62 (describing how the CEOs resigned and fled the country, were indicted, or died).

[15] Hempstead, *supra* note 13, at 56.

[16] One proponent of deregulation argued that the use of regulation to combat the threat of "dangerous price cutting" was no longer "well founded" because "prices in insurance markets [now] reflect expected claim costs and reasonable profits for insurance companies." Angelo Borselli, *Insurance Rates Regulation in Comparison with Open Competition*, 18 CONN. INS. L.J. 109, 113 (2011). This article was published just 3 years after the $180 billion bailout of AIG, which is arguably the most significant example of "dangerous price cutting" by a P&C insurer in the history of insurance.

[17] *See, e.g.*, Spencer L. Kimball and Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 547 (1958) ("[O]verconfident underwriting with rates driven down to uneconomic levels by excessive competition might go

As Part II shows, the historical problems that policymakers were trying to solve with public-utility regulation look remarkably similar to the problems of today. In fact, the biggest problem in the P&C insurance industry today is that prices have increased to over $1 trillion per year and about $100 billion of that is unnecessary.[18] This Article conducts an original, 50-state analysis of insurance premiums and costs to not only illustrate the extraordinary (and underappreciated) rise in insurance prices, but also to demonstrate that these higher prices are not a function of higher losses alone. Loss ratios measure the percentage of premiums that are paid out in claims. Low loss ratios mean a less efficient insurance market, in which insurance premium "taxes" are used to pay for things other than covering loss. From 2014 to 2024, the P&C insurance market has had an average net loss ratio of 72.7%.[19] In contrast, from 1980 to 2000 the net loss ratio averaged around 80%,[20] and the health insurance industry maintains 80-85% net loss ratios.[21] The difference between the current P&C industry's loss ratios and plausible 80% loss ratios is over $100 billion. This extra $100 billion is about 1% of the country's *total* consumer spending.[22]

As one might expect with low loss ratios, industry profits are at historic highs; in 2024, return on assets and return on revenue spiked to above 15%.[23] As the Treasury Department puts it, "despite higher estimated insured catastrophic losses, the sector experienced a sharp gain in underwriting profit."[24]

Why is this the case if the market is competitive? For the same reason that policymakers had initially sought to regulate insurers in the early twentieth century:

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undetected until a catastrophic fire wiped weak companies out of existence with great loss to policyholders."); *Merritt Committee Report*, *supra* note 1, at 94 ("Competition, therefore, in fire insurance has acted badly both as regards to rates and expenses, but in different ways. It has driven rates too low and expenses [in the form of agent commissions] to high.").

[18] *See* Part II.A.

[19] NAT'L ASS'N OF INS. COMM'RS, U.S. PROPERTY & CASUALTY AND TITLE INSURANCE INDUSTRIES – 2024 FULL YEAR RESULTS, 1 (2025), https://content.naic.org/sites/default/files/2024-annual-property-casualty-and-title-insurance-industries-analysis-report.pdf [hereinafter NAIC 2024 P&C FULL YEAR REPORT].

[20] Shaun S. Wang et al., *U.S. Property-Casualty: Underwriting Cycle Modeling and Risk Benchmarks*, 5 Cas. Actuarial Soc'y 93, https://www.casact.org/sites/default/files/2021-07/US-Property-Casualty-Wang-Major-Pan-Leong.pdf

[21] In fact, these higher loss ratios are legally required by Federal law after passage of the Affordable Care Act. 45 CFR 158.210.

[22] U.S. BUR. OF LAB. STATS., CONSUMER EXPENDITURES IN 2023 (2024), https://www.bls.gov/opub/reports/consumer-expenditures/2023/home.htm (showing that total US consumer expenditures in 2023 were $10.4 trillion).

[23] NAIC 2024 P&C FULL YEAR REPORT, *supra* note 19, at 1.

[24] FED. INS. OFF., U.S. DEP'T OF THE TREASURY, ANNUAL REPORT ON THE INSURANCE INDUSTRY, 2 (Sept. 2025), https://home.treasury.gov/system/files/311/Final%20FIO%202025%20Annual%20Report.pdf.

competition is causing excessive insurance agent commissions and advertising expenditures that drive up costs, and thus, the price.[25]

At the same time, the risk of underpricing is still present. In fact, less than 20 years ago, "ruinous competition" led a P&C insurance company, American International Group (AIG), to collapse in a manner that contributed substantially to a global recession. AIG, a traditional insurance company, began selling an insurance substitute called credit default swaps (CDSs). Because CDSs are unregulated, AIG followed the pattern of mavericks of the 19th Century and underpriced the risk to gain market share rapidly and generate easy investment capital. When claims were filed en masse during the 2008 financial crisis, it collapsed.[26] More broadly, smaller insurers continue to fail regularly. Florida currently has 14 P&C insurers in receivership,[27] and hundreds that have closed in recent decades.[28]

Both history and contemporary challenges thus cut strongly against the arguments and prescriptions of deregulation advocates and justify rate regulation. Part III turns to this academic debate. The premise that insurance was originally regulated as a utility because it resembled a "natural monopoly" is incorrect. But regardless, P&C insurance is still a "natural monopoly" even if it no longer resembles an actual monopoly.[29]

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[25] NAT'L ASS'N OF INS. COMM'RS, REPORT ON PROFITABILITY BY LINE BY STATE IN 2023, 9 (2025), https://content.naic.org/sites/default/files/publication-pbl-pb-profitability-line-state.pdf [hereinafter NAIC 2023 PROFITABILITY REPORT] (showing "selling expense" of 16.3%).

[26] William D. Cohan, *The Fall of AIG: The Untold Story*, INSTITUTIONAL INVESTOR (April 7, 2010), https://www.institutionalinvestor.com/article/2btgea9afk8qds2iwikg0/portfolio/the-fall-of-aig-the-untold-story.

[27] *Rehab & Liquidation, Companies in Receivership*, FLORIDA CHIEF FIN. OFFICER https://www.myfloridacfo.com/division/receiver/companies (last visited April 10, 2026).

[28] *Rehab & Liquidation, Closed Companies*, FLORIDA CHIEF FIN. OFFICER https://www.myfloridacfo.com/division/receiver/companies/closed (last visited April 10, 2026).

[29] As then Professor Posner put it: "The term [natural monopoly] does not refer to the actual number of sellers in a market but to the relationship between demand and the technology of supply. If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it. If such a market contains more than one firm, either the firms will quickly shake down to one through mergers or failures, or production will continue to consume more resources than necessary." Richard A. Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 548 (1969). While insurance may not resemble a *monopoly* any more because insurers no longer collude to set prices collectively, it fits the definition of a *natural monopoly* because demand can be satisfied at lowest cost by one insurer. That would reduce selling cost (advertising and agent commission), would increase efficiency by reducing duplicative overhead costs, and increase negotiating power against various vendors to lower claims costs. Further, as a general matter, the larger an insurer, the less it is exposed to the risk of random events and the more predictable

More importantly, the original reason for utility regulation was that insurance was equivalent to a "tax" warranting heightened oversight. There are good reasons why insurance should still be viewed as quasi-public and not a purely capitalistic or private enterprise. If anything, P&C insurance resembles a government function more than ever, complete with "new" legal obligations to obtain auto, homeowners, title, workers' compensation insurance[30] (just like a tax) and an intermingling of public "residual" insurance entities that insure people that the private market will not.[31] It is still a "tax" collected to soften the impact of accidents, disasters, and loss to the broader community, implicating deep levels of interdependency.

On theoretical terms, there are various market failures at the core of insurance that are unavoidable absent rate regulation. Insurance is a market poorly suited to supply-and-demand-based price discovery because purchasers do not have certainty about whether they will need insurance and what they will need it for. At the same time, insurance is uniquely suited to cost-based price regulation because demand is inelastic and firms can increase supply without much upfront capital investment. The traditional argument economists make against price regulation in any market is that it can cause supply shortages by increasing demand and deterring capital investment.[32] But demand is often fixed by law, and insurance policies generally fund themselves because the premiums are earned before the claims go out.[33]

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overall claims payments become. GENEVA ASS'N, THE NATURE AND ROLE OF CAPITAL IN INSURANCE 2 (2016). These arguments are often used to justify the creation of a "single-payer" in health insurance debates.

[30] FED. INS. OFF., REPORT ON PERSONAL AUTO INSURANCE MARKETS AND TECHNOLOGICAL CHANGE, 31, APPENDIX A: PERSONAL AUTO INSURANCE REQUIREMENTS BY STATE, 2023 (January 2025) (detailing auto insurance mandates in all 50 states); *Selling Guide: Originating & Underwriting, B7-2-01, Provision of Title Insurance*, FANNIE MAE (Apr. 6, 2022), https://selling-guide.fanniemae.com/sel/b7-2-01/provision-title-insurance ("Each mortgage loan purchased by Fannie Mae must have a title insurance policy in place or an attorney title opinion letter that meets Fannie Mae's requirements."); Gregory Guyton, *A brief history of workers' compensation*, 19 IOWA ORTHOP J. 106 (1999) (detailing the passage of workers' compensation laws in all 50 states between 1911 and 1948), https://pmc.ncbi.nlm.nih.gov/articles/PMC1888620/.

[31] As of October 2024, thirty-three states have some form of public insurance entity that provides coverage to individuals or businesses who are unable to obtain property insurance in the private market. Most of these plans were created pursuant to the Urban Property Insurance Protection and Reinsurance Act of 1968. *Fair Access to Insurance Requirements Plans, Background*, NAT'L ASS'N OF INS. COMM'RS (Dec. 13, 2024), https://content.naic.org/insurance-topics/fair-access-to-insurance-requirements-plans.

[32] *See, e.g.*, George Reisman, *Price Controls Cause Shortages*, FOUNDATION FOR ECON. EDU. (Feb 1. 1980), https://fee.org/resources/price-controls-and-shortages/.

[33] Geneva Ass'n, *supra* note 29, at v (describing the basic business model of insurance being taking premiums, not outside capital, to pay future claims). One guide to starting an insurance company suggests that the initial capital investment for starting an insurance business is only $50,000 to $500,000.

More practically, the evidence shows that rate regulation leads to cheaper rates without countervailing loss in access. The most robust analysis on the issue shows that heightened rate regulation closely correlates with slower price increases over time.[34] While heightened rate regulation may also correlate with higher uses of residual insurance,[35] that is not necessarily proof of a policy failure. Those consumers are still covered.[36]

Because the problem of "over-taxation" is a problem that utility-style rate regulation is uniquely capable of addressing, Part IV provides public-utility-style policy proposals for addressing the extra $100 billion in insurance premiums. Most notably, state insurance commissioners should start denying rate increases by insurers with low loss ratios. In response, large national insurers will threaten to exit the state as they always do. These threats to exit in response to regulation are common throughout history, but they generally result in one of two outcomes: either the threats are a bluff, and insurers do not leave,[37] or the threats are not a bluff and the large national insurers do exit the state, but when they do, local insurers pick up the abandoned market share.[38]

Starting an Insurance Company: Your Professional Guide, UPCOUNSEL (updated Jan. 14, 2025), https://www.upcounsel.com/how-to-start-a-insurance-company.

[34] J. ROBERT HUNTER & DOUGLAS HELLER, CONSUMER FED'N OF AM., AUTO INSURANCE REGULATION – WHAT WORKS 2019, at 12, fig. 7 (Feb. 11, 2019), https://consumerfed.org/wp-content/uploads/2019/02/auto-insurance-regulation-what-works-2019.pdf.

[35] Martin Grace, Robert W. Klein & Sharon Tennyson, *The Effects of Regulatory Reforms in the South Carolina Auto Insurance Market*, 32 J. INS. REG. 1, 21 (2013).

[36] When customers are pushed into residual markets, the residual market is sometimes (though not always) more expensive or less comprehensive than the private market operating under rate caps. But that does not mean customers would get cheaper insurance if rate caps were lifted to allow customers to obtain more expensive private insurance. And policymakers could fix inadequate residual market coverage.

[37] For example, in 1986, Florida reduced insurance rates and insurers threatened to withdraw from the state. Some did, but they returned within months. Jay Angoff, *Quit California? Don't Bet on It: Insurers Said the Same to Florida Rollback, but They Stayed*, LA TIMES (Dec. 1, 1988), https://www.latimes.com/archives/la-xpm-1988-12-01-me-650-story.html. Before California passed Proposition 103 to roll-back insurance rates by 20% in the state, insurers engaged in a widespread political campaign claiming they would withdraw from the state as a result. *Id.* California passed Prop 103, rates decreased significantly, insurers did not leave, and the state now has the second least concentrated insurance market in the country. Dwight M. Jaffee & Thomas Russell, *Regulation of Automobile Insurance in California*, in DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY, 204-207 (J. David Cummins ed., 2011); Hunter & Heller, *supra* note 34, at 16 (California's auto insurance industry has an HHI of 723).

[38] Consider, for example, the story of auto insurance in Massachusetts. In the 1970s, auto insurance was subjected to increasing regulation, then the state deregulated in 1976, and then quickly snapped back to even more rigorous rate regulation in 1977 once prices skyrocketed after deregulation. Sharon Tennyson,

States can go even further to limit or mitigate the risk of insurers exiting. They can implement exit restrictions,[39] or allow public insurance companies to pick up the abandoned market share if private insurers exit.[40]

At the federal level, Congress should consider creating a federal re-insurance (the insurance insurers buy) program to lower reinsurance costs for private insurers and consider imposing a federal loss-ratio floor of 80% for P&C insurance, modeled after the Affordable Care Act's medical loss ratios for health insurance.

This Article makes three unique contributions. First, it rebuts the ubiquitous academic call for deregulation of P&C insurance. Every modern law review article to take on the topic has depicted insurance rate-setting regulation as misguided. This paper explains why they were wrong.

Second, using publicly available data, this Article demonstrates that insurance loss-ratios have crept down in the last few decades, a phenomenon that has increased prices by about $100 billion a year. This alone is reason not to deregulate and justifies more policymaker attention. It is also an observation counter to the traditional media perspective that P&C insurance is growing more expensive primarily because of rising costs associated with climate change. To be clear, climate change is raising insurer costs.

Mary A. Weiss, & Laureen Regan, *Automobile Insurance Regulation: The Massachusetts Experience*, in DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY, 27-29 (J. David Cummins ed., 2011). Research shows that large national insurers did leave the state in response, but that they were replaced by local insurers selling policies in Massachusetts only. *Id.* at 57-59. In fact, evidence suggests that the strength of rate regulation and the level of market concentration are positively correlated, suggesting what we see in this anecdote is widespread. Hunter & Heller, *supra* note 34, at 17, fig. 14. Regulation might scare off larger national firms, but that leaves room for smaller local firms to gain market share resulting in a more competitive market.

[39] MORGAN RICKS ET AL., NETWORKS, PLATFORMS & UTILITIES: LAW AND POLICY 27 (2022); *See, e.g.*, N.J. ADMIN. CODE § 11:2-29 (requiring long advanced notice for withdrawals); MASS. GEN. L. ch. 175, § 22H (1991) (giving the insurance commissioner authority to suspend insurance licenses for all of an insurers' business lines if an insurer refuses to issue auto insurance policies and cannot prove the refusal is justified based on solvency concerns).

[40] Some states have publicly-owned "residual vehicles" that operate more like direct competitors than back-stops of the private market. For example, Florida's Citizens Property Insurance Corporation is owned and run by the state and insures customers of all kinds. Fla. Stat. 627.351(b). Florida Citizens is widely used and solvent. STATE OF FLA. AUDITOR GENERAL, CITIZENS PROPERTY INS. CORP., REPORT NO. 2025-011, at 3, 5 (Aug. 2024), https://flauditor.gov/pages/pdf_files/2025-011.pdf (showing $4.5 billion in premiums and $2.6 billion in claims in 2023). As of the middle of 2025, it had a healthy $4.8 billion surplus. William Rabb, *Florida Citizens 'Going Naked' on Reinsurance Below Cat Fund Layer*, INSURANCE J. (May 2, 2025), https://www.insurancejournal.com/news/southeast/2025/05/02/822266.htm. And it charges less than the private market (mostly by forgoing reinsurance) while maintaining good customer service scores. State of Fla. Auditor General, *supra* note 40, at 1, 9.

But, in addition, insurance is growing more expensive to pay for unnecessary non-claims expenses, profits, and investor returns.

Finally, the Article contributes to the resurgence of scholarship in the field of Networks, Platforms, and Utilities (NPUs).[41] Modern NPU scholarship tends to focus on transportation, communications, banking, energy, and tech platforms, but this Article shows that insurance is historically and conceptually an NPU sector. In fact, study of the insurance market can contribute uniquely to this broader NPU scholarship due to the variability of policy approaches over time and between states, the unique availability of public data on the market, and the degree to which NPU treatment has been contested over the years, producing comparatively high volumes of case law and historical materials. While today's scholarship regarding the nature of insurance and how it should be regulated is relatively anemic, in eras past, this topic was taken up by luminaries like Louis Brandeis, Charles Evans Hughes, and Elizur Wright, producing ideas relevant to modern NPU scholarship.

I. History of Insurance Regulation

This section provides a history of insurance regulation with the intent of illustrating the original reasons for public utility regulation of insurance. In doing so, it aims to lay the groundwork for showing that the solutions to modern problems can be found in historical precedents and debates that are over a century old. Several themes repeat themselves throughout this history.

The first theme is that, throughout its history, many have viewed insurance as a special, quasi-public, almost governmental function. Policymakers regularly analogized insurance to a tax, or to a charitable enterprise, and treated it as a special market that uniquely implicated public interests because it was seen as society's mechanism for sharing risk communally. As the norms on the degree of economic regulation have changed over time, this perspective has justified stronger regulation than that moving baseline norm.

Second, while the industry itself at times relied on this perspective to build its public image, it was never comfortable with government regulation and frequently challenged regulations before the U.S. Supreme Court. The insurance industry had a terrible win-record, and on at least three separate occasions, these challenges backfired spectacularly, resulting in even more regulation after a court loss. In fact, these losses comprise some of the primary inflection points in the development of insurance

[41] Ricks et al., *supra* note 39.

regulation: in 1868, the Supreme Court validated state authority to regulate insurance and therefore encouraged the early growth of state regulation;[42] in 1914, the Supreme Court validated (and arguably endorsed) the first states' efforts to apply public-utility regulation to insurance and catalyzed its adoption in more states;[43] and in 1944, the Supreme Court eliminated the insurance industry's de facto exemption from federal antitrust law,[44] which caused Congress to pass the McCarran-Ferguson Act to create a statutory exemption, and in the process pushed all remaining state legislatures to pass rate-regulation laws.

Third, a recurring challenge in insurance, from the beginning, was the threat of insurer bankruptcies caused by underpriced insurance. This threat drove both early regulatory policy and the industry's own efforts to self-regulate by starting the nation's first trade associations.

Fourth, insurance received periodic attention from populist movements responding to corporate scandals or high prices, which was the primary catalyst for the creation of utility regulation first in the Progressive Era, and then during the New Deal. That populist attention still exists in modern times, leading to, for example, the landmark industry reforms in California in 1988.

A. Insurance before regulation (Before the 1860s)

It is impossible to pinpoint when the concept of insurance was first invented. It may be more accurate to say that it evolved from a variety of business and social/moral practices. Archeologists, historians, and authors have long noticed that ancient transactions and contracts often involved one party agreeing to take on the risk of loss that would normally fall upon the other.[45] In many ancient societies groups pooled resources and money to pay for members that fell on hard times.[46] No doubt part of the perception of insurance as a quasi-public enterprise comes from these early egalitarian roots. A parallel more business-oriented origin comes from ancient finance, where, for example, it was fairly common for lenders to imbed insurance-like terms in financing for ship voyages by charging an excessive rate for repayment when the voyage was

[42] Paul v. Virginia, 75 U.S. 168 (1868).
[43] German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914).
[44] U.S. v. South-Eastern Underwriters Association, 322 U.S. 533 (1944).
[45] W.R. Vance, *The Early History of Insurance Law*, 8 COLUM. L. REV. 1 (1909) (describing scholars from 1783 who first began arguing that insurance had an ancient origin).
[46] *Id.* at 3.

successful, in exchange for relieving the obligation to repay if the voyage was unsuccessful.[47]

More modern forms of insurance, where one pays an independent third party to cover a risk, developed in three separate business-lines. The first is marine insurance. Modern-looking marine insurance, and even insurance regulation, goes back as far as the 12th Century.[48] Lloyd's of London, the oldest still existing insurance company, started writing modern-looking marine insurance in 1652.[49]

The second is fire insurance. Fire insurance was likely invented in 1609,[50] and the market quickly grew, especially after the London fire of 1666.[51] At first, fire insurance was comingled with voluntary firefighting organizations.[52] But by 1735, the first independent mutual insurance company, the Friendly Society of Mutual Insuring of Homes Against Fire, had been formed.[53] Soon after, Benjamin Franklin famously started one of the oldest insurance companies in the U.S. —the Philadelphia Contributionship—which is still selling insurance.[54]

The third is life insurance. Some claim the industry evolved out of "tontines," a type of investment where subscribers pay an upfront lump sum in exchange for an annual annuity payment until a selected nominee dies.[55] The share of the annuity distributed to each policyholder would increase as other people in the plan died and the policyholder with the last surviving nominee won a jackpot.[56] Tontines were popularized in the West in the 1600s by European governments, which used them to

[47] CHARLES KELLEY KNIGHT, THE HISTORY OF LIFE INSURANCE IN THE UNITED STATES TO 1870 8 (1920).

[48] HENRY OLCOTT, OFFICIAL REPORT OF THE PROCEEDINGS OF THE NATIONAL INSURANCE CONVENTION OF THE UNITED STATES, vii (1871) [hereinafter 1871 NIC OFFICIAL REPORT] (describing the Count of Flanders' creation of a "Chamber of Insurance" in Bruges in 1310, Italian insurance contracts as far back as 1350, Barcelona's comprehensive regulation of insurance in 1435, incorporation of an insurance corporation in Holland in 1629, and even England's passage of an insurance law in 1601, 50 years before Lloyd's of London).

