END LOUISIANA'S INSURANCE MANDATE: CLEAR MARKETS BY UPHOLDING THE U.S. CONSTITUTION[1]

Brandon M. Tate
Loyola University New Orleans

Walter E. Block
Loyola University New Orleans

ABSTRACT

This paper attempts to rehash an age-old debate on compulsory auto insurance in the United States, with a focus on the state of Louisiana, given its crisis of high premiums. In the process, it touches on matters of Law and Economics in light of contemporary issues affecting the marketplace for insurance, such as climate change, improving vehicle safety features, and discrimination. Ultimately, this paper puts forth an alternative path of the law regarding compulsory insurance and offers a novel understanding of key clauses in the U.S. Constitution.

Key Words: Compulsory Insurance, Insurance Laws, Discrimination, U.S Constitution, Capitalism, De-regulation

JEL Category: G22

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[1] We thank Leith Edgar for constructive criticism of an earlier draft of this paper. We thank Matthew Manzella for important editing. Neither is, of course, responsible for any errors of omission or commission. That lies, as per usual, with the authors.

While the people of the state of Louisiana continue to pay the highest annual auto-insurance premiums in the United States, regulators and commentators mistakenly place the blame for this state of affairs on the number of uninsured motorists who continue to drive on the roadways. According to Ghosh, (2021) "Louisiana's insurance rates jumped by 19% from last year, to an average annual premium of $2,839, about double the national average, partly because of its large number of uninsured and underinsured drivers" (para. 3). In that very same article, David Corum, vice president of the Insurance Research Council, went so far as to say, "Keeping auto insurance affordable is more difficult when a significant number of drivers refuse to carry their fair share of the costs" (para. 6).

The assumption made by Corum was that not enough people comply with the state's mandate that drivers must carry a minimum of liability coverage, and that, but for this market intervention, the price of insurance would be "fairer," i.e., cheaper. But this assumption is sadly mistaken. The only price for a service that can be said to be fair, is the price that all parties involved willingly agree to accept.[2] However, the ideal price of auto-insurance within the state is completely indeterminable due to

[2] This is based upon St. Thomas Aquinas' claim to the effect that "the just price is the market price." In the view of Zwolinski (2011): "Rothbard holds what I take to be the standard position among libertarians – that a just price is whatever price people are willing to pay in the market without force or fraud. And he claims to find at least the core of this view in St. Thomas Aquinas. Aquinas, in his Summa Theologica, II.II, 77, 3, discusses the following example (as presented by Rothbard): A merchant is carrying grain to a famine-stricken area. He knows that soon other merchants are following him with many more supplies of grain. Is the merchant obliged to tell the starving citizenry of the supplies coming soon and thereby suffer a lower price, or is it all right for him to keep silent and reap the rewards of a high price? Aquinas' answer, perhaps surprisingly, is that the merchant is not so obligated. It would be "exceedingly virtuous" of the merchant to provide this information to his customers, but he is not required by justice to do so. From this, Rothbard concludes that Aquinas views the "just price as the current price, determined by demand and supply" Zwolinski cites Rothbard (1995) in this matter. See also McGee and Block (1990).

numerous market interventions by law enforcement at the behest of state regulators.

Under a truly "fair" system of an unhampered market, an insurance agreement would be a private contract between the two parties coming to terms on a mutually acceptable exchange of money for coverage given the driver's appetite for risk and accident prone-ness.[3] But unfortunately, auto insurance, unlike some other insurance plans, has historically been viewed and treated as a contract in need of regulatory controls[4] and not merely constituting private exchange between buyers and sellers on a free market.

Like nearly all states in the nation[5], Louisiana law mandates that all motorists carry minimum-liability coverage to alleviate the cost of most of the damage caused by traffic accidents. While driving, a motorist must possess proof of insurance, covering at a

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[3] Under a regime of economic freedom, insurance companies would discriminate in favor of safer drivers by offering them lower premiums, even if this had "disparate impact" upon certain racial or ethnic groups or other demographics. In the present legal milieu, this would be more difficult, if not legally possible. If an insurance firm discriminated on the basis of criteria which were statistically correlated with safe driving, say, by giving lower rates to those with good records of long duration, or, membership in the chess club or the math team assuming arguendo that these latter criteria were relevant and accurately predicted good driving, then it would earn extra profits and could expand its base of operation. On the other hand, if it discriminated on the basis of irrelevant criteria, say, possibly, height, or weight, or hair color, or left or right – handedness, or race or religion, given that these are irrelevant, then the firm would register losses, and in equilibrium, disappear from the market. For more on the economics of discrimination, see Becker, 1957; Block, 1992, 1998A; Block and Williams, 1981; Epstein, 1992; Sowell, 1975, 1981, 1982, 1983, 1994, 2015; Williams, 1982A, 1982B, 2003, 2011

[4] The original argument on behalf of publicly mandated auto-insurance was that it would reduce the number of vehicular deaths each year.

[5] Virginia does not require its motorists to carry minimum liability coverage, nor does New Hampshire. The people of both states pay significantly less than in Louisiana—$853.78 in VA and $847.58 in NH; as of 2018 (See Insurance Information Institute, 2021A. "Facts + Statistics: Auto Insurance," chart 3). While the lack of an insurance mandate is not the sole cause of the difference in premium prices, it does suggest that the idea of wholesale abandonment of mandates will not lead to general chaos.

minimum, $30,000 worth of protection in the event of bodily injuries with a minimum of $15,000 for one individual harmed, and at least $25,000 for damage to property. This type of coverage is commonly referred to as 15/30/25 coverage. Compared to most states, the amount of protection Louisianans have had forced upon them by their legislators is negligible[6]. Over the years, the state's legislators have attempted to manage this crisis of premiums by discouraging legitimate and justifiable tort suits from plaintiffs and lawyers alike.

In its 1997 session, the legislative body presented a Personal Injury Protection Plan (PIPP) (Bowser 1997, para. 7). The proposal was intended to deny litigants "the right to compensation for so called 'noneconomic' damages, such as pain and suffering, unless the injury is considered serious" (Bowser 1997, para. 8). Other ideas on how to lower premiums have included limiting the number of administrative costs insurers can pass onto consumers and other heavy-handed regulatory measures[7]. These examples are just a few of the ways the state legislature has attempted to treat the symptoms of the disease, without addressing its root cause, onerous regulations.

People, in every private transaction, should have the unlimited right to refuse.[8] Essential to the bargaining power of the supplier is the right to refuse to provide a service to a service seeker. Equally important is the right of the service seeker to ultimately refuse exchange of his funds with the provider. When a state mandates that all motorists purchase specific private insurance

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[6] A chart titled, "Automobile Financial Responsibility Limits" illustrates US states' minimum required coverages. The chart shows that Louisiana's 15