[49] *Coffee and Commerce: Travels through our history, 1652-1811*, LLOYD'S https://www.lloyds.com/about-lloyds/history/coffee-and-commerce.

[50] 1871 NIC OFFICIAL REPORT, *supra* note 48, at xi.

[51] HARRY CHASE BREARLEY & DANIEL N. HANDY, THE HISTORY OF THE NATIONAL BOARD OF FIRE UNDERWRITERS: FIFTY YEARS OF A CIVILIZING FORCE 7 (1916).

[52] Hempstead, *supra* note 13, at 10

[53] *Id.*

[54] *Our History*, THE PHILADELPHIA CONTRIBUTIONSHIP, https://1752.com/about-us/history/ (last viewed Aug. 6, 2025).

[55] David R. Weir, TONTINES, PUBLIC FINANCE, AND REVOLUTION IN FRANCE AND ENGLAND, 1688-1789, 49 J. ECON. HIST. 95 (2009).

[56] ANDREW MCDIARMID, THE TONTINE: A HISTORY 2 (2024).

generate funds to raise armies.[57] Having said that, there is evidence to suggest that life insurance contracts are older than tontines and go back as far as the Middle Ages.[58]

Insurance was one of the first industries to have large nationwide corporations in the United States.[59] One of the reasons for this is that insurers needed to cover a diverse set of geographies in order to diversify risk. In 1835, a single fire in New York City bankrupted 23 of the 26 insurance companies in the city.[60] After that experience, companies intentionally rebuilt by targeting nationwide customer-bases to avoid the risk associated with concentrating insurance policies in one geographic area.[61] By the mid-1800s, the industry had become dominated by nationwide enterprises headquartered in New York City, which operated in every state through independent insurance agents.[62]

In these early years, public discussion of the insurance industry focused on its role in society as an almost charitable institution. As George Savage, President of the New York Board of Fire Underwriters, described it: "it has been my comfort, during seasons of great despondency and trouble incident to this business, to know that I was engaged in a good work, the work of promoting the welfare of my fellow men; and I believe that there is not a more beneficent institution in the world than a fire insurance company."[63] The earliest life insurance product in the U.S. was actually sold by the Presbyterian Ministers Fund, primarily to ministers with low salaries who would leave few assets behind for their families upon death.[64] When sold to the broader public, life insurance was often justified on religious terms, describing it as necessary to achieve a "good death" by taking care of left-behind family members.[65] More broadly, marketing of insurance in the 1800s would often highlight its collective or charitable nature to attract customers.[66]

During this time, likely due to the perception of insurance as a charitable enterprise, insurance companies were legally considered "civil corporations," which was a hybrid between government and private corporation. In *Trustees of Dartmouth College v. Woodward*,[67] an 1819 case, the Supreme Court explained that there were

[57] *Id.* 3-4.
[58] CHARLES KELLEY KNIGHT, THE HISTORY OF LIFE INSURANCE IN THE UNITED STATES TO 1870 8 (1920).
[59] Hempstead, *supra* note 13, at 8-10.
[60] *Id. at 10.*
[61] *Id.*
[62] *Id.* at 10.
[63] 1871 NIC OFFICIAL REPORT, *supra* note 48, at 65.
[64] Hempstead, *supra* note 13, at 6.
[65] *Id.* at 6-7.
[66] *Id.* at 25.
[67] 17 U.S. 518 (1819).

different types of corporations. Some, like Dartmouth College, were "private corporations" governed by contract between the state legislature and private parties. Some, like cities, counties, and towns, are "government corporations." But certain corporations, "such as banks, *insurance companies*, and the like" were considered "civil corporations" that were "created, not by general law, but usually by [government] grant; their constitution is special; it is such as the legislature sees fit to give, and the grantees to accept."[68] These "civil corporations" were specially chartered by the legislature, like all corporations of the time, but in addition, the legislature acted similarly to the board of directors making major management decisions for the company. If one peruses any legislative session of a state during this time, it will inevitably be full of ministerial acts relating to the management of specific insurance companies.[69]

But this was a debated perspective even in 1819 that eventually fell out of favor. In fact, an influential concurrence by Justice Story in *Dartmouth College* itself advocated for a simpler approach of treating "public corporations" and "private corporations" as a matter of ownership.[70] In 1853, the Supreme Court expressly adopted Justice Story's perspective and held that corporations are not public "unless their funds belong to the government."[71]

B. The rise of state insurance commissioners (1859-1890)

Throughout the 1800s, insurance executives attempted to end a constant cycle of destructive competition. Smaller insurance companies would take advantage of low capital costs to enter a market, undercut the bigger insurers with premiums that were not high enough to cover risk, and then go bankrupt after a major fire or other disaster.[72] To solve this problem, executives in a local market would try to agree on fixed rates that were high enough to cover disasters. The efforts failed cyclically.[73] A disaster would happen, insurers would go bankrupt, the remaining insurers would try to fix rates high enough to cover risk going forward, but once memories of the prior

[68] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 562 (1819) (emphasis added).
[69] For example, the New York legislature's session from 1841, chosen at random, includes dozens of Acts chartering insurance companies, and adjusting charters to allow specific companies to enter new insurance segments, issue dividends, change names, and approve other basic business decisions. 1841 N.Y. Laws, 74th Sess.
[70] *Dartmouth College*, 17 U.S. at 669.
[71] Pique Branch of State Bank of Ohio v. Knoop, 57 U.S. 369, 380-81 (1853).
[72] Hempstead, *supra* note 13, at 11.
[73] Brearley & Handy, *supra* note 51, at 9-10.

disaster faded, new entrants inevitably entered the market and "cheated" by charging lower rates, causing another crash.[74]

After a firecracker disaster in Portland in 1866 caused another insurance market crisis, fire insurance executives for the first time attempted to solve this problem on a nationwide basis by forming the National Board of Fire Underwriters.[75] From the outset, the National Board of Fire Underwriters was organized around fixing rates to combat the "wildcat" insurer problem.[76] As the President of Merchant's Insurance described it: "Without an organization of this kind, insurance companies would be in the position of Kilkenny cats. They would devour each other and leave nothing but the tips of their tails."[77] The main purpose of the Board was to establish uniform premiums and compensation for independent agents.[78] Ultimately, these efforts failed because there was no mechanism to enforce the agreed-upon rates.[79] Declaring defeat just 3 years after its founding, the National Board told local branches that the rates could no longer be considered mandatory.[80]

Wildcat insurers and insolvency were also the original impetus for the creation of state regulators around roughly the same time. New York passed the first dedicated set of general insurance laws in 1849, which were devoted almost exclusively to insolvency oversight.[81] Massachusetts created the first insurance commission in 1858, quickly followed by New York's creation of the New York State Insurance Department in 1859.[82]

But as soon as states started regulating insurance to prevent bankruptcies, advocates began pushing for heightened consumer protection. For example, the first insurance commissioner of Massachusetts, Elizur Wright, advocated for laws to standardize reimbursement values when consumers stopped paying premiums.[83] Massachusetts passed this law in 1861, which is among the first specific consumer

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[74] Hempstead, *supra* note 13, at 11. The first reference to fixing rates found by historian Katherine Hempstead was at an 1819 meeting of the New York fire insurance trade association called the Salamander Society. *Id.*

[75] *Id.; See also* Brearley & Handy, *supra* note 51, at 3, 7.

[76] *Id.* at 16.

[77] *Id.* at 11-12.

[78] *Id.* at 13.

[79] *Id.* at 25.

[80] *Id.* at 26.

[81] An Act to provide for the incorporation of Insurance Companies, 1849 N.Y. Laws, 72nd Session, Chap. 308, p. 441-449. This was the first comprehensive statutory scheme, though other states, including New York, had previously passed discrete statutes. Hempstead, *supra* note 13, at 26.

[82] An Act for the Better Establishment of the Board of Insurance Commissioners, 1858 Mass. Acts, Chap. 177, p. 152-53; An Act to Establish an Insurance Department, 1859 N.Y. Laws, 82nd Session, Chap. 366, p. 882-84.

[83] *Id.* at 29.

protection statutes of any kind in the United States.[84] New York's first insurance commissioner, William Barnes, took the opposite approach, preferring competition to regulation on that issue.[85] But both Barnes and Wright advocated for using a level of regulation that was uncommon in other industries.[86] Reflecting the quasi-public perception of insurance at that time, Superintendent Barnes chose *Alter Alterius Onera Portate* (bear ye one another's burden) as the New York Insurance Department's first motto.[87]

The insurance industry fought back and resisted emerging regulations from the start, both through lobbying for federal preemption of state law[88] and in the courts. In its first high-profile attempt, the industry manufactured a legal challenge against out-of-state bonding requirements to get the Supreme Court to rule that state regulation was unconstitutional.[89] This gambit failed spectacularly. The industry's argument at the Supreme Court was that authority to regulate falls within Congress's power "to regulate commerce" under the Commerce Clause, and therefore, states had no power to regulate insurance.[90] But instead, in *Paul v. Virginia,*[91] the Court ruled that Congress cannot regulate insurance because insurance was not commerce at all, but rather, just a simple contract for services, leaving its regulation to the states.[92]

Soon after *Paul v. Virginia,* in 1871, New York's insurance superintendent George W. Miller organized a conference of state regulators, the National Insurance Convention (NIC),[93] which eventually turned into the still operating (and still influential) National Association of Insurance Commissioners (NAIC).[94] Representatives from 20 state insurance departments met to regularize and standardize state insurance regulation now that the Supreme Court had established states as the sole authority responsible for insurance.[95] Miller described their purpose in his letter inviting commissioners to meet:

> The past and prospective increase in the number of state departments, each established under different laws and adopting different forms, rules, and

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[84] An Act to Regulate the Forfeiture of Policies of Life Insurance, 1861 Mass Acts, Chap. 186, p. 495.
[85] Hempstead, *supra* note 13, at 30.
[86] *Id.*
[87] 1871 NIC OFFICIAL REPORT, *supra* note 48, at v.
[88] Hempstead, *supra* note 13, at 31-32.
[89] *Paul*, 75 U.S. at 168-170.
[90] *Id.* at 169-170.
[91] 75 U.S. 168 (1868).
[92] *Id.* at 183.
[93] 1871 NIC OFFICIAL REPORT, *supra* note 48.
[94] *Our Story*, NAT'L ASS'N OF INS. COMM'RS, https://content.naic.org/about (viewed Oct. 21, 2025).
[95] 1871 NIC OFFICIAL REPORT, *supra* note 48, at vi.

> regulations, has naturally tended rapidly to increase the labors and consequent expenses of insurance companies, and, of course, to absorb by so much the security or funds of the insured. As the people of every state are interested in procuring insurance which shall be reliable, and, at the same time, cost as little as possible, it would seem that some measures might, and if possible, ought to, be adopted, which would tend to promote the general interests of the insurer and insured. It occurred to me sometime since that the most feasible and practicable mode of securing that simplification and unification, both of form and of law, which public interests seem to demand, was to be found in concert of action on the part of those several state officers charged by their respective states with the supervision of insurance.[96]

The insurance industry had heavy influence in these first meetings; they even funded the convention.[97] After losing their Supreme Court gambit and failing to address the risk of price cutters themselves, the insurance industry saw NIC as the way to standardize insurance regulation and saw solvency regulation as the way to protect themselves from market disruption.[98] The New York Times reported on the convention, sarcastically noting that extravagant parties would be paid for with "the sacred funds reserved for widows and orphans."[99] Out of these initial meetings, the NIC agreed to explore the creation of uniform financial reporting forms and agreed to continue meeting.[100]

C. The Progressive Era (1890-1914)

Rate-setting laws emerged in the populist Progressive Era. The Progressive Era was a time when Americans began to view government as having a more expansive role in regulating the economy.[101] As one progressive from Texas put it, Americans began to believe government's purpose was "for the protection of the weak against the encroachment of the strong."[102] Populist outrage over abuses and scandals of the insurance industry formed a significant part of the movement.

[96] *Id.* at 1.
[97] Hempstead, *supra* note 13, at 34.
[98] *Id.* at 36-37.
[99] *Id.* at 41.
[100] *Id.* at 38
[101] LEWIS L. GOULD, AMERICA IN THE PROGRESSIVE ERA 1890-1914 (2014).
[102] *Id.* at ix.

In particular, the use of independent sales agents paid on commission drove increasingly aggressive sales tactics and a poor industry reputation. Supervision and training of insurance agents were minimal, but competition for agents was fierce, driving sales tactics that were increasingly viewed as sleezy by the public.[103] As New York Commissioner Barnes described it: "these absurd donations to agents [gave rise to] a set of irresponsible and reckless agents, combined and confederated for the purposes of selfish gain, without regard for the public good."[104] And competition between insurance companies focused more on attracting agents (with higher commissions that drove *up* prices) than consumers.[105]

The NIC tried to get on top of the growing poor perception of insurance by endorsing anti-rebate laws,[106] and by 1895, 25 states had passed an anti-rebating law.[107] The anti-rebating laws were difficult to enforce, and more consumer-minded advocates of the time believed the only way to solve the problem was to eliminate the extravagant commissions paid to agents altogether.[108]

But the broader populist environment meant that, in many states, previously industry-friendly insurance commissioners were being replaced with more populist commissioners.[109] These commissioners, following in the footsteps of Elizur Wright before them, began pushing for more consumer protection. For example, early on in this period, insurance commissioners in Kansas began threatening to revoke licenses if insurers grew too aggressive in contesting claims.[110]

The reform movement was fueled by a series of muckraker exposés into the largest insurance companies in New York, including Tomas Lawson's "Frenzied Finance" series, John Ryckman's "Despotism of Combined Millions," and in particular, a *New York World* investigation into the insurance company Equitable's extravagant parties allegedly paid for with policyholder's premiums.[111] These reports caused New York Senator William Armstrong to establish a committee to investigate the life

[103] Hempstead, *supra* note 13, at 51.
[104] *Id.*
[105] *Id.*
[106] Anti-rebate laws prohibited independent agents from rebating parts of their commission back to customers. It was viewed as unfair because it led to discriminatory costs to customers.
[107] *Id.* at 51-52.
[108] *Id.* at 52-53.
[109] *Id.* at 54.
[110] *Id.* at 54-55.
[111] *Id.* at 59-61. The public viewed extravagant spending on a party as a scandal because insurer surplus funds were considered the policyholders' money.

insurance industry in 1905, which would be led by progressive reformer (and future Supreme Court Justice and Presidential nominee) Charles Evans Hughes.[112]

Hughes held a series of well-attended hearings on the industry, and ultimately proved most of the allegations about corporate corruption, including financial improprieties, excessive expenses, and aggressive political lobbying and even bribery.[113] The hearings were allegedly so hard-hitting, and the public backlash so fierce, that the CEOs for the five largest insurance companies all resigned in shame.[114] The Armstrong Committee recommended, and many states passed, a variety of reforms including (1) a ban on insurers investing in equities, (2) a ban on political contributions, (3) standardized insurance policy forms to prevent discrimination, (4) limits on agent rebating, (5) policyholder representation in mutual insurance companies, and (6) limits on new business for insurers with excessive market share.[115]

But the populist wave surged past the Armstrong Committee recommendations. For example, Texas passed a new law called the Robertson Law, requiring 75% of reserves from Texas policyholder premiums to be invested in Texas.[116] To stop this law from being replicated in other western and southern states, many life insurance companies withdrew from Texas,[117] but those companies were replaced by local companies. In the years immediately after the Armstrong Committee, public resentment towards the New York insurers and state laws designed to combat market concentration led to the founding of many new local insurance companies.[118]

At first, the populist energy was directed at breaking up the rate-setting "compacts" (the National Board, and similar local entities) using antitrust law. Due to the holding in *Paul v. Virginia*, the industry was exempt from the federal Sherman Act, so states passed their own laws banning rate-setting bodies. Five states passed these laws in the late 1880s, another nine in the 1890s, and eight more from 1900-1910.[119]

But some states viewed this as inadequate and turned to direct rate regulation to keep prices reasonable. The first state was Kansas in 1909.[120] Texas passed their own

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[112] Scott Bomboy, *The remarkable career of Charles Evans Hughes*, NAT'L CONSTITUTION CENTER (Apr. 11, 2024), https://constitutioncenter.org/blog/the-man-most-qualified-to-be-president-who-wasnt

[113] Hempstead, *supra* note 13, at 61; *Armstrong Committee Report*, *supra* note 14, at 13.

[114] *Id.* at 62.

[115] *Armstrong Committee Report*, *supra* note 14, at 358-440.

[116] Hempstead, *supra* note 13, at 69.

[117] *Id.*

[118] *Id.* at *70.*

[119] Marc Schneiberg & Tim Bartley, *Regulating American Industries: Markets, Politics, and the Institutional Determinants of Fire Insurance Regulation*, 107 AM. J. SOC. 101, 113-114 (2001).

[120] An Act Relating to Fire Insurance, and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein, 1909 Kan. Sess. Laws 279.

rate-setting law also in 1909,[121] followed by Louisiana in 1910,[122] and Missouri in 1911.[123] These laws gave a state insurance commissioner authority to regulate rates directly, to ensure they were adequate (high enough to promote solvency), not excessive, and not discriminatory.[124] Eight other states followed and passed anti-discriminatory pricing laws, but not yet full rate regulation, between then and 1915.[125]

Right after Texas passed its first rate-setting law in 1909, the insurance industry joined forces to file collectively fixed "key rates" with the government and threatened to withdraw from the state if these high rates were not approved. Rather than back down, the Governor of Texas doubled-down, and called a special session of the legislature to strengthen the legislation.[126] In his address to the Texas legislature, the Governor recommended that the legislature pass a law that conditions obtaining a charter to do business in the state on proof that the insurance company has not "undertaken to dominate legislation by threats to withdraw from the State," and ban re-entry if an insurer does withdraw.[127] In the Governor's address to the Texas legislature, he explained the stakes:

> At the time of enactment of [the original rate-setting law] and for many years prior thereto there was a widespread and well-founded dissatisfaction with general fire insurance conditions, and especially was there dissatisfaction with respect to the fire insurance premium rates, and the people were ready to welcome almost any proposed remedy for the evils and inequalities obtaining. It was a matter of common knowledge that small property owners were uniformly required to pay higher rates of insurance than their more fortunate neighbors with large holdings. Under conditions then existing the fire insurance premium rates were unfair, inequitable and affected adversely a majority of the individuals composing the insuring public. The assurances of benefits to accrue to the people under the law as proposed and enacted won for it in advance almost universal approval. . . . Corporate greed again asserts itself and a combination of

[121] Fire Insurance Companies-Prescribing Conditions for Transacting Business, 1910 Tex. Gen. Laws 311.
[122] 1910 La. Acts 355.
[123] Insurance Other Than Life—State Superintendent May Regulate Rates, 1911 Mo. Laws 267.
[124] Schneiberg & Bartley,., *supra* note 119, at 111.
[125] *Id.* at 138, tbl. A1.
[126] *H.J. of Tex.*, 31st Leg., 3d C.S., at 1 (1910), https://lrl.texas.gov/scanned/specialSessions/31-3proc.pdf.
[127] *H.J. of Tex.*, 31st Leg., 3d C.S., at 7 (1910), https://lrl.texas.gov/scanned/govdocs/Thomas%20Mitchell%20Campbell/1910/message071910.pdf.

> circumstances with which the public is familiar, has brought about the intolerable situation which demands legislative action.[128]

In the legislative discussion that followed, the Insurance Committee's Chair laid out the stakes:

> [I]nsurance is in reality a tax; [] it should be levied on each risk in proportion to the hazard of that risk and not in proportion to the ability of some man to get insurance on the same hazard lower than some other man; and [] all men should stand before the taxing power of the insurance companies in the same manner and with the same rights as they stand equal before the law and before the taxing power of the State of Texas.[129]

The legislature ultimately replaced the original five-page law[130] with an even stronger and more prescriptive fourteen-page law regulating the industry.[131] Under the prior bill, the industry was given the right to vote for one of the three Insurance Board seats. That right was taken away in the new bill.[132] And while under the original law the insurers set the original price schedule, which the Board would approve, in the new bill the Board set the original schedule.[133] The penalty for violating the new law was criminal prosecution and cancellation of the authority to transact business in Texas.[134]

Following in the footsteps of the Armstrong Committee, which focused on life insurance, New York created the Merritt Committee to investigate political corruption in the fire insurance industry in 1910.[135] The Committee found widespread political corruption, including bribes intended to prevent passage of anti-compact and valued policy laws being considered by the New York legislature.[136] The Committee report spends some time explaining the nature of insurance, describing it as a "mutual" enterprise consisting of "the contribution of the many to help bear the misfortune of the

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[128] *Id.*
[129] COMMITTEE ROOM, FULL REPORT ON S.B. 7, p. 36 (Aug. 24, 1910), https://lrl.texas.gov/LASDOCS/31CS4/SB7/SB7_31CS4.pdf#page=105.
[130] 1910 Tex. Gen. Laws 311.
[131] Acts 1910, 31st 4th C.S., ch. 8, General Laws of Texas, https://lrl.texas.gov/scanned/sessionLaws/31-4/SB_7_CH_8.pdf.
[132] *Id.*
[133] *Id.*
[134] *Id.* §§ 20, 24, 25.
[135] *Merritt Committee Report, supra* note 1, at 3.
[136] *Id.* at 5, 23. An anti-compact law prohibits coordinating rates and a valued policy law requires insurers to cover the full value of a policy in the event of a total loss, rather than just the value of the lost property.

few," and noting that the complex and commodified nature of insurance "must not be allowed to obscure the fact that the business, even in this form, is essentially mutual."[137] The report even describes "insurance men" who refer to fire insurance as a tax meant to cover the fire losses of a community.[138] The Merritt Committee ultimately supported private, insurer-run rate-setting organizations and recommended prohibitions on discriminatory pricing, but did not recommend full rate-setting oversight to prevent excessive rates.[139] However, two Committee members separately recommended that New York pass legislation to give the Superintendent authority to modify rates that were unreasonable, excessive, arbitrary, or unwarranted.[140]

During the Progressive Era, the insurance industry continued to bring cases in court to get out of heightened regulation. In the 20 years between 1885 and 1905, the industry brought at least five unsuccessful cases challenging the authority of states to regulate to the Supreme Court.[141] But around the time that Kansas, Texas, Louisiana, and Missouri first passed their rate-setting laws, the insurance industry brought a surge of cases in an attempt to halt the legislative momentum.

The first case was *German Alliance Ins. v. Hale.*[142] That case challenged a particularly creative anti-monopoly law in Alabama, which did not ban compacts, but did require insurers participating in a compact to over-pay customer claims by 25%.[143] The insurance industry challenged this Alabama law on the grounds that it interfered with the right to contract, consistent with then binding caselaw like *Lochner v. New York*.[144] The court ruled that any regulation to "substitute competition in the place of combination or monopoly" was within Alabama's legitimate police power.[145]

Second, in *New York Life Ins. Co. v. Deer Lodge County*,[146] the insurance industry argued that state taxes on insurance were a burden on interstate commerce. In 1913, the Supreme Court once again ruled that insurance is not commerce.[147]

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[137] *Id.* at 36-37.
[138] *Id.* at 38.
[139] Schwarcz, *supra* note 4, at 957.
[140] *Merritt Committee Report*, *supra* note 1, at 131.
[141] Fire Ass'n of Philadelphia v. New York, 119 U.S. 110 (1886); Hooper v. California, 155 U.S. 648 (1895); Noble v. Mitchell, 164 U.S. 367 (1896); New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900); Nutting v. Massachusetts, 183 U.S. 553 (1902).
[142] 219 U.S. 307 (1911).
[143] Code Ala.1896, §§ 2619, 2620, *upheld in* German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911).
[144] 198 U.S. 45 (1905).
[145] *German Alliance Ins. v. Hale*, 219 U.S. at 316.
[146] 231 U.S. 495 (1913) (notably, Justice Hughes, the head of the Armstrong Committee almost a decade earlier, dissented without writing an opinion).
[147] *Id.* at 508.

But the most notable case is *German Alliance Ins. Co. v. Lewis*,[148] a case directly challenging the constitutionality of rate-setting laws as inconsistent with due process under the *Lochner* line of cases. The case was an attack on the original rate setting regime in Kansas. In a remarkable ruling that reflects the perception of insurance as a quasi-public business, the Supreme Court laid out a justification for regulating insurance as a utility, asserting that "the business of insurance [is] so far affected with a public interest as to justify legislative regulation of its rates[.]"[149]

For a few reasons, this opinion is a uniquely valuable historical artifact for the inquiry into why insurance was treated as a utility. First, it was a direct challenge to the very first rate-setting law passed in Kansas but, importantly, it was handed down before the vast majority of states had adopted rate regulation. Ten states adopted utility-style regulation immediately after the opinion, suggesting the opinion's reasoning spoke to the policymakers that first passed rate regulation in those states.[150] Second, the Court's opinion involved not just technical legal matters, but also policy and conceptual justifications. Third, one of the Justices who joined the opinion, Justice Hughes, was himself a key political figure in the populist movement to regulate insurance. He began his remarkable political career[151] by chairing the aforementioned Armstrong Committee in 1905.[152] Two years after the opinion, he resigned to run for President as the Republican nominee, in a campaign that prioritized regulation of insurance.[153] Renowned jurist Justice Oliver Wendell Holmes was in the majority as well.

In explaining why there should be an exemption to *Lochner* for insurance, the majority opinion first explained why public utility markets are treated differently under the law.[154] The Court reasoned "that when private property is 'affected with a public interest, it ceases to be *juris privati* only' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large;' and, so using it, the owner 'grants to the public an interest in that use, and must submit to be controlled by the public for the common good.'"[155] The Court ruled that

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[148] 233 U.S. 389 (1914).

[149] German Alliance Ins. Co. v. Lewis, 233 U.S. 389.

[150] *See* Schneiberg & Bartley, *supra* note 119, at 138, tbl. A1 (showing an initial push by four states to create rate-setting authority in 1909-1911, then 4 years of no new laws, then another 10 laws passing in the 5 years after *German Alliance* in 1914).

[151] Bomboy, *supra* note 112.

[152] *See* Hempstead, *supra* note 13, at 44-64.

[153] *Republican Party Platform of 1916*, AM. PRESIDENCY PROJECT (June 7, 1916), https://www.presidency.ucsb.edu/documents/republican-party-platform-1916.

[154] *German Alliance v. Lewis*, 233 U.S. at 407.

[155] *Id.* at 408 (citing *Munn v. Illinois*, 94 U.S. 113, 126 (1876)

"business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."[156]

The Court then spelled out why insurance fits into this utility exception to *Lochner*:

> In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency, are of great concern. . . . Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it . . . . We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals.[157]

The Court justified regulating insurance as a utility because insurance is the way society shares risk as a community. And the Court analogized insurance to a government function, describing insurance as a "tax" as others had before.

To this the Court added a few additional points. First, "contracts of insurance may be said to be interdependent"[158] in that consumers have an interest in the insurer's insolvency, which necessarily implicates contracts the insurer has with other policyholders. Second, "[i]t is practically a necessity to business activity and enterprise."[159] Third, applicants cannot negotiate rates, and so "the business of insurance is of monopolistic character and . . . 'it is illusory to speak of a liberty of contract.'"[160] Note that this point is not that insurance is a "natural monopoly," but rather, that insurance is a contract of adhesion that consumers do not negotiate.

To summarize, in 1914, the Supreme Court justified utility regulation of insurance for the following reasons:

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[156] *Id.* at 411.
[157] *Id.* at 412-413.
[158] *Id.* at 414.
[159] *Id.* at 414.
[160] *Id.* at 417.

(1) Insurance resembles a government function, like a tax or a government program.
(2) Insurance is the way society shares risk communally and involves a high amount of interdependence. The insurance contracts between two parties affect the public at large, not just the two signatories to the contract.
(3) Insurance is a practical necessity of life and business, and
(4) Insurance is sold in contracts of adhesion.

As mentioned above, immediately after the *German Alliance* opinion, rate-setting laws spread rapidly. In 1914, the National Association of Insurance Commissioners (NAIC)[161] met and insurance commissioners across the country expressed unanimous support for ratemaking bureaus and for abandoning the antitrust approach.[162] As the California Attorney General expressed in his opening address at the 1915 NAIC conference, there was growing support for "legislation which treats insurance companies as quasi-public utilities," "recognizing the consumer's right to participate in the control of that which his money maintains," as "an extension of democracy."[163]

Three new states passed their own laws in 1915 (MI, MN, OK), followed by another in 1916 (KT), two more in 1917 (SC, WI), and another seven between 1918-1924 (CO, IN, SD, VT, VA, WY, MS).[164] In that same time-period, another fifteen states passed anti-price discrimination laws, taking the approach recommended by the Merritt Committee's members.[165]

D. The New Deal and the Post-War Era (1935-1969)

In a natural extension of the view that insurance was a pseudo-public function, during the New Deal Era, the country debated the nature of insurance and whether it should be an actual government function, culminating in the creation of the government insurance programs of Social Security, Medicare, and Unemployment Insurance that form the main pillars of the social safety net.[166] Meanwhile utility-regulation of private

[161] Previously named the National Insurance Convention (NIC).
[162] Hempstead, *supra* note 13, at 134.
[163] *Id.* at 134.
[164] Schneiberg & Bartley, *supra* note 119, at 138.
[165] *Id.*
[166] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 ("Medicare"); Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) ("Social Security). Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937) (explaining how states passed unemployment insurance laws immediately after passage of the Social Security Act in 1935). *See* Centers for Medicare & Medicaid Services, Milestones 1937-2015 (July 2015), https://www.cms.gov/about-cms/agency-information/history/downloads/medicare-and-medicaid-milestones-1937-2015.pdf (explaining how Medicare was conceived of in 1937).

insurance had been adopted by a significant number of states, but not the majority. That changed after a Supreme Court case in 1944 that pushed the remaining states to follow suit.[167]

In that case, *U.S. v. SE Underwriters Assoc.*, the Court ruled for the first time that the Constitution *did not* prohibit federal regulation of insurance and that the federal Sherman Act applied, overturning a 75-year-old understanding that insurance regulation was reserved to the states.[168] The industry immediately lobbied Congress to pass a law that would protect industry rate-setting bodies from antitrust law.[169] Congress passed the federal McCarran-Ferguson Act in 1945, exempting insurance from federal antitrust law, but *only if* it was regulated by state law.[170] The law created a deadline of 1948 for states to pass rate-setting laws, which sparked another lobbying bonanza at the state level to get rate-setting laws passed and rates approved.[171] During this short window, the National Association of Insurance Commissioners (NAIC) released model legislation in coordination with the industry.[172] The model legislation established that rates would have to be filed with a state insurance commissioner, which could approve or reject the rates. It also permitted the creation of private, voluntary rate bureaus, which would allow coordination of rate setting and data sharing within the insurance industry in a state.[173] At least 30 states passed this model legislation in 1947.[174]

Regulation of P&C insurance continued to progress through the 1960s with ever-increasing government involvement. For example, in 1968, Congress passed the National Flood Insurance Act, which created a federal insurance plan for flood insurance that continues to cover the vast majority of flood risk in the country.[175] Under the National Flood Insurance Program, the federal government directly insures customers for flood risk, though it is usually sold by private insurance companies acting as the government's agent.

In that same year, Congress passed the Urban Property Insurance Protection and Reinsurance Act, which pushed states to pass Fair Access to Insurance Requirements (FAIR) plans. FAIR plans are residual insurance plans that cover customers who the

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[167] *South-Eastern Underwriters Association*, 322 U.S. 533.
[168] *Id.* at 534.
[169] James C. O'Connor, *Property and Casualty Insurance*, 15 J. OF THE AM. ASS'N OF UNIV. TCHRS. OF INS. 94, 94 (1948).
[170] McCarran Ferguson Act, 15 U.S.C. 1012.
[171] O'Connor, *supra* note 169, at 94-98.
[172] *Id.* at 94-98.
[173] *Id.* at 95.
[174] *Id.* at 96.
[175] 82 Stat. 572, Pub. L. 90–448.

private market would not cover and are either state run or state mandated, but run and funded by the private insurance industry in the state.[176] These kinds of residual vehicles have become common in many state P&C insurance markets.

Another development during this time—which arguably made private insurance look even more like a tax—was the proliferation of laws mandating various forms of P&C insurance. The reason for this highlights the interdependent nature of insurance; in a great many cases, an insurance policy doesn't just protect the customer, but also, people the customer unintentionally harms. For example, auto insurance protects people you crash into. While the first law requiring drivers to purchase auto insurance was passed by Massachusetts in 1927, the second state, New York, did not pass a version of this law until 1954.[177] By twenty years after that, auto insurance was mandatory in most states.[178]

The auto insurance mandates followed in the footsteps of workers' compensation, which was the first form of mandated P&C insurance. New York passed one of the first workers' compensation laws in 1910, which was immediately overturned by the New York Court of Appeals in 1911 because it mandated employer participation, and then resurrected by Constitutional amendment in 1913 as part of Theodore Roosevelt's high profile political effort to rein in judicial policymaking.[179] Between 1911 and 1935 almost every state had passed a workers' compensation law.[180] Some states passed a law making the program voluntary for employers to avoid judicial scrutiny and some maintained the mandatory structure; some relied on private insurers, some created public insurers that competed with private insurers, and some created a mandatory public insurer.[181] Those pre-WWII policy decisions still largely govern the diversity of state workers' compensation laws in the U.S. today.

E. The Neoliberal Era (1970-2008)

Many scholars have written about the Neoliberal Era—characterized by an ideology of privatizing public functions and deregulating private industry—starting

[176] NAT'L ASS'N OF INS. COMM'RS, *Fair Access to Insurance Requirements Plan, Background*, *supra* note 31.
[177] Jennifer B. Wriggins, *Mandates, Markets, and Risk: Auto Insurance and the Affordable Care Act*,19 CONN. INS. L. J. 275, 312-313 (2013).
[178] *Id.*
[179] *See* Ives v. S. Buffalo Ry. Co., 201 N.Y. 271 (Ct. App. N.Y. 1911); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLING WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 152 (2004).
[180] Christopher Howard, *Workers' Compensation, Federalism, and the Heavy Hand of History*, 16 STUD. IN AM. POL. DEV. 28, 32-33 (2002).
[181] *Id.*

around 1970 and running to the financial crisis in 2008 and beyond.[182] Some scholars argue that the insurance industry was "the quintessential form of neoliberal governmentality,"[183] and essential to the development of the neoliberal ideology because it was the industry over which policymakers, academics, and market participants most debated whether and how the private sector should manage a public function in the decades before 1970.[184]

For purposes of this Article, there are a few things that occurred during the Neoliberal Era that are significant. First, this is when intellectual elites began to view utility regulation with skepticism.[185] Scholars like Milton Freidman, Harold Demsetz, and Richard Posner, sometimes called the "Chicago School," were at the forefront of this shift.[186] There were a number of arguments against utility regulation, including that utilities capture their regulators and are able to increase prices more than they could in a free market, or that cost-of-service rate regulation creates the incentive for utilities to incur excess capital costs in order to boost the rate of return, or that price-setting inherently reduces price variability and increases cross-subsidization among customers.[187]

In 1969, Richard Posner argued that even "natural monopoly" utilities should be deregulated.[188] A "natural monopoly" which is a concept popularized in this era, occurs when the entire demand can be satisfied at lowest cost by one firm, in which case the market will trend towards a monopoly that charges monopoly prices.[189] Under the assumption that this is the only plausible explanation for utility regulation,[190] which was itself a strawman, Posner concluded that it was an inadequate justification because

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[182] *See, e.g.*, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022); Aabid Firadausi, *Neoliberalism Is Dead: Or is it?*, 65 BERKELY J. OF SOCIO. 142 (June 26, 2024).
[183] Zsuzsanna Vargha, *Insurance after Markets*, 17 ECON. SOCIO.—THE EUROPEAN NEWSLETTER 6 (2015).
[184] Caley Horan, INSURANCE ERA: RISK, GOVERNANCE, AND THE PRIVATIZATION OF SECURITY IN POSTWAR AMERICA 11-13 (2021).
[185] Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1397-1402 (1998).
[186] Milton M. Friedman, CAPITALISM AND FREEDOM 119-60 (1962); Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 65 (1968); Posner, *supra* note 29, at 620.
[187] Kearney & Merrill, *supra* note 185, at 1400-1401.
[188] Posner, *supra* note 29.
[189] *Id.* at 548.
[190] Tellingly, Posner dispenses with the notion that anyone would fathom utility regulation for another reason in a single footnote: "To the extent that public utility regulation can be justified on grounds unrelated to natural monopoly (I cannot myself think of any such ground), the critique of this Article is inapplicable." *Id.* at n. 2.

competition and antitrust law are sufficient to keep a natural monopoly from reaching an actual monopoly, and because utility regulation is often imperfect.

These critiques were flawed in certain key respects. First, because utility regulation was the status quo, commenters were looking at the imperfect execution of one policy approach (rate regulation) and comparing it to a platonic ideal of another (deregulation). This is often described by Chicago School scholars themselves as the "nirvana fallacy."[191] The observation that utility regulators can become captured, err in the process of setting rates, or impose unnecessary transaction costs are all true, but they are the messy details of implementing the ideal that can be mitigated with careful attention to execution. It is true that a perfectly efficient rate-setting regime is not realistic. But in the real world, perfect competition does not exist either.[192] For example, agency capture can also hinder antitrust enforcement; in fact, it did.[193] A focus on short-term stock prices could drive utility executives to make irrational choices in the long-run,[194] a particularly poor fit for utilities given the unique need for longer-term planning.[195] Therefore, if we are comparing the conceptual ideal of competition against rate regulation, it should be a version of rate regulation that is also the conceptual ideal.

Second, while the critiques are styled as primarily targeting rate setting authority, the arguments mostly apply to entry restrictions that eliminate price competition. The Chicago School tends to assume rate-setting and entry restrictions always come as a package deal. But utilities can have both competition *and* rate-setting, insurance being the perfect example. In this scenario, competition is already performing much of the price discipline it would in a deregulatory environment, and the rate-regulator either lowers the price from that baseline even more, or in rare cases, prevents

[191] Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969) ("The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing "imperfect" institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements.").

[192] REVAZ LORDKIPANIDZE, THEORY OF PERFECT COMPETITION 22 (2024) ("A perfectly competitive market is a theoretical benchmark and does not exist in reality."). This is not a criticism of economists' use of the concept of perfectly competitive markets. It can be a helpful construct for analytical purposes.

[193] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 718-722 (2017) (describing how the Chicago School's shift of antitrust analysis from an economic structuralism to price theory undermined antitrust enforcement at the Federal Trade Commission and Department of Justice).

[194] *See, e.g.*, Alfred Rappaport, *The Economics of Short-Term Performance Obsession*, 61 FIN. ANALYSTS J. 3, 65 (2005).

[195] Many utilities involve massive capital investments based on advanced planning for decades in the future. Even insurance, a utility without major capital investments, requires long-term planning to account for catastrophes that only occur once per century, long-term demographic changes, and other long-term trends and variables.

insurers from letting competition drive them to insolvency. In this scenario where competition already exists, it is hard to see how removing rate-regulation could decrease price. Insurance is not the outlier in this regard. Competition and rate-setting co-existed in many other utility regulated markets, like banking, airlines, and communications. In fact, one of the utility regulatory tools is interconnection mandates designed to add competition to a market where a firm might otherwise be able to have a monopoly based on their infrastructure investment.[196]

Third, none of these critiques address the fundamental destructive competition concern. Normal forces of competition lead to the closure of underperforming firms. In non-utility markets, the public is not particularly harmed when companies go out of business because they are outcompeted by other firms, and so economists generally view this as a good thing. The company with better prices and services survives and takes the market share. But in many utility markets, the process of firm closure is more catastrophic. When an insurer closes, claims go uncovered. If a power company closes, people lose power until a new company can replace it. In these markets where competition-driven firm closure would cause real damage to people, rate-setting authority is a way to avoid closures without eliminating competition entirely.

Despite the flaws in their arguments, the neoliberal ideological perspective gained influence and the U.S. experienced widespread deregulation of utilities between 1970 and 2010.[197] The deregulation fad reached insurance too, although the unique legal posture created by the McCarran-Ferguson Act—that state utility regulation legally operated as a condition precedent to immunity from antitrust liability—created an incentive to maintain some form of rate regulation. As a result, deregulation of insurance was an incomplete project and mostly took the form of liberalizing the rate review process. Before this era, in most states a commissioner determined or approved the price of P&C insurance. After deregulation, over 30 states shifted to a model in which the insurance commissioner could reject P&C insurance rates but did not have to affirmatively approve them.[198] This made it practically easier to increase rates in those states, but maintained the industry's exemption from federal antitrust law.

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[196] Ricks et al., *supra* note 39, at 27-28. In the modern economy, none of the utility markets have a monopoly by law, but some have a monopoly by practical necessity (e.g. sewers). In these circumstances, the neoliberal critique is even more irrational because free-market competition is literally impossible.

[197] *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (Oct. 24, 1978); California Assembly Bill 1890 (1995) (deregulating California energy market); Kearney & Merrill, *supra* note 185.

[198] For example, in auto insurance, there are currently no states where the commissioner sets the rate, 19 states (and DC) that require prior approval, 31 states that do not require prior approval, and one state (Wyoming) that has fully deregulated. NAT'L ASS'N OF INS. COMM'RS, 2021/2022 AUTO INSURANCE DATABASE REPORT, at 211, tbl. 38B, https://content.naic.org/sites/default/files/publication-aut-pb-auto-insurance-database.pdf.

There was also, during this time, a new populist Consumer Rights countermovement that advocated for more significant consumer protections.[199] This movement had at least one major success in the insurance market. In 1988, associates of Ralph Nader sponsored an initiative in California, Proposition 103, which made the insurance commissioner an elected official, established prior approval of rates, created a unique public intervention process in rate cases, and forced a one-time cut of P&C insurance prices by 20%.[200] The insurance industry spent large sums of money fighting Prop 103 and it became one of the highest profile political stories of that year.[201] While there have been more recent critiques connected to a resurgent push for deregulation of homeowners insurance,[202] the general consensus is that Prop 103 saved Californians over $154 billion in auto insurance premiums without major downsides.[203] Even deregulation advocates reluctantly agree that California's Prop 103 was a policy success for the auto insurance market.[204]

Finally, underwriting underwent a significant transformation during this period. Using risk scoring and large quantities of personal data, insurers now price insurance more precisely to the individual's risk, meaning that cross-subsidization within a "risk-tier" is substantially lessened in the modern insurance market and the kind of price discrimination that was one of the main concerns of populists in the Progressive Era has become justified so long as the discrimination fairly reflects different levels of risk.[205] One scholar describes this change as a fundamental shift: "[b]y redefining discrimination as an acceptable actuarial practice, insurers elevated fairness over equality as a central goal of American social institutions and collective life."[206]

Concerned with the growing use of large dossiers on Americans used to feed this kind of granular underwriting, Congress passed the Fair Credit Reporting Act (FCRA)

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[199] *See* Myriam Gilles, *The Private Attorney General In a Time of Hyper-Polarized Politics*, 65 ARIZ. L. REV. 337, 360-365 (2023) (describing the consumer rights movement's efforts relating to consumer protection law during this time).

[200] Stephen Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683 (1990).

[201] *See, e.g.*, Robert Reinhold, *Car Insurance Industry Fights Consumer Revolt in California*, N. Y. TIMES (Aug. 16, 1988), https://www.nytimes.com/1988/08/16/us/car-insurance-industry-fights-consumer-revolt-in-california.html.

[202] *See, e.g.*, Steven Greenhut, *How Policy Helped Create California's Insurance Crisis*, CITY J. (Jan. 16, 2025), https://www.city-journal.org/article/what-led-to-californias-insurance-crisis.

[203] Hunter & Heller, *supra* note 34, at 5.

[204] Schwarcz, *supra* note 4, at 987; Jaffee & Russell, *supra* note 37, at 251.

[205] *Technological Advancements: Transforming the Underwriting Cycle Approach,* FASTERCAPITAL (Apr. 9, 2024), https://fastercapital.com/content/Technology-Advancements--Transforming-the-Underwriting-Cycle-Approach.html.

[206] Horan, *supra* note 184, at 12.

in 1970.[207] The FCRA is the first data privacy statute in the United States, and it created accuracy requirements, due process rights, transparency rights, and limited the sale of data primarily to lenders, insurers, or employers who have a Congressionally sanctioned "permissible purpose."

In the modern economy, insurers share consumer data used to underwrite insurance through "consumer reporting agencies" governed by the FCRA, including companies like Insurance Information Exchange, LexisNexis, Arity, Drivers History, Verisk, and Connected Analytic Services.[208] These entities primarily share data on the history of filing claims, but insurers also use demographic data, credit reports and credit scores, and "external data" (data that has no relation to the risk being insured) when underwriting using automated algorithms or predictive models.[209] Thus, more than just an increase in precision, during this time underwriting shifted from an exclusive focus on the property risk, towards a mixture of property risk and an applicant's likelihood to file claims based on their demographics, creditworthiness, and claims history.[210]

F. The Modern Era (2008-2025)

There have been a few notable events in last 20 years. Congress passed the Patient Protection and Affordable Care Act (ACA) in 2010.[211] The history and details of the ACA are beyond the scope of this Article, but one part of the law is worth raising because it represents a major shift in the history of utility-regulation of insurance. The ACA created federal loss-ratio floors for health insurance of 85% or 80%, which state insurance commissioners have authority to raise.[212] If an insurer drops below the legal

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[207] *See,* 15 U.S.C. 1681; 89 Fed. Reg. 101402, 101403-04 (Dec. 13, 2024) (describing the legislative history of the FCRA).

[208] *List of Consumer Reporting Companies,* CONS. FIN. PROT. BUREAU, https://www.consumerfinance.gov/consumer-tools/credit-reports-and-scores/consumer-reporting-companies/companies-list/?title=&categories=personal-property-insurance (last visited Mar. 30 2026).

[209] *See, e.g.,* N.Y. DEPT. FIN. SVCS, USE OF EXTERNAL CONSUMER DATA AND INFORMATION SOURCES IN UNDERWRITING FOR LIFE INSURANCE," INSURANCE CIRCULAR LETTER NO. 1 (2019), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2019_01.

[210] MOIRA BIRSS, ET AL., PENALIZED: THE HIDDEN COST OF CREDIT SCORE IN HOMEOWNERS INSURANCE PREMIUMS, CLIMATE & COMMUNITY INSTITUTE (2025), https://climateandcommunity.org/research/penalized-the-hidden-cost-of-credit-score-in-homeowners-insurance-premiums/.

[211] Pub. L. 111-148.

[212] 42 U.S.C. 300gg-18(b); 45 CFR 158.210. Whether an insurer has to maintain 80% or 85% loss ratios depends on whether they are in the large group market (i.e. large employers) or the small group or individual market.

threshold in a year, they have to issue rebates to customers to return the difference.[213] The ACA did not take regulatory authority away from state commissioners, which still license, perform solvency oversight, regulate consumer protection, and even review rates. But commissioners now have the benefit of a federal loss-ratio back-stop, giving commissioners the leverage (and legal obligation) to keep rates low in the rate-setting process.

In 2008, the country experienced perhaps the largest "ruinous competition" episode in the history of insurance. In the lead-up to the financial crisis of 2008 and the resulting Great Recession, financial companies including the country's largest P&C insurance company—American International Group, Inc. (AIG)—began selling credit default swaps on mortgage-backed assets.[214] A credit default swap is, effectively, insurance against default on a loan or a bundle of loans (in this case, consumer mortgages).[215] However, it was categorized as an over-the-counter derivative instead of insurance, so it was exempt from state insurance regulation, and also exempt from Commodities Future Trading Commission (CFTC) or Securities and Exchange Commission (SEC) oversight after the Commodity Futures Modernization Act of 2000.[216] AIG covered hundreds of billions in credit risk in the form of credit default swaps without maintaining any reserves to cover potential losses.[217] AIG's Financial Products division had also invested a substantial amount of its capital in mortgage assets, leaving the company exposed to mortgage-losses on both ends.[218] When the housing crisis began, and mortgage default rates began spiking, AIG was at risk of collapsing.[219] Ultimately the U.S. Federal Reserve bailed out AIG with $182 billion in loans to avoid contagion to the many major banks that AIG "insured" with credit default swaps.[220]

The Financial Crisis Inquiry Commission's official report blames the AIG failure on inadequate capital to cover the risk of these credit default swaps.[221] Regulators did not regulate credit default swaps as insurance, even though they practically operated as an insurance policy, and so this episode provides a natural experiment showing what

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[213] 42 U.S.C. 300gg-18(b)(1)(B).
[214] FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, at 50 (2011).
[215] *Id.* Credit default swaps differ from typical insurance in one key way – while the policyholder of insurance must own the insured asset, financial companies sold credit default swaps to both parties that owned the insured asset, but also third parties taking bets on the asset.
[216] *Id.* at 48.
[217] *Id.* at 50.
[218] *Id.* at 345.
[219] *Id.* at 345-47.
[220] *Id.* at 350.
[221] *Id.* at 352.

could happen if we deregulated insurance. In insurance terms, AIG did not have enough surplus to cover claims and would not have passed an insurance commissioner's basic solvency review. Put another way, AIG was underpricing credit default swaps. AIG's prior 8 years of profits were $66 billion, and it incurred $99.3 billion in losses in 2008.[222] This is the exact pattern that insurers and policymakers grappled with in the 19th Century fire insurance industry. AIG was a short-sighted "wildcat" insurer, driven by competition to underprice insurance to attract premium capital to put into risky investments, leading to a collapse once a major catastrophe caused mass claims. If AIG and other financial institutions had priced credit default swaps for mortgage-backed securities higher and used those higher revenues to populate a healthy reserve, it would not have collapsed.

In response to the various corporate misconduct leading to the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[223] The law included many components, but relating to insurance, it created a Federal Insurance Office in the Department of Treasury,[224] an office that conducts research and provides reports to Congress but does not have regulatory or enforcement authority. Congress also built the Financial Stability Oversight Council (FSOC), of which the head of the Federal Insurance Office is a member, and which has authority to declare financial institutions including insurance companies "systemically important financial institutions" subjecting them to bank-level supervision by the Federal Reserve.[225] In 2013 and 2014, FSOC determined AIG, Prudential Financial, and MetLife were systemically important,[226] but after an administration change, they were all de-designated.[227]

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[222] *Id.* at 350.

[223] Pub. L. 111-203 (July 21, 2010).

[224] Federal Insurance Office Act of 2010, 124 Stat. 1580, codified at 31 U.S.C. 301.

[225] 12 USC 5323.

[226] *Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc.*, FIN. STABILITY OVERSIGHT COUNCIL (2014), https://home.treasury.gov/system/files/261/MetLife%2C Inc..pdf; *Basis of the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc.*, FIN. STABILITY OVERSIGHT COUNCIL (2013), https://home.treasury.gov/system/files/261/Prudential%20Financial%20Inc.pdf; *Basis of the Financial Stability Oversight Council's Final Determination Regarding American International Group, Inc.*, FIN. STABILITY OVERSIGHT COUNCIL (2013), https://home.treasury.gov/system/files/261/American%20International%20Group%2C%20Inc.pdf.

[227] *Notice and Explanation of the Basis for the Financial Stability Oversight Council's Rescission of Its Determination Regarding Prudential Financial, Inc.*, FIN. STABILITY OVERSIGHT COUNCIL (2018), https://home.treasury.gov/system/files/261/Prudential%20Financial%20Inc%20Rescission.pdf; *Notice and Explanation of the Basis for the Financial Stability Oversight Council's Rescission of its Determination Regarding*

Another major recent development is the growing importance of government insurance programs in the natural catastrophe insurance market, especially given the rising risk associated with climate change.[228] These programs largely grew out of the trend of creating "residual vehicles" started in the 1960s. The most significant state programs are found in Florida and California. Florida's legislature created both a reinsurer called the Florida Hurricane Catastrophe Fund in 1993,[229] and a direct insurer called Florida Citizens Property Insurance Corporation in 2002.[230] Florida Citizens was, for a time, a success story. It charged 80% the comparable price in the private market in 2022, and 70% in 2023, saving customers about $2.8 billion.[231] It charged cheaper premiums than the private market because it did not need to spend money on sales and advertising, and did not purchase reinsurance.[232] Florida Citizens also rated well on customer service scores.[233] And as of the end of 2024, it had a $4.2 billion surplus.[234] In the unlikely scenario that a storm wipes out the fund, Florida Citizens has the ability to issue a special assessment to cover claims.[235] In early 2025, the Florida Governor announced a 5.6% *decrease* in premiums charged by Florida Citizens.[236]

Florida Citizens was a true "public option" in the sense that it is considered a government agency of the state of Florida managed directly by government officials, and it was generally available to all customers of all risk-profiles.[237] Compare that to California's FAIR Plan, which was created by state law, but is funded and run by the

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American International Group, Inc., FIN. STABILITY OVERSIGHT COUNCIL (2017), https://home.treasury.gov/system/files/261/American%20International%20Group%2C%20Inc.%20%28Rescission%29.pdf; Metlife, Inc. v. Financial Stability Oversight Council, 177 F.Supp.3d 219 (D.D.C. 2016).

[228] U.S GOV'T ACCOUNTABILITY OFF., GAO-10-568R, NATURAL CATASTROPHE INSURANCE COVERAGE (2010), https://www.gao.gov/products/gao-10-568r.

[229] *About the FHCF*, FLORIDA HURRICANE CATASTROPHE FUND (last visited Aug. 26, 2025), https://fhcf.sbafla.com/about-the-fhcf/ (last visited Aug. 26, 2025.

[230] FLA. STAT. § 627.351(b).

[231] State of Fla. Auditor General, *supra* note 40, at 9.

[232] *Id.* at 8.

[233] *Id.* at 1.

[234] FLA. INS. DEPT., ANNUAL STATEMENT OF CITIZENS PROPERTY INSURANCE CORPORATION, at 29 (2024), https://www.citizensfla.com/documents/20702/31968487/2024+Annual+Statement.pdf/98f321e0-ecff-b44c-d5f3-3dbc487ed720?t=1741632246907.

[235] State of Fla. Auditor General, *supra* note 40, at 9.

[236] Press Release, Exec. Office. of the Governor of Florida, Governor Ron Desantis Announces Rate Reductions for Miami-Dade County, Auto Insurance Reductions Statewide, and 11 New Companies Entering Florida's Market" (Feb. 5, 2025), https://www.flgov.com/eog/news/press/2025/governor-ron-desantis-announces-rate-reductions-miami-dade-county-auto-insurance.

[237] *See* Fla. Ins. Dept., Annual Statement of Citizens Property Insurance Corporation, *supra* note 234, at 14.3. Having said that, state policy has encouraged Florida Citizens to place policies into the private market. GAO-10-568R, *supra* note 228, at 23.

private insurance industry, and only insures consumers the private market will not cover as an "insurer of last resort."[238] As a condition of operating a private P&C insurance company in California, insurers are required by law to pay into the FAIR Plan, and the board is made up of nine representatives of those insurers.[239] At the beginning of 2025, the plan had only about $1.5 billion in assets.[240] That changed in 2025 after the Palisades and Eaton wildfires produced substantial losses, which caused the FAIR Plan to file a claim for reinsurance and depleted all the plan's reserves. The fund was repopulated with a $1 billion assessment to private insurers in February 2025 to cover claims and stay solvent.[241]

In recent years, both California's FAIR Plan and Florida Citizens have been characterized as in "crisis" and have become the locus of a renewed deregulation push.[242] The claims of a crisis are based on the observation that the public plans are being used at increasing rates and are allegedly insolvent after major natural disasters. But the fact that the plans are being used is not a crisis. It means the plans are working as intended.

The claims that Florida Citizens is "not solvent" are divorced from reality. It is flush with cash. As noted above, it had over $4 billion in reserves at the end of 2024. In fact, the main problem with Florida Citizens is that starting in 2025, the state instituted an aggressive "depopulation program" to force its customers into the more expensive private market, even offloading 200,000 policies in a single week.[243]

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[238] Ca. Ins. Code § 10094.

[239] Ca. Ins. Code §§ 10094(a), (c), 10095.

[240] Letter from Cal. FAIR Plan to Ins. Comm'r of Cal., Requesting Assessment 2 (Feb. 11, 2025), https://californiaglobe.com/wp-content/uploads/2025/02/Order-No-2025-1-Approving-the-California-FAIR-Plan-Association-s-Request-to-Issue-Assessment.pdf.

[241] *In the matter of* The California FAIR Plan Association, Insurance Commissioner of the State of California, Order No. 2025-1: Approving the California Plan Association's Request to Issue Assessment (Feb. 11, 2025).

[242] *See, e.g.*, Schwarcz, *supra* note 4, at 985; Peter Carroll, *Homeowners Insurance Market Disruption: Challenges, Effects, and Solutions*, OPEN BANKER (April 1, 2025), https://openbanker.beehiiv.com/p/insurancemarketdisruption; Kristian Fors, *Why California's Homeowners' Insurance Market Collapsed—and How to Fix it*, INDEPENDENT INST. (May 12, 2025), https://www.independent.org/article/2025/05/12/why-californias-homeowners-insurance-market-collapsed-and-how-to-fix-it/; Louis Jacobson & Samantha Putterman, *DeSantis said Citizens Property Insurance is 'not solvent,'* TAMPA BAY TIMES (March 15, 2024), https://www.tampabay.com/news/florida-politics/2024/03/15/desantis-said-citizens-property-insurance-is-not-solvent-fact-check/; Tessa McLean, *Over 600,000 in California enroll in 'insurance of last resort' as crisis deepens*, SFGATE (Aug. 18, 2025), https://www.sfgate.com/california/article/calif-use-last-resort-insurer-nearly-doubles-20819295.php.

[243] *Depopulation*, CITIZENS PROPERTY INS. CORP., https://www.citizensfla.com/depopulation (last viewed Apr. 7, 2026); *Florida's Citizens Property Insurance Shrinks as Private Insurers Gain Customers,* INSURASALES

The story in California is a little more complicated. It is true that the FAIR plan's customer base has grown significantly in recent years. For example, the FAIR plan had only 236,515 policies in force in 2021 and that has increased to 621,234 in 2025.[244] But claims of a collapse or crisis are also overblown because it is legally impossible for the California FAIR Plan to be insolvent. The private insurance industry is required to cover FAIR Plan claims. The FAIR Plan ran out of money after the L.A. fires because the insurance industry, which runs the plan, decided not to keep funds in the FAIR Plan's accounts sufficient to cover major catastrophes. Instead of keeping funds in the plan to earn returns for the plan, the insurance industry chose to operate the FAIR plan on a "cash-in, cash-out" basis, which means private insurers placed reserves in their own accounts to generate returns on their own books.[245] This was not illegal: California law gives the industry a choice of whether to contribute to the plan in advance of a catastrophe, or after the fact. The industry chose the latter. But that means it needs to recapitalize the fund when a catastrophe does happen. In other words, the assessment to repopulate the FAIR Plan was not a "bail out";[246] it was just a reflection of the choices the industry made on how to manage the funds that should have always been considered available to cover claims of the FAIR Plan.

And the California homeowners insurance market can afford the assessments. In 2024, homeowners insurers in California collected $15.4 billion in premiums and only paid $7.3 billion in claims,[247] which is a high margin on top of the income earned in a booming stock and bond market. In fact, California's average loss-ratio for homeowners insurance was just 47.24% in 2024, which made it the state with the 10th *lowest* loss ratios in the country.[248] This has no doubt changed in 2025 with the wave of claims caused by historic wildfires, but high returns in advance of 2025 should have prepared the industry well for the bad year.

(Oct. 29, 2025), https://insurasales.com/news-story/98862/floridas-citizens-property-insurance-shrinks-as-private-insurers-gain-customers; Thomas Frank, *California leapfrogs Florida in US insurance risk*, POLITICO (July 18, 2025), https://www.eenews.net/articles/california-leapfrogs-florida-in-us-insurance-risk/.

[244] *Key Statistics & Data*, CALIFORNIA FAIR PLAN PROPERTY INSURANCE, https://www.cfpnet.com/key-statistics-data/ (last viewed March 2, 2026).

[245] Letter from Cal. FAIR Plan to Ins. Comm'r of Cal., Requesting Assessment, *supra* note 240, at 2-3.

[246] Levi Sumagaysay, California *Homeowners Will Have to Fund Half of High-Risk Insurer's $1 Billion "Bailout*," SANTA BARBARA INDEPENDENT (Feb. 14, 2025), https://www.independent.com/2025/02/14/california-homeowners-will-have-to-fund-half-of-high-risk-insurers-1-billion-bailout/.

[247] NAT'L ASS'N OF INS. COMM'RS, 2024 MARKET SHARE REPORTS FOR PROPERTY/CASUALTY GROUPS AND COMPANIES BY STATE AND COUNTRYWIDE, 155 (2025), https://content.naic.org/sites/default/files/publication-msr-pb-property-casualty.pdf [hereinafter NAIC 2024 MARKET SHARE REPORT].

[248] *Id.* at 154-166.

Nonetheless, the insurance industry and commentators have painted a picture of a California homeowners insurance market in collapse.[249] Insurers have once again deployed the tactic of threatening to withdraw from a state to influence policy and increase their own profits. The tactic has been largely successful because the state has allowed insurers to hike rates,[250] allowed insurers to pass 50% of the FAIR Plan assessments on to customers in fees,[251] and passed legislation to create alternative funding sources for the FAIR Plan.[252]

II. The Current Problems in P&C Insurance

Before getting to the case against deregulation and the case for utility regulation, we need a common understanding of the very real problems in the modern P&C insurance industry.

A. Premiums are too high

As described in Part I.C, insurers, policymakers, and Supreme Court justices of the Progressive Era viewed insurance to be a tax to pay for societal harms from inevitable accidents and disasters. This section will demonstrate that the taxes are over $100 billion per year higher than necessary. Even just since 2020, the country increased the amount it spends on financial services and insurance by a rate of 11% more than background inflation, which was of course already high.[253] In a country in the middle of an affordability crisis,[254] this excess should be a top priority.

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[249] *See, e.g.*, Giulia Carbonaro, *California's 'Regulatory Failure' Blamed for Wildfire Insurance Disaster*, NEWSWEEK (Feb. 6, 2015), https://www.newsweek.com/california-regulatory-failure-blamed-wildfire-insurance-disaster-economist-2026381.

[250] OFF. OF CAL. GOV., EXECUTIVE ORDER N-13-23 (Sept. 21, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/09/9.21.23-Homeowners-Insurance-EO.pdf.

[251] Press Release, Ca. Dept. Ins., Commissioner Lara takes action to ensure FAIR Plan can continue paying consumer claims after the Southern California wildfires (Feb. 11, 2025), https://www.insurance.ca.gov/0400-news/0100-press-releases/2025/release015-2025.cfm.

[252] Fair Plan Stabilization Act, CA AB 226 (introduced Jan. 9, 2025).

[253] Fed. Rsrv. Bank of St. Louis, *Real personal consumption expenditures: Financial services and insurance*, FED. RES. ECON. DATA, https://fred.stlouisfed.org/series/DIFSRX1A020NBEA (last visited Mar. 26, 2026).

[254] Robin Rothstein & Chris Jennings, *Examining the Cost of Living by State in 2024*, FORBES (Jul. 15, 2024), https://www.forbes.com/advisor/mortgages/cost-of-living-by-state/; Thomas F Heston, *The Cost of Living Index as a Primary Driver of Homelessness in the United States: A Cross-State Analysis*, 15 CUREUS (2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10574586/.

Insurance companies make money in two ways—from the difference between premiums collected and costs including claims and operating costs, and from investment income earned on the reserve/surplus that the insurance company maintains to pay out claims. The NAIC publishes data on premium pricing and claims paid by insurance companies, which can be used to determine firm-wide and industry-specific loss-ratios, on the national and state level. A loss ratio is a basic calculation of an insurer's claims paid, divided by premiums collected. It is the standard industry measure one can use to determine how much of dollar premiums are going towards covering risks, and how much is going towards other things (like profit, overhead, advertising). Helpfully, one can use loss-ratios to see how expensive insurance is in a way that controls for inflation and changes in claims cost. The lower the ratio, the more expensive and less efficient insurance is.

NAIC data shows that, in 2024, the average loss ratio for the P&C insurance industry was 61.80%.[255] A 61.80% loss ratio means that for every $1 in premiums, the insurers only paid out $0.62 in claims. This was not an outlier year. The average for the last five years is 63.39%.[256]

These are very low ratios. It means that while the P&C insurance industry collected $1.03 trillion in premiums in 2024, after paying claims, it had $383 billion left over. And in 2024, the industry earned an additional $164 billion in the markets.[257] This means the industry spent about $550 billion on overhead, advertising and agent commissions, reinsurance, stock buybacks and dividends, executive compensation, and profits. For comparison, $550 billion is more than half the total U.S. expenditure on Medicaid,[258] and more than half the U.S. military budget.[259] It is 1.8% of U.S. Gross Domestic Product.[260] While the U.S. spends $550 billion on collecting and managing the P&C insurance "tax," it only spends $18.2 billion on the Internal Revenue Service to collect literal taxes.[261] Certainly, the industry needs some of that money for overhead

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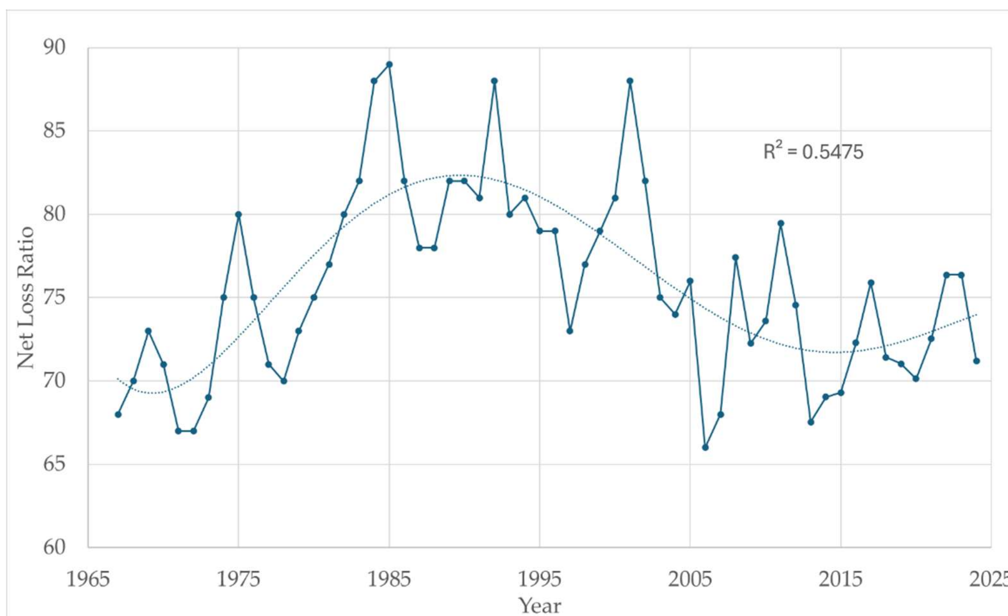
[255] NAIC 2024 MARKET SHARE REPORTS, *supra* note 247, at 4.
[256] *See* Figure 2.
[257] NAIC 2024 P&C FULL YEAR REPORT, *supra* note 19, at 1.
[258]*NHE Fact Sheet*, CTR. FOR MEDICARE AND MEDICAID SERV. (Jan. 14, 2026), https://www.cms.gov/data-research/statistics-trends-and-reports/national-health-expenditure-data/nhe-fact-sheet.
[259] US DEPT. OF DEFENSE, OFFICE OF THE UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF FINANCIAL OFFICER, DEFENSE BUDGET OVERVIEW, DEFENSE BUDGET OVERVIEW, at 1-3 (March 2024, revised April 4, 2024), https://comptroller.defense.gov/Portals/45/Documents/defbudget/FY2025/FY2025_Budget_Request_Overview_Book.pdf.
[260] Fed. Rsrv. Bank of St. Louis, *Gross Domestic Product (Q2 2025)*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/GDP/ (last visited Mar. 11. 2026).
[261] Internal Revenue Service, *IRS Budget & Workforce FY 2024*, (May 29, 2025), https://www.irs.gov/statistics/irs-budget-and-workforce.

and profit. But $550 billion is an astronomical margin for a business using largely automated underwriting, where the customers are legally or practically required to participate.

Insurance was not always this expensive. The insurance industry often measures "net loss ratios" inclusive of reinsurance, which is by definition a higher number than the simpler "pure loss ratio" that includes only claims, and which is referred to above. In 2024, "net loss ratio" for the P&C insurance industry was 71.2% and the average over the last 10 years was 72.7%.[262] But between 1975 and 2000, net loss ratios only dipped below 75% a few times.[263] Between 1982 and 2002, net loss-ratios exceeded 80% in 14 of those 21 years.

Figure 1 – Net Loss Ratios Over (1967-2024)[264]



There is another reason to believe 60-65% pure loss ratios or 70-75% net loss ratios are lower than they need to be; in the health insurance market, net loss ratios are

[262] NAIC 2024 P&C FULL YEAR REPORT, *supra* note 19, at 1.

[263] Shaun S. Wang et al., *U.S. Property-Casualty: Underwriting Cycle Modeling and Risk Benchmarks*, 5 CASUALTY ACTUARIAL SOC'Y 91, 93, https://www.casact.org/sites/default/files/2021-07/US-Property-Casualty-Wang-Major-Pan-Leong.pdf.

[264] Historical data up to 2009 for Figure 1 was obtained from Wang, et al., *supra* note 263, at 93. Newer data was collected from the Federal Insurance Office's annual reports. FED. INS. OFF., U.S. DEP'T OF THE TREASURY, ANNUAL REPORT ON THE INSURANCE INDUSTRY, at 52 (Sept. 2024); FED. INS. OFF., U.S. DEP'T OF THE TREASURY, ANNUAL REPORT ON THE INSURANCE INDUSTRY, at 87 (Sept. 2018); FED. INS. OFF., U.S. DEP'T OF THE TREASURY, ANNUAL REPORT ON THE INSURANCE INDUSTRY, at 23 (June 2013).

capped by federal law at 80% for small group market or individual market insurance plans, or 85% for large group plans.[265] Given that health insurance companies have relatively high overhead compared to other insurance segments because of the frequency in which claims are processed,[266] the health insurance industry should, arguably, have lower loss ratios. Yet health insurance companies survive, and even thrive, with higher net loss ratios of 80% or 85% simply because it is legally required to do so.

The difference between real-world P&C insurer net loss ratios and 80% net loss ratios represents $100 billion in extra premiums in 2024.[267] That $100 billion excess is split roughly 50-50 between consumer-paid insurance segments like auto and homeowners insurance, and business-paid insurance like general liability and workers' compensation insurance.

The 61.80% pure loss ratio is for the entire P&C market. Certain segments have even lower ratios. Figure 2 provides nationwide pure loss-ratio data from 2019-2023 for each type of P&C insurance segment, in order of segment size. Homeowners and auto insurance, the largest consumer segments, averaged less than 70% annual pure loss ratios. The most important segments for businesses—workers' compensation, other liability, commercial peril, and commercial auto—averaged even lower. Workers' compensation's five-year nationwide average pure loss ratio is below 50%.

Theoretically, one might argue that we should tolerate lower annual loss ratios for insurance segments that are more vulnerable to mass loss events (like fire, earthquake, flood, homeowners, allied lines, and inland marine) because insurance companies are saving funds to cover high-loss years caused by infrequent natural catastrophes. Losses are less predictable in these markets. We do see that in at least earthquake insurance, which has exceptionally low loss ratios. But in the modern insurance market, insurers obtain reinsurance to insure against mass-loss events and stabilize loss ratios year-over-year, so the need to earn extra in one year to save for bad years can be overstated.[268] Of course, some segments do not plausibly implicate large catastrophic events (like auto, workers' comp, liability, medical malpractice), so that

[265] 45 CFR 158.210.

[266] *Overhead Costs for Private Health Insurance Keep Rising, Even as Costs Fall for Other Types of Insurance*, CTR. FOR ECON. & POL'Y RSCH. (Feb. 6, 2017), https://cepr.net/publications/overhead-costs-for-private-health-insurance-keep-rising-even-as-costs-fall-for-other-types-of-insurance/.

[267] *See* Part IV.E on the 80% loss ratio proposal. For more precise estimates of the impact of an 80% net loss ratio proposal, *see* Brian Shearer, *How to Lower the Insurance "Tax" by $150 Billion*, VANDERBILT POL'Y ACCELERATOR (2026).

[268] J. David Cummins et al., *The Costs and Benefits of Reinsurance*, GENEVA PAPERS ON RISK AND INS. – ISSUES AND PRACTICE 46, 177-199 (Feb. 10, 2021).

excuse is not available for some submarkets. Regardless, to account for year-to-year loss fluctuations, the five-year average loss ratios are perhaps more informative.

The surety, mortgage guaranty, fidelity, financial guaranty, and credit insurance markets consistently have *very* low loss ratios. These segments are similar in that they do not insure against liability or physical asset loss, but rather, financial loss. More research and scrutiny into this category of the P&C market is warranted.[269] Similarly, the loss ratios in the title insurance market are consistently very low due to the uniquely high agent commissions paid in that segment.[270]

Figure 2 – Pure Loss Ratios by P&C Segment 2019-2023[271]

Type of Property & Casualty Insurance	2024 Total Premium (Billions)	2024 Loss Ratio	2023 Loss Ratio	2022 Loss Ratio	2021 Loss Ratio	2020 Loss Ratio	Avg Loss Ratio
Total P&C (excluding Title & R/I)	$1,029	61.80%	65.53%	67.34%	62.43%	59.83%	63.39%
Consumer Auto (Total)	$350	66.07%	75.40%	80.11%	67.95%	56.03%	69.11%
Homeowners Multiple Peril	$163	61.51%	70.52%	70.83%	68.97%	66.49%	67.66%
Other Liability	$120	70.77%	62.97%	61.06%	59.29%	63.29%	63.48%
Commercial Auto (Total)	$69	72.97%	73.97%	70.17%	64.03%	64.06%	69.04%

[269] In particular, the mortgage guaranty insurance figures are perplexingly low. Mortgage insurance is paid by mortgage borrowers, often as an involuntary condition to get a mortgage. It is a fairly large segment with about $6 billion in premiums in 2023, and yet the average 5-year loss ratios are less than 4%.

[270] Progressive Era insurance reformers often complained about excessive agent commissions driving up premiums, and they would recognize the cause of these low loss ratios. The title insurance companies compete by offering commission to independent agents for business referrals. Commissions in the title insurance market range between 70-85% of premiums, far exceeding any other insurance market. This is the primary driver of title insurance costs. *Title Insurance Premiums: Who's getting paid?*, FED. TITLE AND ESCROW COMPANY (Feb 1, 2012), https://www.federaltitle.com/title-insurance-premiums-whos-getting-paid/.

[271] Most data comes from NAIC 2024 MARKET SHARE REPORTS, *supra* note 247, at 4-7. Title insurance and reinsurance data comes from NAIC 2024 P&C FULL YEAR REPORT, *supra* note 19, at 10, 13.

Commercial Peril (Total)	$65	54.41%	61.04%	59.26%	60.11%	61.20%	59.21%
Workers' Compensation	$61	50.39%	47.10%	48.10%	52.19%	50.81%	49.72%
Reinsurance	$46	69.40%	61.30%	68.80%	72.70%	73.80%	69.20%
Inland Marine	$34	43.58%	44.23%	46.58%	49.31%	63.78%	49.50%
Allied Lines	$31	49.13%	49.81%	76.43%	75.20%	80.85%	66.28%
Fire	$30	41.27%	45.30%	61.88%	66.24%	61.04%	55.15%
Multiple Peril Crop	$17	85.46%	103.42%	95.22%	75.75%	91.19%	90.21%
Title	$16	5.20%	4.70%	3.10%	2.30%	2.90%	3.64%
Medical Prof. Liability	$11 (2021)	NA	NA	NA	54.30%	56.27%	55.29%
Surety	$10	23.49%	22.12%	14.52%	17.53%	22.71%	20.07%
Farmowners Multiple Peril	$6	63.36%	78.78%	76.63%	64.76%	68.97%	70.50%
Mortgage Guaranty	$6	2.35%	-1.72%	-22.35%	5.43%	35.73%	3.89%
Ocean Marine	$6	51.53%	47.35%	61.06%	52.46%	54.94%	53.47%
Earthquake	$5	1.43%	0.57%	1.98%	2.83%	10.52%	3.47%
Products Liability	$4 (2021)	NA	NA	NA	52.46%	47.45%	49.96%
Pet Insurance	$4	71.62%	NA	NA	NA	NA	71.62%
Warranty	$4	66.50%	65.20%	58.87%	55.31%	56.34%	60.44%
Federal Flood	$3	237.85%	59.31%	118.44%	48.06%	26.11%	97.95%
Boiler and Machinery	$3	26.81%	34.55%	35.66%	36.07%	54.98%	37.61%
Credit	$3	46.83%	37.72%	31.01%	26.42%	56.98%	39.79%
Aircraft	$3	53.43%	47.75%	58.85%	53.11%	59.90%	54.61%
Private Crop	$1	92.23%	98.83%	78.44%	88.63%	126.57%	96.94%
Excess Worker Comp	$1	17.68%	21.10%	57.88%	43.26%	74.82%	42.95%
Fidelity	$1	36.88%	34.12%	34.06%	28.48%	42.82%	35.27%
Private Flood	$1	27.62%	6.50%	47.43%	43.18%	61.98%	37.34%
Burglary and Theft	$0.6	23.24%	31.09%	30.34%	51.03%	69.57%	41.05%

Financial Guaranty	$0.4	49.75%	97.18%	-63.15%	-77.00%	89.81%	19.32%

The idea that P&C insurance is more expensive than necessary to cover existing risk levels is not the standard story. Take business liability insurance for example. For decades there has been a legislative push for tort reform to reduce litigation costs for businesses.[272] These efforts are driven by arguments that frivolous lawsuits are driving up business costs, and ultimately, consumer prices.[273] But the litigation costs actually incurred by most businesses consist of insurance premiums paid to cover those costs. The average loss ratio for medical professional liability insurance is 55.29%.[274] The average for product liability insurance is 49.96%. The average for other liability insurance was 63.48%. These low pure loss ratios represent excess charges by the insurance industry to the rest of corporate America that is increasing litigation costs substantially.[275] Eliminating that excess could reduce corporate litigation costs by about as much as the combined savings from all prior tort reform efforts.[276]

As described in Part I.F, nearly every day there is a news story about how homeowners insurance premiums are increasing to account for increasing storm activity and wildfires caused by climate change.[277] It is no doubt true that some of the

[272] *See, e.g.*, Scott Devito & Andrew W. Jurs, *Doubling Down" for Defendants: The Pernicious Effects of Tort Reform*, 118:3 PENN ST. L. REV. 543, 548-554 (2014) for a summary of the history of tort reform movements.
[273] Nicholas C. Lucas, *The Hidden Costs of Lawsuits Continue to Grow*, U.S. CHAMBER OF COMMERCE (Nov. 20, 2024), https://www.uschamber.com/lawsuits/hidden-costs-lawsuits-grow.
[274] In addition, the fact that medical malpractice insurance premiums are only $11 billion a year raises serious doubts about whether medical malpractice litigation has any meaningful effect on a $4.1 trillion healthcare industry. *Costs*, NAT'L INST. HEALTH, NATIONAL LIBRARY OF MEDICINE, https://www.nlm.nih.gov/oet/ed/stats/01-400.html (last visited June 18, 2025).
[275] For example, the Chamber of Commerce estimated that there are $528.9 billion a year in costs attributed to the tort system, which was calculated by looking at insurance premiums. About 25% of that is more accurately attributed to premiums charged by insurance companies beyond the level they would need to maintain more reasonable 85% loss ratios. Lucas, *supra* note 273 at 16. Note also that $215 billion of the Chamber's $528.9 billion figure is from auto insurance premiums, even though most auto insurance claims never implicate litigation.
[276] Leonard J. Nelson III et al., *Damages Caps in Medical Malpractice Cases*, 85 MILBANK Q. 259, 269 (2007) (summarizing research showing that tort reform efforts lowered premiums by somewhere between 6% and 25%, with uncertainty about whether it is closer to the high or low end of that range due to the different time-periods, reforms, and datasets used in the most rigorous empirical analyses that the authors reviewed).
[277] *See, e.g.*, *Home insurance rates are rising amid climate change. What could break the cycle?*, NAT'L PUB. RADIO (July 23, 2024), https://www.npr.org/2024/07/18/1198912918/home-insurance-rates-are-rising-due-to-climate-change-what-could-break-that-cycl; *see also* Shan Ge, et al., *The Effects of Rising Insurance Premiums on Mortgage Delinquency and Household Relocation* (Mar. 10, 2026), https://ssrn.com/abstract=4992281.

increase in premiums is caused by an increase in claims. In five years from 2020 to 2024, annual homeowners' insurance losses increased by 40%.[278] But the prices increased by 52% in that same time,[279] and the pure loss ratio was just 61.5% in 2024.[280]

One of the major causes of inflation during the COVID-era was auto insurance premium increases.[281] In 2024, the pure loss ratio for consumer auto insurance was just 66%.

As described in Part I.F, California, in particular, has experienced an uptick in wildfires, producing regular stories about how the homeowners insurance industry is in "crisis" because state regulation prevents rate hikes to cover increasing claims.[282] But in 2024, the loss ratios for homeowners insurance in California were just 47.24%.[283] In particular, in 2024 State Farm began threatening to withdraw from California if the state did not let it increase rates faster; its 2024 loss ratio for homeowners insurance in California specifically was just 50.14%.[284]

What is the insurance industry doing with the extra $550 billion? A lot of the excess is going to profit. By some estimates, both return on assets and return on revenue were above 15% in 2024, which is up from 8-9% in 2023.[285] Both are higher than the average corporate profit margin.[286] Amid claims that costs are rising, P&C insurance experienced a "sharp gain" in profit in 2024 driven by price increases and high investment returns.[287]

Of the roughly 35% of premiums that do not go to claims, less than 10% go to general overhead. An additional 10% goes to "loss adjustment expense."[288] Loss adjustment expenses are the insurer's basic cost of processing claims, as well as the cost

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[278] NAIC 2024 MARKET SHARE REPORTS, *supra* note 247, at 4.
[279] *Id.*
[280] *Id.*
[281] *See, e.g.*, Michael Wayland, *Why car insurance costs are skyrocketing and leading to higher inflation*, CNBC (Apr. 11, 2024), https://www.cnbc.com/2024/04/11/why-car-insurance-costs-are-skyrocketing-leading-to-higher-inflation.html?msockid=0364eee00de163a32161fb230cf3629f.
[282] *COSTLY MANDATES WOULD MAKE CALIFORNIA'S BAD INSURANCE CRISIS EVEN WORSE*, FIX THE INSURANCE COVERAGE CRISIS, https://fixtheinsurancecrisis.com/CostlyProposals/ (last viewed April 7, 2026).
[283] NAIC 2024 MARKET SHARE REPORT, *supra* note 247, at 155.
[284] Press Release, *State Farm General Insurance Company: Update on California*, STATE FARM (March 20, 2024), https://newsroom.statefarm.com/update-on-california/.
[285] NAIC 2024 P&C FULL YEAR REPORT, *supra* note 19, at 1. Other sources show only 5.5% of net premiums consisted of profit in 2023. NAIC 2023 PROFITABILITY REPORT, *supra* note 25, at 9 (April 2025).
[286] *Corporate Profits*, BUR. ECON ANALYSIS, https://www.bea.gov/data/income-saving/corporate-profits (last visited Mar. 20, 2026).
[287] FED. INS. OFF., ANNUAL REPORT ON THE INSURANCE INDUSTRY (Sept. 2025), *supra* note 24, at 2.
[288] NAIC 2023 PROFITABILITY REPORT, *supra* note 25, at 9.

associated with paying adjusters, investigators, and attorneys to try to minimize payouts to customers.

But the largest chunk went to "selling expenses." In 2023, the P&C industry spent 16.3% of net premiums on "selling expense."[289] Selling expenses are the cost to acquire customers, which in most industries is traditional marketing like advertising. In insurance, it also includes commissions paid to agents, financial planners, and brokers for referrals. According to the Federal Insurance Office, over 10% of premiums go towards commissions payments.[290] P&C insurance is a product that is largely (legally and practically) mandatory, which means there is little societal value to spending money to educate the public about the need for the product. And yet competition is driving the P&C insurance industry to spend more to acquire customers than nearly any other industry.[291]

Insurance companies have also used the excess to pay back their shareholders generously. For example, take Progressive, the largest publicly traded P&C insurance company in the U.S. In 2024, Progressive earned $72 billion in premiums and had a 60.63% loss ratio.[292] In January 2025, Progressive paid out $4.6 per share in dividends,[293] costing $2.7 billion.[294] In March 2025, Progressive announced it would repurchase 25 million shares,[295] which based on a May 2025 stock valuation, would cost about $7 billion. Again at the end of 2025, Progressive announced a large annual dividend of $13.60 per share, costing another $8 billion.[296] More broadly, publicly traded insurers regularly pay very high dividends to shareholders.[297]

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[289] *Id.*

[290] FED. INS. OFF., ANNUAL REPORT ON THE INSURANCE INDUSTRY (Sept. 2025), *supra* note 24, at 47.

[291] Linh Khanh, *Average Customer Acquisition Cost: Benchmarks by Industry*, USER PILOT (Aug. 15, 2025), https://userpilot.com/blog/average-customer-acquisition-cost/ (showing that insurance pays an average $1,280 to acquire a customer, compared to the average of $702 across all markets).

[292] NAIC 2024 MARKET SHARE REPORTS, *supra* note 247, at 1.

[293] *Dividend History*, PROGRESSIVE https://investors.progressive.com/stock-info/dividend-history/default.aspx.

[294] There are 586.22 million shares outstanding. *The Progressive Corp. (PGR)*, STOCK ANALYSIS https://stockanalysis.com/stocks/pgr/statistics/ (last visited Mar. 25, 2026).

[295] *Progressive (NYSE:PGR) Announces Share Repurchase Program for 25 Million Shares*, YAHOO!: FIN. (May 13, 2025), https://finance.yahoo.com/news/progressive-nyse-pgr-announces-share-233707195.html.

[296] Press Release, Progressive, *Progressive Announces Dividend Information and 2026 Annual Meeting Record Date*, (Dec. 8, 2025), https://investors.progressive.com/financials/financial-news-releases/news-details/2025/Progressive-Announces-Dividend-Information-And-2026-Annual-Meeting-Record-Date/default.aspx.

[297] The Dividend Farmer, *Insurance—An Analysis of the Top 25 Insurance Sector Dividend Players 2/1/2024 to 1/31/2025*, THE DIVIDEND FARMER SUBSTACK (Feb. 16, 2025), https://dividendfarmer.substack.com/p/insurance-an-analysis-of-the-top (showing the top 25 dividend payers in 2024 ranging from 3.34% to 11.06%).

Lastly, rising reinsurance premiums are a major contribution to higher insurance prices. Most domestic P&C insurers themselves pay for insurance from global private reinsurers who cover catastrophic losses from massive loss events (e.g. 2025 California wildfires). Insurers do this to stabilize loss ratios year-over-year and reduce the risks to the firm of these major events. In essence, insurers are increasing overhead costs in exchange for stabilizing loss ratios and lowering insolvency risk.[298] Reinsurers, in turn, are taking on much of the risk associated with rare natural disasters.

In the five years between 2018 and 2023, the premiums that reinsurers charged American insurance companies suddenly spiked by 100%.[299] The price increases were a result of a self-described "climate epiphany," experienced simultaneously across the reinsurance industry.[300] And yet, at that same time, reinsurer return-on-equity jumped from typically under 10%, to 20% for the first time.[301] Profits were positive before the epiphany, and according to one reinsurer, after the epiphany the industry achieved "exceptionally strong profitability in 2023."[302] To be clear, we have seen a doubling of natural catastrophe insured losses in the past 30 years.[303] But that might justify a corresponding doubling of reinsurance premiums over 30 years, not a doubling of reinsurance premiums over 5 years.

B. Claim denial rates are high

P&C insurers deny policyholder claims at high rates. According to one industry expert, P&C insurers denied claims 50% of the time in 2023.[304] For comparison, health insurers, which are often criticized for high denial rates, denied claims 20% of the time in 2023.[305]

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[298] Cummins, et. al, *supra* note 268.
[299] Benjamin J. Keys & Philip Mulder, *Property Insurance and Disaster Risk: New Evidence from Mortgage Escrow* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32579, 2024).
[300] *Id.*
[301] GALLAGHER RE, REINSURANCE MARKET REPORT, 6 (2023), https://www.ajg.com/gallagherre/-/media/files/gallagher/gallagherre/news-and-insights/2024/april/gallagher-reinsurance-market-report-2023.pdf.
[302] *Id.* at 20.
[303] *sigma 1/2024 in short*, SWISS RE. INST. (Mar. 26, 2024), https://www.swissre.com/institute/research/sigma-research/sigma-2024-01/in-short.html.
[304] Martin Weiss, *Homeowners Beware! Big Insurers Deny HALF of Damage Claims*, WEISS RATINGS (Sept. 26, 2024), https://weissratings.com/en/weiss-ratings-daily/homeowners-beware-big-insurers-deny-half-of-damage-claims.
[305] Justin Lo et al., *Claims Denials and Appeals in ACA Marketplace Plans in 2023*, KFF (Jan. 27, 2025), https://www.kff.org/private-insurance/claims-denials-and-appeals-in-aca-marketplace-plans-in-2023/.

These high denial rates raise one of two policy concerns. First, insurers are denying claims they should approve. There are countless stories about customers experiencing wrongful denials, and thereafter, bureaucratic obstacles to getting a wrongfully denied claim resolved. In 2025, of the over 63,000 complaints received by state insurance departments about insurers, the company's original position on a claim was only upheld 2,565 times.[306] For most of the remaining complaints, the company's position was overturned, or the consumer received a settlement.

Second, when claims are correctly denied, that means consumers believed they had insurance to cover a given loss but did not. Every "rightful" denial, other than attempted fraud, represents a consumer who thought they bought coverage for a type of loss, and only found out that they did not after the loss occurred. These consumer mistakes are exacerbated by increasingly complicated fine print policies prescribing counter-intuitive coverage boundaries, which is part of a broader trend of increasingly lengthy and complex fine print in consumer contracts.[307] The problem is so severe that it persists even though there is a common law doctrine—specific to insurance—applicable in several states that requires insurers to cover a claim even when not technically covered if the coverage is objectively within policyholders' reasonable expectations.[308]

As noted above, 10% of premiums are going to loss adjustment expenses. Some of that is necessary overhead to process claims paperwork. But a large portion of it is the insurers' costs committed to fighting customer claims. Thus, high insurer spending on fighting customer claims may be driving these high claims denial rates.

C. Discriminatory underwriting

As described in Part I.C, the original Progressive Era movement passed anti-discrimination laws for the insurance industry well before Congress prohibited discrimination based on protected classes in housing, lending, and employment in the

[306] *Closed Confirmed Consumer Complaints by Disposition* (2025), NAT'L ASS'N OF INS. COMM'RS, https://content.naic.org/cis_agg_disposition.htm (last visited March 23, 2026).

[307] *See, e.g.*, Tim R. Samples, Katherine Ireland, & Caroline Kraczon, *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKELEY TECH. L.J. 47 (2024); Mark A. Lemley, *The Benefit of the Bargain*, 2023 WIS. L. REV. 237 (2023); Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention o Standard-Form Contracts*, 43 J. OF LEGAL STUD. 1 (2014); Carl Schneider & Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PENN. L. REV. 647, 671 (2011) (reciting research that "suggests that almost no consumers read [contract] boilerplate, even when it is fully and conspicuously disclosed").

[308] *See* Arthur J. Park, *What to Reasonably Expect in the Coming Years from the Reasonable Expectations of the Insured Doctrine*, 49 WILLAMETTE L. REV. 165, 166 (2012).

Civil Rights Era.[309] Nonetheless, discrimination is commonplace in the insurance industry because a whole host of practices that are widely understood to be illegal in other markets have been justified as necessary to assess applicant risk in insurance.[310]

Underwriting for insurance resembles underwriting for loans in that both use complicated models to score risk levels of applicants. In both cases, these models rely on data obtained from the applicant and third parties like consumer reporting agencies to determine whether to approve applicants, and at what price point. In the lending market, the law prohibits two types of discrimination. First, lenders cannot engage in "disparate treatment" discrimination, where race, color, religion, national origin, sex, marital status, age, participation in public assistance programs, or the consumer's exercise of consumer rights are explicitly (or by proxy) used as input variables. Second, lenders cannot engage in "disparate impact" discrimination, where the model produces disparate results based on one of the protected categories and the lender could have used a less discriminatory alternative model.[311]

Recent scholarship has rightly highlighted the injustice of failing to use disparate impact when assessing whether there was illegal discrimination in insurance.[312] But it is worse than that. Insurers openly engage in *disparate treatment* discrimination against traditionally protected classes. For example, in many states the P&C insurance industry continues to use gender as a heavily weighted variable in underwriting models.[313] In fact, in addition to the more objective and individualized variables with a clear nexus to the risk insured—like a vehicle's attributes, driving records, and number of drivers—auto insurers use age, gender, credit behavior, marital status, education, geographic region, and claims history to make underwriting decisions based on the notion that

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[309] Equal Credit Opportunity Act, Pub. L. 93-495 (Oct. 28, 1974); Equal Employment Opportunity Act, Pub. L. 92-261 (March 24, 1972); Civil Rights Act of 1968, Title VIII, Fair Housing Act, Pub. L. 90-284 (April 11, 1968).

[310] *See* Horan, *supra* note 184, at 167 (for a description of failed efforts to ban gender discrimination in insurance in the 1970s and 1980s).

[311] *See* Carroll v. Walden University, LLC, 650 F.Supp.3d 342, 360 (D. Md. 2022) ("ECOA claims may be prosecuted on the basis of (i) disparate treatment, *i.e.*, that plaintiffs were treated differently because of their membership in a protected class, or on the basis of (ii) disparate impact, *i.e.*, that the defendant's practices have a proportionally greater negative impact on minority populations."); 12 C.F.R. 1002.6(a) (stating that "effects test" in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) applies to lending).

[312] *See, e.g.*, Schwarcz, *supra* note 5.

[313] Press Release, CONS. FED. AM., Most large auto insurers charge 40 and 60-year-old women higher rates than men, often more than $100 per year (Oct. 12, 2017), https://consumerfed.org/press_release/large-auto-insurers-charge-40-60-year-old-women-higher-rates-men-often-100-per-year/.

these variables correlate to cost to insure.[314] States have for the most part prohibited discrimination based on race, but fewer states have prohibited gender discrimination, and only two states have prohibited geographic discrimination (i.e. redlining).[315]

Age, gender, marital status, and arguably, claims history, would all be considered protected bases under civil rights law, and zip code is frequently considered a proxy for race (e.g. redlining). To justify overt, intentional discrimination on these bases by arguing that they are actuarially justified is to say that one can stereotype based on those characteristics because the stereotype is accurate. That is a defense that courts have never given credence in other contexts, in recognition that assessing a person based on their inclusion in a demographic group, instead of individual characteristics that often differ from the average in the demographic group, is the very definition of discrimination.[316]

D. Insurers threatening to exit states

Many proponents of deregulating insurance focus on the problem of insurers exiting states.[317] Insurance commissioners themselves do as well, and they conduct policy in part to prevent insurers from exiting their state.

For example, in 2025, State Farm issued an ultimatum to California, demanding that it let the company increase rates or else it would exit the state.[318] In May 2025, after significant losses caused by the L.A. wildfires, California Insurance Commissioner Ricardo Lara backed down, approving the largest rate increase in history for the largest

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[314] ROBERT HARTWIG AND AM. PROPERTY CASUALTY INS. ASSOC., BEHAVIORAL VALIDATION OF AUTO INSURANCE RATING VARIABLES 2 (Nov. 2021), https://www.claimsjournal.com/app/uploads/2021/11/AutoInsRatingVariables_WhitePaper.pdf.

[315] *See* Schwarcz *supra* note 5, at 669.

[316] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."); City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 (1978)("The statute 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.' The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

[317] Schwarcz, *supra* note 4, at 985.

[318] Bill Alpert, *California's Biggest Home Insurer Threatens to Leave State Unless Its Rates Rise*, BARRON'S (Feb. 18, 2025), https://www.barrons.com/articles/californias-biggest-home-insurer-threatens-to-leave-state-unless-its-rates-rise-a7875687.

insurer in the country.[319] Addressing the press, Commissioner Lara stated that "[t]he decision was a tough one. We either allow for this increase, to ensure that we keep State Farm customers covered, or else they lose their coverage and end up on the FAIR Plan, further exacerbating the insurer of last resort."[320] In exchange for letting State Farm increase prices by 17%, State Farm agreed to continue operating in the state and transfer $400 million of its parent company's assets to recapitalize the California subsidiary after the L.A. wildfires.[321]

It is not clear that State Farm needed a price increase to stay solvent in California. First, State Farm's California subsidiary held $620 million *after* the L.A. wildfires, which is perhaps not a once-in-a-generation event in the current globally warmed world, but still a rare occurrence.[322] Insurance funds are there to cover periods of increased loss and are replenished in the calm years. As recently as 2024, State Farm's homeowners insurance loss ratio in California was a low 50.14%, which is lower than State Farm's own national average of 72.59%, suggesting the premiums were already high enough to repopulate the fund quickly.[323] Second, even if the remaining $620 million proved inadequate to cover the next few years before the fund could be replenished, the parent company could have recapitalized its California subsidiary. In 2024, State Farm's parent company held $240 billion in assets, $20 billion more than the year before.[324] It could afford $400 million to recapitalize the fund for the largest state in the country, in the rare likelihood that catastrophic loss events occurred back-to-back.

More broadly, as shown in Part I, insurers have regularly threatened to exit a state to procure favorable regulatory treatment. While it is difficult to prove a negative, this author has been unable to find an instance in which people are left uninsured because of insurers exiting a state. Consider, for example, the story of auto insurance in Massachusetts. In the 1970s, auto insurance was subjected to increasing regulation, then the state deregulated in 1976, and then quickly snapped back to even more rigorous rate regulation in 1977 once prices skyrocketed after deregulation.[325] Research shows that

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[319] *In the Matter of the Rate Application of State Farm General Ins. Co.*, Insurance Commissioner of the State of California, Proposed Decision Approving Stipulation, File Nos. PA-2024-00011, PA-2024-00012, PA-2024-00013 (May 13, 2025).
[320] Becca Habegger, "*Unprecedented': California Insurance Commissioner on State Farm rate hike approval*, ABC (May 14, 2025), https://www.abc10.com/article/news/local/wildfire/california-insurance-commissioner-rate-hike-approval/103-60e880c8-3757-42a4-8c59-593cb5d2fb1a.
[321] *In the Matter of the Rate Application of State Farm General Ins*, Proposed Decision, *supra* note 319, at 9.
[322] *Id.* at 26.
[323] NAIC 2024 MARKET SHARE REPORT, *supra* note 247, at 150, 155.
[324] 2024 ANNUAL REPORT, STATE FARM, https://www.statefarm.com/content/dam/sf-library/en-us/secure/legacy/pdf/2024-annual-report.pdf.
[325] Tennyson, Weiss, & Regan, *supra* note 38, at 27-29.

large national insurers did leave the state in response, but that they were replaced by local insurers selling policies in Massachusetts only.[326] Another example can be found in recent exits by larger insurers in Florida. Researchers have found that when insurers exited Florida, new local insurers filled the gap.[327] While these new insurers are less diversified and less capitalized than the large national insurers, and thus fail more frequently, the Florida Insurance Guaranty Association (FIGA) covers policyholder claims in the case of failure, and FIGA is funded by the P&C industry, not taxpayers.[328]

In fact, evidence suggests that the strength of rate regulation and the level of market competition are positively correlated, suggesting what we see in these anecdotes is widespread.[329] Regulation might scare off larger national firms, but that leaves room for smaller local firms to gain market share resulting in a more competitive market.
To be clear, the United States does have a problem of uninsured homes, in particular for homes that are owned without a mortgage given that homeowners insurance is not required in those circumstances.[330] But if a home is uninsured because the price was too high for the owner, that was not caused by rate regulation or an insurer exiting a state. Discouraging an insurer from exiting by letting them *increase* the price would only make insurance that much more unaffordable to the uninsured.

E. Risk of insolvency

The original purpose of insurance regulation in the 1800s is still a live issue in the 21st Century. In spring of 2025, after a high-profile life insurer failed, a special task force of the NAIC was convened to re-think the method insurance regulators used to assess

[326] *Id.* at 57-59.
[327] Parinitha Sastry, Ishita Sen, & Ana-Maria Tenekedjieva, *When Insurers Exit: Climate Losses, Fragile Insurers, and Mortgage Markets*, NBER (Dec. 2023), https://finance-conference.wpcarey.asu.edu/sites/g/files/litvpz3416/files/2024-02/SST_When_Insurers_Exit.pdf.
[328] *Home*, FLORIDA INSURANCE GUARANTY ASSOC., https://figafacts.com/ (last visited April 2, 2026). To be clear, this should not be seen as a success story. Many of the customers that are now served by these smaller insurers had interim coverage at Florida's public option Citizens Property Insurance Corporation, where the service was comparable to the private market, the prices were lower, and the fund was solvent. Customers would have been better off if they remained at Citizens.
[329] Hunter & Heller, *supra* note 34, at 17 fig. 14.
[330] Sharon Cornelissen, Douglas Heller, Michael DeLong, *Exposed: A Report on 1.6 Trillion Dollars of Uninsured American Homes,* CONS. FED. AM. (March 12, 2024), https://consumerfed.org/wp-content/uploads/2024/03/Exposed-UninsuredHomes-1.pdf.

solvency[331] amid increasing concerns that existing solvency models do not adequately consider risks associated with reinsurance.[332] And property insurers still regularly fail. For example, Florida currently has eleven P&C insurers in receivership,[333] and hundreds have closed in recent decades.[334]

III. The Case for Rate Regulation

The mainstream academic position on the regulation of insurance is that policymakers should repeal utility-style rate regulation and leave insurance pricing to competition.[335] A 2018 article by Daniel Schwarcz titled "Ending Public Utility Style Rate Regulation in Insurance" is the leading and best piece in support of that view.[336] This section takes the opposite view. My arguments will heavily anchor on that piece and Schwarcz's work more generally, for the simple reason that his work presents the clearest and strongest case for deregulation.

The basic case against rate regulation as articulated by Schwarcz is that, conceptually, regulation of P&C insurance as a utility was originally justified on the notion that insurance was at one time a natural monopoly, but now the market is competitive, so utility regulation is no longer justified. Schwarcz also claims that rate-setting regulation has created negative practical consequences, including cross-subsidization of risk between customers, a reduction in access, and increased compliance costs.[337] Multiple articles and books published by the American Enterprise Institute similarly conclude that price regulation "tends to reduce availability of coverage" and increases costs due to regulatory burden.[338]

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[331] In 2024 the Connecticut Insurance Commissioner discovered that PHL had a capital deficit that would leave $1.46 billion in uncovered liabilities in 2030. Kenneth Araullo, *Connecticut regulator advances sale prep for troubled PHL Variable*, INSURANCE BUSINESS (May 23, 2025), https://www.insurancebusinessmag.com/us/news/breaking-news/connecticut-regulator-advances-sale-prep-for-troubled-phl-variable-536752.aspx.

[332] John Hilton, *New NAIC task force urged to update RBC to avoid more insurer failures*, INSURANCE NEWSNET (July 21, 2025), https://insurancenewsnet.com/innarticle/new-naic-task-force-urged-to-update-rbc-to-avoid-more-insurer-failures.

[333] Florida CFO, *Rehab & Liquidation, Companies in Receivership*, *supra* note 27.

[334] Florida CFO, *Rehab & Liquidation, Closed Companies*, *supra* note 28.

[335] *See supra* note 3.

[336] Schwarcz, *supra* note 4.

[337] *Id.* at 985-87.

[338] ROBERT W. HAHN & ROBERT E. LITAN, *Foreword,* in DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY (J. David Cummins ed., 2002); SCOTT E. HARRINGTON, INSURANCE DEREGULATION AND THE PUBLIC INTEREST 3 (2000).

This section addresses the arguments against deregulation and the case for continuing and even strengthening rate regulation, which are in many cases two sides of the same coin. It starts with the conceptual reasons for continuing to treat insurance differently than other markets, and ends with more practical considerations to prove that, on net, rate regulation is better at accomplishing policy goals than deregulation.

A. Conceptually, insurance is not like a typical market

The main conceptual argument against rate regulation is that insurance is no longer a natural monopoly. While it is true that various policymakers and academics have at times viewed the market's tendency to be a "natural monopoly" as one theoretical justification for utility-style regulation, that is mostly a post hoc rationalization created during the Neoliberal Era, well after the Progressive Era when utility regulation started.[339] For that reason, this should not be the focus of debate.

But insurance is still technically a natural monopoly. As then Professor Posner put it:

> The term [natural monopoly] does not refer to the actual number of sellers in a market but to the relationship between demand and the technology of supply. If the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more, the market is a natural monopoly, whatever the actual number of firms in it. If such a market contains more than one firm, either the firms will quickly shake down to one through mergers or failures, or production will continue to consume more resources than necessary.[340]

Deregulation advocates are correct that insurance does not resemble an *actual* monopoly and looks less like an actual monopoly than it used to. But insurance still fits the definition of a natural monopoly quite well. A single entity would reduce selling cost by eliminating advertising and agent commission; increase efficiency by reducing duplicative overhead costs; standardize claims processes, thereby creating more certainty and predictability for policyholders; and increase negotiating power against various vendors to lower claims costs. Further, as a general matter, the larger an insurer, the more predictable and diversified overall claims payments become, meaning insurers can underwrite with thinner loss ratio margins even keeping other costs constant.[341]

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[339] *See supra* Part I.E.
[340] Posner, *supra* note 29, at 548.
[341] Geneva Ass'n, *supra* note 29, at 2.

These are not just the normal economies of scale available in any market; they are unique reasons that make an insurance company more efficient as it becomes bigger.[342] In fact, these are often the kinds of arguments made for consolidating health insurance into a "single payer."[343]

But the better conceptual test is whether the original theoretical argument for utility regulation, understood at the time it was created in the Progressive Era, still holds. As described in Part I.C, the original reasoning was that:

(1) Insurance is the way society shares risk communally, and resembles a government function like a tax,
(2) Insurance is inherently interdependent, not one-off contracts,
(3) Insurance is a practical necessity of life, and
(4) Insurance is sold in contracts of adhesion, such that competition will not be sufficient.

Those four reasons hold true today and have only grown more compelling. Insurance is a quasi-public function warranting heightened public oversight and control. It is still a "tax." In fact, the public character of insurance is arguably stronger today. We now have numerous publicly owned insurance entities and reinsurers that are intermingled with the private market. We have Medicare, Medicaid, Social Security, the Federal Flood insurance program, and a slew of state-level public insurance corporations and reinsurers. In many states, insurers are obligated to run a residual market for multiple P&C markets by law, or the state runs one itself.

Add to that the fact that insurance is becoming increasingly required by law (just like a tax). Auto insurance is legally mandated.[344] Homeowners insurance is required, by policies set by government-sponsored enterprises, to get most mortgages.[345] Workers'

[342] For example, State Farm Group, the largest insurer in the country, has one of the highest loss ratios of 75.24%. NAIC 2024 MARKET SHARE REPORT, *supra* note 247, at 10.
[343] *See, e.g.*, Linda J. Blumberg and John Holahan, *The Pros and Cons of Single-Payer Health Plans*, URBAN INSTITUTE (March 2019), https://www.urban.org/sites/default/files/publication/99918/pros_and_cons_of_a_single-payer_plan.pdf.
[344] Massachusetts passed the first mandate in 1925. Mass. Acts 1925 – Chap. 346. Every state now has a comparable personal auto insurance requirement. FED. INS. OFF., REPORT ON PERSONAL AUTO INSURANCE MARKETS AND TECHNOLOGICAL CHANGE, APPENDIX A: PERSONAL AUTO INSURANCE REQUIREMENTS BY STATE, 2023 (January 2025), https://home.treasury.gov/system/files/311/Report%20on%20Personal%20Auto%20Insurance%20Markets%20and%20Technological%20Change.pdf.
[345] Fannie Mae, *supra* note 30 ("Each mortgage loan purchased by Fannie Mae must have a title insurance policy in place or an attorney title opinion letter that meets Fannie Mae's requirements."). The provision for attorney title opinions is new.

compensation insurance is often legally required, and in some states, employers must purchase from the public workers' compensation insurer.[346] Insurance used to be practically necessary. It still is, but increasingly, insurance is becoming a legal necessity as well, which means insurance has traveled further down the quasi-public spectrum away from "private" and towards "public" because the government has told customers that they cannot walk away from the market.

Furthermore, insurance still involves substantial interdependency. Insurance is more than a private transaction between a consumer and an insurance company. It is a collective exercise in sharing risk that is inherently interdependent because when one buys insurance, they are not just buying a product for themself. They are buying into an inter-dependent system of policies that collectively spreads the risk of precarity in society. Take, for example, auto insurance. Consumers buy insurance to protect themselves from liability, but a consumer's insurance policy also protects people they crash into. Same with medical malpractice insurance. Doctors buy it to protect themselves from liability, but it also ensures patients are made whole when doctors make mistakes. Fire insurance is important to a homeowner because it helps them rebuild their home if it burns down, but also, it is important to the homeowner's neighbor because it ensures homes in their neighborhood are rebuilt instead of left derelict. AIG sold insurance-like products to investors, which protected the investors, but also affected the viability and volume of mortgage-backed securities. Most forms of P&C insurance has this kind of deep interdependency.

The argument that insurance should be price regulated because it involves contracts of adhesion with complex coverage boundaries—which alone might not be enough to justify rate regulation but is a contributing argument that Progressive Era policymakers considered—should be given even more weight today. Scholars have recognized that complexity of fine print in contracts of adhesion has grown in modern times.[347] There is insurance-specific research into this problem as well, which shows that fine print and legalese in insurance contracts continues to be a major issue.[348]

In sum, all of the main arguments made during the Progressive Era for rate regulation are even stronger today. But there are additional economic arguments for rate regulation to remedy market failure.

First, there is a natural, unavoidable obstacle to price discovery (i.e. the process by which buyers and sellers interact to produce a fair market price) at the heart of

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[346] Gregory Guyton, *A brief history of workers' compensation*, 19 IOWA ORTHO. J. 206 (1999) (detailing the passage of workers' compensation laws in all 50 states between 1911 and 1948).

[347] *See, e.g.*, *supra* note 307.

[348] *See, e.g.*, Kyle Logue, Daniel Schwarcz, Brenda J. Cude, *The Value of Understanding Consumer Insurance Contracts*, 8 INT'L REV. FIN. CONS. 1 (2023).

private insurance transactions. Buying insurance entails a tradeoff of paying up-front premiums in exchange for coverage of an identified risk. Unlike in the vast majority of markets, where consumers are exchanging money for tangible goods and services that buyers will obtain with certainty, insurance is one of the only markets where a customer is paying for something they might not ever receive or need. Put another way, consumers have no way to know whether, at the time of purchase, they received a significant amount of surplus in the transaction (e.g., where the claim compensation exceeds premium payments), or instead, received no surplus at all (e.g., where the consumer never files a claim). How much surplus the consumer received is entirely contingent on whether something that the consumer does not want to happen occurs in the future. If a rational consumer knows for certain they will use the insurance, they would be willing to pay large sums for coverage (likely more than they actually pay). If, instead, they knew for certain they would not use it, they would be willing to pay nothing at all for it. The market only functions because of this core uncertainty, which cannot be solved.

To be clear, there is *some* mechanism for price discovery oriented around customers' conception of the likelihood of certain negative outcomes occurring in the future, similar to gambling. But this form of price discovery is only as accurate as people's ability to predict negative future outcomes, something research in a wide variety of fields indicates people are generally poor at.[349] Therefore, because of this inherent uncertainty at the heart of insurance, we should not expect the private market to set "correct" prices through a process of price discovery that relies on buyers who can determine the economic value of a service to themselves.

Second, insurance rates should be regulated because the main conceptual reason not to regulate prices—supply shortages—would not occur in insurance as a matter of theory. Therefore, we do not have to weigh the traditional pro of price regulation (lower prices) against the traditional con of price regulation (supply shortages). We can have the lower prices without the supply shortage.

The standard theory taught in Econ 101 class is that price regulation creates supply shortages because it depresses profit, deterring investment in the creation of

[349] *See, e.g.*, Russell Roberts et al., *People calibrate future expectations to past performance when predicting transparently random events,* 4 PNAS NEXUS (2025), https://doi.org/10.1093/pnasnexus/pgaf237; Zhangwei Zheng et al., *Health insurance purchase intentions in the past decade: a systematic review and future research directions*25 BMC HEALTH SERVS. RSCH. (2025), https://pmc.ncbi.nlm.nih.gov/articles/PMC12131525/; Ian Lundberg et al., *The origins of unpredictability in life outcome prediction tasks*, 121 PROC. NAT'L ACAD. SCI OF U.S.A (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11181083/; Bharath N, *An Examination of Influencing Factors in Insurance Policy Purchase Decisions: A Literature Review*, 12 INT'L J. OF CREATIVE THOUGHT 504 (2024), https://ijcrt.org/papers/IJCRT2411511.pdf; Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUPREME COURT ECON. REV. 105 (2013).

new supply, while simultaneously making the product more attractive by making it cheaper, thereby increasing demand.[350] Artificially high demand and artificially low supply leads to shortage. This theory is sound in markets where companies must commit capital to build supply, where investors are making decisions about what to create with their capital in the context of alternative investments and opportunity cost, and in markets where demand is price sensitive.

But that does not describe insurance. Both supply *and* demand are unusually inelastic in property insurance. Demand is legally or practically mandatory in many cases, in which case demand cannot be responsive to a price drop. For example, in homeowners insurance, demand will only be responsive to price to the extent the price difference is so significant that it encourages homeownership, which is more heavily influenced by things like the price of homes and credit. So price regulation generally does not increase demand.

In addition, companies are not investing capital to "build" insurance policies. While a company needs capital to start an insurance company and pay for fixed costs, companies do not need much capital to marginally increase volume of an insurance portfolio. Insurance is a famously low up-front capital market because an insurer collects the premiums before paying out claims.[351] Policies fund themselves by generating revenue before the variable cost of paying claims come due.

This is important because the mechanism by which price regulation, in theory, reduces supply is that capital flows to the use that generates the most returns. If capital can make more of a return invested in X than Y because Y is price regulated, then capital flows to X. For this reason, price regulation might still reduce supply in Y even if the regulation leaves enough room for capital to earn some profit in Y. But if Y is insurance, it does not need to attract a lot of new capital. Capital can flow to X, and the demand for Y will still be met because the business can also make a return in Y with little up-front capital expenditure.

There is, of course, a point at which price regulation will result in decreased supply. Insurers will not sell a policy at a price that is not profitable at all, i.e. not actuarially sound. But regulating a price to below a "competitive price" where insurers are earning the returns they would generate in an unregulated market, but above a "break-even" or actuarially sound price at which the company is still making marginal profits, should not reduce supply. This author is unaware of any instance where

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[350] *See, e.g.*, Reisman, *supra* note 32, for a typical description of why economists believe price controls lead to shortages.

[351] This is why it was so easy in the 1800s to start an insurance company with underpriced policies. *See* Part I.A and I.B.

insurers were allowed to price consumers at an actuarially sound level, but nonetheless, there was a supply shortage.

B. Rate regulation lowers prices

From a practical perspective, rate regulation was created not based on any particular doctrinal belief, but rather, due to a political movement by advocates in response to a perceived lack of affordability.[352] Deregulatory advocates' primary argument is that deregulation will increase access. The often-unsaid mechanism for accomplishing that goal is allowing insurers to increase premiums in order to cover higher risk.[353] Thus, far from solving the premium affordability problem, deregulation would make it worse, intentionally. There is, in fact, no plausible argument that removing rate-setting regulations would *decrease* premiums.

One example of what can happen when a state deregulates is Massachusetts.[354] In 1976, the state legislature passed a law allowing for more competitive automobile insurance rate setting. Immediately after going into effect in 1977, prices rose for certain customers significantly. Complaints to the state Division of Insurance rose to record highs. Strong rate-setting regulations were reinstated after just one year.

In fact, in what is the only research of its kind, a 2019 report by the Consumer Federation of America (CFA) analyzed the average increase in auto insurance premiums between 1989-2015, by type of rate-regulation used in the state. Consistent with what one would expect, the more stringent the rate regulation, the lower the price growth over time.[355] California and Hawaii, two states with comparatively rigorous prior approval requirements, are the clear winners—in that time, average premiums in those states *decreased.*[356] Meanwhile, the one state that fully deregulated, Wyoming, experienced an over 100% increase in premiums.[357]

The fundamental reason we need rate regulation to keep insurance affordable, despite the fact that most P&C insurance markets have many competitors, is that competition is driving overspending on selling expenses, which is increasing price. The

[352] *See* Part I.
[353] Peter Carroll, *Homeowners Insurance Markets Disruption: Challenges, Effects, and Solutions*, OPEN BANKER (April 1, 2025), https://openbanker.beehiiv.com/p/insurancemarketdisruption.
[354] Tennyson, Weiss, & Regan, *supra* note 38, at 27-28.
[355] Hunter & Heller, *supra* note 34, at 13.
[356] *Id.* at 10.
[357] *Id.*

industry spends 16% of premiums, over $160 billion, on ads and agent commissions.[358] The main reason economists consider advertising to have some public welfare value is that it can provide information to the public about products.[359] But there is little educational value in telling the public about products they are already forced to buy. And to the extent coverage varies among providers, advertising is not effective at explaining those complex fine-print nuances. Rather, advertising in insurance takes the form of trying to build general brand awareness for a largely interchangeable product. There is very little public welfare in that.

High agent commissions are a problem as well. Independent agents are paid by insurance companies out of a percentage of the consumer's premium. Agents are incentivized to steer their clients towards higher paying insurers, which means insurers compete against each other to get business by increasing the commission they pay to agents. Agent commissions thus create a competitive dynamic called "reverse competition" in which increased competition among insurers creates *higher* prices for consumers.[360] The most dramatic example of this is in title insurance, where runaway reverse competition has driven prices so high that loss ratios are only 5%[361] and 70-85% of the premium goes to agent commission.[362] This was a dynamic observed by consumer advocates before and during the Progressive Era that continues to persist.[363]

In short, $160 billion in selling expense represents a significant amount of lost efficiency as a result of insurer competition. While high profit margins might, in theory, be addressed with competition, this excessive selling expense will not. And rate regulation can co-exist with competition to accomplish both.

C. Compliance burdens of rate regulation are miniscule

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[358] NAIC 2023 PROFITABILITY REPORT, *supra* note 25, at 9 (April 2025).

[359] *See, e.g.*, Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. of Bus. 213 (1975); George Burton Hotchkins, *An Economic Defence of Advertising*, 15 AM. ECON. REV. 14, 14 (1925).

[360] Birny Birnbaum, *An Analysis of Competition in the California Title Insurance and Escrow Industry*, CONSUMER FED'N OF AM, at 27 (2005), https://consumerfed.org/wp-content/uploads/2024/03/competition-report-redacted-final.pdf. This reverse competition effect is widely understood to drive up prices in other markets as well, such as the real estate agent market. Moehrl v. Nat'l Assoc. of Realtors, 492 F.Supp.3d 768, 782-85 (N.D. Ill. 2020) (sustaining, at motion to dismiss, an allegation that NAR's ethics rules directing selling real estate brokers to pay for the buyer's broker had the anticompetitive effect of driving up prices by causing selling real estate brokers to compete by offering higher broker fees to buyers).

[361] NAIC 2024 P&C FULL YEAR REPORT, *supra* note 19, at 13.

[362] Fed. Title & Escrow Company, *supra* note 270.

[363] Hempstead, *supra* note 13, at 52-53.

The only real argument that deregulation advocates make to suggest deregulation could bring down prices is that regulatory burdens increase cost, which can be passed on in the form of prices. Back-of-the-envelope mathematics disarm this argument fairly easily. Some estimates are that states employ 500 personnel devoted to rate reviews, and that insurers themselves commit multiples of that to the task of submitting rates to regulators.[364] Assuming the multiple is 10-1 (which would be 15% of all actuaries in the country), and there are 5,000 FTE in the insurance industry committed to rate approvals nationwide who make the average salary of $125,770 per year,[365] the nationwide annual compliance cost for rate filings would be $628.8 million. This cost pales in comparison to the potential savings created by rate regulation. It is only 0.06% of the $1.03 trillion in premiums that P&C insurers collect.

D. Deregulation would not meaningfully improve access

Deregulation proponents believe that increasing prices is worth it because "[e]ven if rate deregulation lead[s] to higher rates, in the long run this would be offset by greater market availability and consumer choice."[366] This is arguably the core of the deregulation case. The argument tracks the traditional criticism of price controls in any market, which is that price controls lead to supply shortages. As noted in Part III.A, there is strong reason to question whether this traditional criticism of price controls should be applied to insurance. But more fundamentally, the argument strains to work around the existence of state residual markets that cover customers who are priced out of the private market.

Deregulation proponents argue that rate regulation "prices out" high-risk customers from the private insurance market, forcing them to be insured by a state insurer-of-last-resort.[367] The common assumption is that "a large residual market indicates that the competitive market for insurance is not functioning well."[368] The often unspoken premise is that use of the residual vehicle is bad, conflating purchasing insurance from the residual vehicle as the same as a supply shortage. But those consumers do have insurance. And in most states, the system is designed so that the public option does not cost taxpayers. It is either funded by the insurers operating in the

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[364] *Id.* at 987.

[365] *Occupational Outlook Handbook: Actuaries,* U.S. BUREAU OF LAB. STAT. (AUG. 28, 2025), https://www.bls.gov/ooh/math/actuaries.htm.

[366] Angelo Borselli, *Insurance Rates Regulation in Comparison with Open Competition*, 18 CONN. INS. L.J. 109, 111 (2011).

[367] Schwarcz, *supra* note 4; *see also,* Grace, Klein, & Tennyson, *supra* note 35, at 21.

[368] Grace, Klein, & Tennyson, *supra* note 35, 21.

state (like in California) or is itself a solvent and healthy insurance company that pays for itself with premiums collected from customers (like in Florida).[369] Where the residual insurer is funded by the insurance industry, insurers may need to increase costs to all customers in order to pay for the residual insurer if the residual entity is not self-sustaining and the insurers do not have enough margin to cover the costs. But as Part II.A describes, they do have that margin. As explained below in Part III.F, that kind of cross-subsidization can be a good thing. And deregulating to allow insurers to increase their rates so that a state does not need a residual insurer *also* means rates will be increased. Increased use of residual insurers may be a bad thing for private insurance companies because they lose volume, but we should not assume that there is a policy failure if more customers use a state's public residual insurer.

Take South Carolina for example. South Carolina in the 1990s had a prior approval rate-review system for auto insurance, paired with a reinsurance facility that acted as a residual market. Over 42% of customers used the facility, and the cost of the facility was passed on as surcharges to drivers across the state. This was viewed as a policy failure and in 1997 the state deregulated by lifting constraints on rates and underwriting. As a result, and by design, the residual market contracted substantially.[370] This has been characterized as a policy success, primarily based on the reduction of the facility.[371]

But ultimately, people could get adequate auto insurance in South Carolina before deregulation, whether in private insurance or the residual facility, so success should be judged by the total cost to customers of receiving that insurance. Based on that metric, deregulation did not improve the market. Profits spiked by over 10%.[372] Loss ratios dropped from 75-80% down to 55-65%.[373] Premiums stayed slightly below the nationwide average before and after deregulation,[374] but given the loss ratios, premiums could have dropped if the state had used its rate-setting authority more strategically.

Sometimes commentators point out that residual markets are more expensive than the private market, or relatedly, that residual plans cover less and require

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[369] *See* Part I.F.
[370] Grace, Klein, & Tennyson, *supra* note 35, at 2.
[371] *Id.* at 2. A note of caution. Deregulation advocates have also pointed to the number of insurers (i.e. that it increased after deregulation) as a sign of success. But the number of companies is not synonymous with the level of market concentration. South Carolina's market of 78 companies in 1990 had the same HHI as the market in 2010 with 130 companies. That means that, while there are more companies, the number of firms with large market share increased after deregulation as well. *Id.* at 15.
[372] *Id.* at 19.
[373] *Id.*
[374] *Id.* at 27.

customers to get supplemental insurance. That can be true. But this is the wrong analytical frame for assessing the success of rate-setting policy. It is comparing the residual market to the *existing* private market that won't serve that customer, instead of to what the private market would look like if the private market were allowed to increase the price to cover customers they won't cover under the caps. There is no reason to believe that the private market's prices, in that scenario, would be lower than existing residual prices. Take a recent news article on California's FAIR plan for example.[375] The article describes consumers who cannot receive private insurance and are forced onto the FAIR plan. One consumer claimed they found *unregulated* insurers that would write a policy at $40,000/year, which was too expensive, so she had to use the cheaper FAIR Plan. In other words, while this customer is certainly struggling with the price of property insurance, deregulation will not help them. It will just open up more overpriced insurance that she cannot afford. In fact, if deregulation increases prices, that could have the effect of driving even more people to residual plan

With that said, there are significant problems in the residual market that need addressing. For example, in California, there are frequent stories of homeowners experiencing inadequate coverage under the FAIR plan. The FAIR plan, unlike many homeowners insurance policies, does not cover remediation costs[376] and does not cover non-fire related claims like water or theft.[377] Further, the FAIR plan has payout caps.[378] California can fix all of these coverage problems, and any others, by simply mandating that the FAIR plan broaden its coverage, and by requiring the insurance industry to fund the plan more fully to do so. To the extent inadequate payouts have less to do with policy coverage and more to do with operational execution, the state could take over operational control of the FAIR plan as well.

In other words, while rate regulation can cause the unintended consequence of increasing residual insurance coverage when either (1) the rates are poorly tailored or (2) the industry is using it as leverage to get price increases, that only hurts consumers because there are flaws in the state policies establishing what residual insurance covers.

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[375] Megan Fan Munce, *California wants regular insurers to grow. But it's the FAIR Plan that's growing faster than ever*, S. F. CHRON. (July 21, 2025), https://www.sfchronicle.com/california/article/home-insurance-fair-plan-20761285.php.

[376] Emma Caplan-Fisher, *Fair plan gave 97-year-old fire victim just $38K – so her son paid $300K to repair home. Why bare insurance is a risk most homeowners can't afford*, MONEYWISE (Mar. 25, 2026), https://moneywise.com/insurance/home/fair-plan-gave-victim-97-just-38k-for-ca-fire-damage-son-paid-300k-to-fix-why-bare-insurance-is-a-risky-option.

[377] *Dwelling*, CALIFORNIA FAIR PLAN PROPERTY INSURANCE, https://www.cfpnet.com/policies/dwelling/ (last viewed Apr. 7, 2026).

[378] *California FAIR Plan*, CALIFORNIA DEPT. OF INS., https://www.insurance.ca.gov/01-consumers/200-wrr/California-FAIR-Plan.cfm (last viewed Apr. 7, 2026).

Instead of deregulating to avoid this, states can mandate better coverage by the residual insurers.

E. Rate regulation decreases market concentration

Perhaps counter-intuitively, deregulation does not trend towards a more competitive market. Instead, the available evidence suggests that deregulation trends towards a more concentrated insurance market with fewer but larger insurers. CFA's report on auto insurance found that Herfindahl-Hirschman Index (HHI) scores (a standard measure of market concentration) tend to be higher in states with less rate regulation.[379]

To give some color on why that might be the case, consider one study of the history of rate regulation in Massachusetts. The authors observed that regulation "distorted [the market] towards smaller, single-state insurers," that the market was "larger than it would be expected under competition," and that "insurer rates of return remain[ed] low under the regulatory system."[380] The leading hypothesis by the authors of the Massachusetts survey is that heightened regulation chased large insurers out of the state, after which smaller insurers or remaining mid-sized insurers took advantage of the low barrier to entry to pick up the market share of the exiting insurers. While the authors viewed this as negative because it was artificial, lower margins and more local market participants would normally be treated as a virtue by policymakers.

Perhaps more price regulation means there is less revenue to spend on acquiring new market share (e.g. advertising expenditure, competing through agent commissions), leading to market share stability and less concentration over time. Perhaps bespoke state regulatory regimes are harder to manage for larger national or international firms with nationally set business models and financing structures. Or perhaps large national firms leave for political reasons, in attempt to influence state regulation, and not actual business reasons. But regardless, because there is minimal up-front capital requirement for insurance, as long as regulators allow marginal profitability when regulating rates, when a large insurer leaves a state, it will lead to a *more* competitive market because it opens room for smaller market participants to pick up market share.

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[379] Hunter & Heller, *supra* note 34, at 17.

[380] Tennyson, Weiss, Regan, *supra* note 38, at 78.

F. Rate regulation can use cross-subsidization for good

Deregulation proponents argue that rate regulation compresses rates among the customer base, forcing low-risk customers to "subsidize" higher-risk customers.[381] While all insurance commissioners allow risk-based pricing at a general level—that is higher prices for higher risk customers—the argument is that regulators will tend to limit rating factors or generally resist more dramatic price variance. When they do this, deregulation proponents claim it creates moral hazard by underpricing riskier behavior.[382]

The "subsidization" argument suffers from a logical flaw that some economists have labeled the "lump of profit fallacy."[383] It assumes that profits and expenses are held constant, and thus any reduction in revenue from one place will necessarily increase fees or costs for customers elsewhere (instead of reducing profits or expenses). As explained in Part II.A, loss ratios are at historically low levels. If you assume the margins are too high portfolio-wide, it means either low- or high-risk customers, or both, are being overcharged to pad the margin, not to pay for under-charging of other customers. Customer cross-subsidization is only a compelling story if the insurer is operating efficiently with minimal margins, which they are not.

Furthermore, in many cases the moral hazard argument fails a basic smell test because property insurance is intended to cover the risk of something that a customer has many other reasons to avoid. The use of claims history, driving records, or driving patterns in underwriting might create a disincentive to drive riskier. But this is a minor incentive as compared to much bigger factors affecting driving behavior. The primary reason to drive safely is to avoid death. Arguments about moral hazard are most compelling when there are not other big factors driving customer decision-making.

This discussion of moral hazard also presumes precise risk determinations based solely on customer behavior. It is true that underwriting has become more advanced in recent years with the introduction of better data quality, larger data sets, and more sophisticated modeling. But underwriting is not an exact science for predicting the future and many underwriting decisions are based to a significant extent on immutable traits (e.g. gender) that have nothing to do with customer behavior.

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[381] *See* Schwarcz *supra* note 4, at 985-86.
[382] *Id.* at 986; Patricia M. Danzon & Scott E. Harrington, *Workers' Compensation Rate Regulation: How Price Controls Increase Costs*, 44 J.L. & ECON 1, 1-4 (2001).
[383] Darren Bush, Mark Glick, Gabriel Lozada, and Hal Singer, *Overdraft Fees, Credit Card Late Fees, and the Lump of Profit Fallacy*, INST. FOR NEW ECON. THINKING (April 15, 2024), https://www.ineteconomics.org/perspectives/blog/overdraft-fees-credit-card-late-fees-and-the-lump-of-profit-fallacy.

But while evidence that cross-subsidization can affect behavior is somewhat limited, the main flaw in this argument is not that is it untrue, but that it is not *necessarily* a bad thing. In fact, it is in tension with the fundamental nature of insurance. The business of insurance rests on a much deeper form of cross-subsidization between people who experience harms and people who do not. In this way, cross-subsidization is the very purpose of insurance. If we wanted everyone to pay the exact full price of their own risk, we would simply ban insurance and replace it with *post hoc* repayment plans.

If cross-subsidization is inevitable, whether or not to cross-subsidize specific behaviors, in what direction, and how much, are legitimate policy choices that can be accomplished with price regulation. For example, in conducting rate regulation, insurers may wish to create cross-subsidization not between customers of various risks, but instead between customers of various financial means, similar to the choice of how progressive to make a tax. More progressive tax systems are generally considered more favorable.[384] But this may also be necessary to counter-act the fact that prices create different levels of incentive depending on the wealth of the customer. A wealthy homeowner might not care that they have to pay $2,000 more per month to insure a home on a beach-side cliff, whereas a less wealthy homeowner would. An insurer, therefore, might need to charge different rates to create comparable incentives.

Similarly, it is reasonable to make sure medical malpractice insurance is not pricing people out of going into the medical profession. This country is in the middle of a doctor shortage with potentially scary consequences in the future.[385] And we should not disincentivize doctors from performing more dangerous procedures, entering more dangerous specialties, or incentivize defensive practices that are not justified by purely medical judgment.[386] We may need to direct insurers to cross-subsidize between safer medical professions and innovative professions to ensure doctors who are the first to try new lifesaving procedures are not deterred from doing so.

It is reasonable to want to promote homeownership among the middle class and less wealthy Americans by keeping homeowners insurance lower for cheaper homes, which might require some cross-subsidization. Homeownership is one of the best ways

[384] *See, e.g.*, Jim Chen, *Progressive Taxation: An Aesthetic and Moral Defense*, 50 U. LOUISVILLE L. REV. 659 (2012).

[385] GlobalData Plc., *The Complexities of Physician Supply and Demand: Projections from 2021 to 2036,* ASSOC. OF AM. MED. COLLEGES, (March 2024), https://www.aamc.org/media/75236/download?attachment.

[386] For example, a study on the effect of a 60% increase in medical malpractice premiums resulted in a $15 billion increase in Medicare spending because it drove more defensive medical decisions. Katherine Baicker, *Malpractice Liability Costs and the Practice of Medicine in the Medicare Program,* Nat'l Lib. of Med. (2008), https://pmc.ncbi.nlm.nih.gov/articles/PMC2266679/.

to build wealth.[387] In addition, in the middle of a housing shortage, it may be necessary to cross-subsidize homeowners insurance between high risk properties and other properties to prevent insurance prices from taking existing housing stock out of the market; simultaneously, insurance commissioners could flip the subsidy for new properties to deter building new homes in high-risk areas.

As for insurance obtained by companies, we may not want to deter risk taking in all cases. In fact, the general consensus is that risk-taking in business leads to economic growth and innovation.[388] Pricing corporate insurance to risk takers at a higher rate, in the name of more accurate actuarial pricing, would deter risk-taking as if that is a universal good. But policymakers regularly make specific decisions to encourage business risk-taking depending on where it makes sense. For example, the ability to incorporate to shield business owners from liability is justified by the theory that it encourages risk taking.[389]

All of these examples are worthy of deeper analysis and debate. But the point of this section is not to prove that cross-subsidization of one kind or another is good or bad policy. The point is to highlight that whether or not to cross-subsidize to increase or decrease risk-taking, and by how much, should be an individual policy choice, and that it is not immediately apparent that zero cross-subsidization should be our default position. Rate-setting authority is the only way to ensure that a government body can make those choices. Deregulation would leave these significant policy decisions completely up to private insurers—divorcing it entirely from the democratic process—which would assign incentives to risk without accounting for circumstances where society may benefit from encouraging or discouraging risk-taking.

G. Ruinous competition is still a problem

[387] Michael Neal, et al., Research Report: Wealth Opportunities Realized through Homeownership, URBAN INSTITUTE (May 2023), https://www.urban.org/sites/default/files/2023-05/Wealth%20Opportunities%20Realized%20through%20Homeownership.pdf.

[388] Phuong My Thi Pham and Binh Thanh Thi Dao, *A meta-analysis of risk taking and corporate performance*, 9 COGENT BUS. & MGMT (2022), https://www.tandfonline.com/doi/full/10.1080/23311975.2022.2064263#abstract.

[389] Andrew Verstein, *Incorporating Responsibility*, 41 YALE J. REG. 717, 721-22 (2024) (discussing how limited liability of shareholders intentionally promotes risk-taking that could be characterized as a "moral hazard").

Using rate-setting regulation to prevent ruinous competition by preventing price cutting may seem, in 2026, antiquated. Nonetheless, maintaining price stability is still a valid reason for maintaining a rate-setting regime.

A vigorously competitive market involves winners and losers, with the losers going out of business. Normally, it is not a societal concern if a single company goes out of business due to competition. But in insurance, like in certain limited markets like banking or utilities, when a company of any size goes bankrupt, there can be disastrous consequences to the public absent regulation. It means a policyholder's claim will not be paid, posing risks to policyholders themselves, the indirect beneficiaries of those policies, and broader interconnected economic networks. Because insurers usually go bankrupt due to a large surge of claims, when insurers go bankrupt, it usually means many people have losses that will not be covered.

AIG's recent collapse provides a natural experiment of what could happen if we deregulated P&C insurance. Of course, there are many ways to look at the financial crisis: it was caused by nonbank mortgage lenders who chose to originate set-up-to-fail loans;[390] it was caused by a failure of bank regulators to see it coming; it was caused by a failure of ratings agencies and Wall Street investors to understand the underlying assets of mortgage-backed securities. But it was also a classic story of underpriced and unregulated insurance, mirroring the undercutting fire insurers that caused cyclical insurance market collapses in the 1800s. A large insurer decided to capture market share by undercutting the actuarially-sound price and then collapsed when there was a catastrophe that the insurer could not cover. Policymakers solved this same problem in fire insurance with rate regulation to ensure actuarially sound pricing.

The AIG debacle suggests that we have not evolved beyond the risks of "ruinous competition." American insurance executives are still vulnerable to the same short-term incentives and thinking that can lead to underpricing and bankruptcy. There is significant short-term incentive to underprice in order to pick up market share and quickly build up investment capital, especially in boom market conditions.[391] In fact, Florida currently has 14 P&C insurers in receivership,[392] and hundreds that have closed in recent decades.[393] We need rate-regulation to both ensure premiums are not excessive, but also to ensure they are priced at an actuarily sound level.

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[390] CONS. FIN. PROT. BUREAU, POLICY STATEMENT ON ABUSIVE ACTS OR PRACTICES, 2-3 (2023), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf.

[391] Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 75-76 (1998).

[392] Florida CFO, *Rehab & Liquidation, Companies in Receivership*, *supra* note 27.

[393] Florida CFO, *Rehab & Liquidation, Closed Companies*, *supra* note 28.

H. Regulators are capable of performing rate reviews

One of the arguments against rate regulation is that state regulators do not have the competence to handle rate reviews in an age of data-intensive underwriting and risk-based pricing.[394] It may be true that insurers themselves understand insurance underwriting and actuarial principles at a deeper level than their regulators. But this argument underestimates insurance commissioner staff, while also substantially overstating what regulators need to do to be able to provide value to the public. Insurance commission staff do not have to, for example, review each risk tier to determine the fidelity between a price and the specific risk of that tier.

A regulator can provide value in rate reviews without digging into risk-based pricing at that level by focusing on the basic metrics of an insurance plan. For example, statistics like loss ratios, loss ratios + loss adjustment expenses, cost ratios, selling expense ratios, general expense ratios, and underwriting profit are well defined and understood metrics that the NAIC and industry use regularly. A regulator could review the reasonableness of prices by focusing on these statistics. They could decide not to increase aggregate premiums if, during the prior period, the insurer's net loss ratio was lower than 80%, unless the insurer faces tangible insolvency risk. A regulator could refuse to increase the premium when selling expense exceeded 5%, or some other metric the commissioner deems reasonable, and direct the insurer to find efficiencies in their advertising budgets or agent commission before asking to increase price. A commissioner could deny a premium increase when the insurer made underwriting profits, on top of investment returns. A commissioner could require an insurer to claw back prior dividends to a parent company in lieu of approving a price increase or limit future dividends as part of a rate proceeding. And a commissioner could dig into the insurer's expenses to make sure that it did not waste policyholder money on extraneous expenses like private jets, lobbying, political contributions, or unreasonable executive compensation.

In other words, critics both underestimate the actuarial expertise of insurance commissioners and overestimate the importance of actuarial expertise in rate reviews. While actuarial expertise is necessary to vet projections of future claims, that is only one part of the job. Commissioners can provide a lot of value by focusing on non-claims costs, which as Part II.A shows, are currently too high.

[394] Schwarcz, *supra* note 5, at 673-74.

IV. Improving Regulation of P&C Insurance

While regulating property and casualty insurance as a utility is theoretically sound, and the status quo is no doubt better than a deregulated market, the current regulatory system is underperforming. Below are suggestions for policymakers seeking to ensure affordable, fair, and sound access to insurance going forward.

A. State commissioners should deny rate increases

As noted in Part II.A, in the last decade loss ratios in the P&C insurance market have been low. As a start, insurance commissioners should deny rate increases and even demand decreases to bring insurer net loss ratios up to 80%, unless the specific insurer is at risk of insolvency. If insurance commissioners consistently insisted on an average 80% net loss ratio, it would produce $100 billion in annual savings as compared to 2024 and reduce the price of insurance by about 11%.[395]

Insurance commissioners should be able to do this without threatening insolvency. But to do it, they will need to question the reasonableness of non-claims costs.[396] For example, commissioners should aim for slightly negative underwriting income because insurers make ample returns off the insured's capital. Insurance commissioners should insist that insurance companies pay a little for access to that capital, just like any investment fund would. Insurance companies are effectively investment funds. Other investors *pay* for access to capital.[397] Insurers can pay a few hundred basis points for access to insureds' capital as well, which would come in the form of a slightly negative underwriting profit.

Second, a lower 5% selling expense is more appropriate given the limited public welfare value of selling expenses in insurance.

Third, commissioners should examine whether loss adjustment expenses of 10% are too high, both from the perspective that claims processes should be more automated and efficient, and from the perspective that the money saved reducing payouts may not justify these fairly high expenses.

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[395] Assuming total premiums of $1.03 trillion in 2024 and total claims cost of $636 billion in 2024. NAIC 2024 MARKET SHARE REPORT, *supra* note 247, at 4.

[396] Peggy Brinkmann, Nancy Watkins, Cody Webb, *Impact of rate regulation on the personal auto insurance market for Illinois v. other states*, MILLIMAN, 10 (2024), https://edge.sitecorecloud.io/millimaninc5660-milliman6442-prod27d5-0001/media/Milliman/PDFs/2024-Articles/2-26-24_NAM03-Report-20240223.pdf.

[397] The Federal Funds Rate in September 2025 is 4.22%. Fed. Rsrv. Bank of St. Louis, *Federal Funds Effective Rate*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/fedfunds (last visited Mar. 26, 2026).

Fourth, insurance commissioners could look at reducing insurers' roughly 8% overhead costs as well. For example, the CEOs of the top 10 largest auto and home insurers were paid a quarter billion dollars in 2022 and 2023.[398] State Farm owns 4 private jets.[399] There is no doubt some fat to cut. State legislatures could also consider laws to prohibit passing on the cost of especially frivolous expenses like private jets, political donations, and lobbying to customers in their premiums. States have begun doing that very thing for energy utilities.[400]

But in order for this to work, insurance commissioners will need to become less responsive to threats by insurers to exit the state. Insurers have been making these threats for over a century to influence regulatory policy, and sometimes insurers even follow through with it. This author has been unable to uncover an instance in which this has resulted in consumers losing access to insurance entirely. The reason for this is, as explained above, writing insurance policies is not the same as manufacturing products. When large insurers exit a state, the remaining insurers are able to quickly pick up the market share assuming they are allowed to charge above break-even/actuarially sound rates. An existing insurance company can quickly increase their market-share and does not need much additional capital to do so. And if that does not happen, residual insurers can fill the gap.

B. States should create exit restrictions

If, however, insurance commissioners and legislatures want more certainty than that, they can deploy one of the most important tools in the utility toolbox: exit restrictions. For example, the Federal Energy Regulatory Commission and wholesale energy cooperatives supplement the rate-setting regime for that utility with "exit charges" to deter parties from threatening to exit.[401] Insurance commissioners or state legislatures could create exit restrictions for insurance companies, which is something

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[398] Press Release, *As Insurance Rates Skyrocket, Executives Pull in Millions*, CONS. FED. AM., (Oct. 4, 2023), https://consumerfed.org/press_release/as-insurance-rates-skyrocket-executives-pull-in-millions/.

[399] *State Farm Mutual Automobile Insurance Company*, PLANESPOTTERS.NET, https://www.planespotters.net/airline/State-Farm (last updated on Oct. 22, 2025).

[400] Brian Shearer, *How to Lower Electricity Bills to $100 a Month*, VANDERBILT POL'Y ACCELERATOR, 16 (2026), https://cdn.vanderbilt.edu/vu-URL/wp-content/uploads/sites/412/2026/03/09173607/How-to-Lower-Electricity-Bills-to-100-Dollars-a-Month.pdf (describing new laws in California, Colorado, Connecticut, and Maine).

[401] *See* United Power, Inc. v. Fed. Energy Reg. Comm., 49 F.4th 554 (D.C. Cir. 2022) (ruling on a jurisdictional dispute over which regulator has authority to set exit charges).

New Jersey and Massachusetts has already implemented for auto insurance.[402] In particular, a state can make clear that when an insurer exits a portion of a state or even a whole category of P&C insurance, the state will pull their license to operate anywhere in the state in any segment of insurance. This tactic would be especially effective if paired with critiques of low loss-ratios and excessive spending, profits, or investor payments.

C. State-owned insurers should compete in open market

States could allow their residual insurance companies to compete directly in the competitive market and not just act as an insurer of last resort. Most residual insurers in the homeowners and auto insurance markets are insurers who only step in when the customer cannot obtain other insurance. But states can take the approach Florida took in the homeowners insurance market—before the public plan's depopulation in 2025—to create a backstop against private insurer exit and provide even more affordable insurance at no cost to the public. When doing so, states should both ensure that the residual insurance entity provides comparable coverage to the private industry and take over operational management of residual insurers currently run by the private industry to make sure the residual insurer provides comparable service.

A state-run insurance company competing in the market would immunize itself from the threat of private insurers exiting in response to rejected price increases. If private insurers exit, the public insurer could pick up any abandoned market share.

D. Congress should create Federal re-insurance programs

Re-insurance is an important way for insurance companies to even out loss ratios year-over-year. However, as described in Part II.A, that expense is now inflated because reinsurers are overcharging the insurers, which is being passed on to policyholders. In other words, P&C insurers are themselves victim to overcharging by P&C insurers operating with low loss-ratios (the reinsurance loss-ratios of about 69% are actually more reasonable than the average in the P&C insurance industry).

If the federal government created a federally-owned P&C reinsurance plan that charged actuarially sound (but not inflated) reinsurance rates, insurance commissioners

[402] *See, e.g.*, N.J. ADMIN. CODE § 11:2-29 (requiring long advanced notice for withdrawals); MASS. GEN. L. ch. 175, § 22H (1991) (giving the insurance commissioner authority to suspend insurance licenses for all of an insurers' business lines if an insurer refuses to issue auto insurance policies and cannot prove the refusal is justified based on solvency concerns).

would be able to keep rates lower. There were bills introduced in Congress in 2024 and 2025 to do this very thing.[403]

However, in crafting a federal reinsurance plan, Congress should take due care of the significant risk of adverse selection, which is that insurers might only pay for federal reinsurance to cover the most risky claims, depriving the federal fund of premiums for the safer policies. To address that concern, Congress could make the reinsurance plan mandatory, or mandatory for all plans if the insurer chooses to participate for any plans.[404]

E. Congress and state legislatures should create loss-ratio floors

Recently, Professor Schwarcz published a paper proposing a new Federal law to apply provisions of the Affordable Care Act to homeowners insurance, including: (1) coverage mandates, (2) prohibitions on considering certain factors in underwriting, (3) centralized online marketplaces to improve comparison shopping, and (4) subsidies.[405] This is a good idea for the reasons set out in the paper.

But the paper omitted arguably the most significant insurance regulation in the Affordable Care Act, which is the Medical Loss Ratio (MLR) requirement. The ACA requires insurers to rebate customers if the health plan's loss ratio for the year exceeded 85% for large-group insurers or 80% for small group insurers.[406] This is, effectively, a federal rate-setting regulation of insurance, though it did not preempt supplemental state-level reviews.

The results of the MLR have been somewhat mixed in the healthcare industry. Some researchers have shown that the MLR requirement has a perverse effect of reducing insurers' incentive to bargain for lower healthcare costs with healthcare providers.[407] But this is an unintended side-effect that is unique to health insurance. Health insurers engage in direct negotiations with hospitals and providers over the cost of paying for various healthcare services. P&C insurers do not perform similar

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[403] *See* Incorporating National Support for Unprecedented Risks and Emergencies (INSURE) Act, H.R. 6944 (Jan. 10, 2024); S. 2349 (July 17, 2025).

[404] Benjamin L. Collier, et al., A proposal for a US federal property reinsurer, The Hamilton Broject, at 22 (March 2026), https://www.brookings.edu/wp-content/uploads/2026/03/20260318_THP_CollierKeysMulder_ClimateInsurance_PolicyProposal.pdf.

[405] Daniel Schwarcz, *Obamacare for Homeowners Insurance: Fixing America's Broken Insurance Markets in a Time of Climate Change*, 49 HARV. ENVT'L L. REV. 525, 532-34 (2025).

[406] 40 U.S.C. 300gg-18(b).

[407] Xiaoxi Zhao, *Medical Loss Ratio Regulation and Insurer Pricing* (March 19, 2021), https://xiaoxizhao.github.io/files/JMP_XiaoxiZhao.pdf; Scott E. Harrington, *Medical Loss Ratio Regulation under the Affordable Care Act*, 50 INQUIRY J 9 (2013).

negotiations. Without that market feature, an MLR for P&C insurance should have the effect of reducing margins without the unintended consequence of increasing cost per claim.[408] In other words, it would lower prices.

Congress should consider a net loss-ratio floor, similar to the 80% federal floor in health insurance, for *all* P&C insurance markets,[409] while making clear that state insurance regulation is not pre-empted. States would still have rate-setting, solvency, and consumer protection regulatory authority as they do in the health insurance market. A standardized loss-ratio floor, however, would provide a backstop that would deter high-stakes games of chicken where insurers threaten to leave states. In particular, a federal floor would work well in markets where year-over-year loss ratios are stable, including in insurance markets not vulnerable to catastrophic or wide-spread loss, and markets where reinsurance smooths out loss ratios over time. For this reason, pairing a loss-ratio floor with a federal reinsurance proposal would be particularly effective and make the loss-ratio floor more viable in less stable insurance markets.

Alternatively, or in addition, state legislatures could pass a similar loss ratio floor, especially if paired with exit restrictions and less constrained public option residual plans.

Conclusion

Policymakers over 100 years ago created rate regulation because they did not like how insurers were pricing insurance. Sometimes insurers charged too much. Sometimes they charged too little and caused market crises. Sometimes they discriminated. So policymakers chose a simple solution and gave a government official authority to approve and reject prices to stop these outcomes.

America finds itself in an affordability crisis, and the price of P&C insurance is, once again, too high. P&C insurance is a practical necessity for both businesses and individuals, and so this is an equal problem for consumers and corporate America. Instead of deregulating insurance to increase prices even more, policymakers should use utility regulation to solve this problem, through more muscular use of existing authority and new reforms taking from the long tradition of utility regulation of insurance.

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408 To be clear, it may create an incentive to deny fewer claims. This would, however, be a positive development given customers' experience with high denial rates as described in Part II.B.

409 See Brian Shearer, *How to Lower the Insurance "Tax" by $150 Billion*, VANDERBILT POL'Y ACCELERATOR (2026), for further discussion of this proposal.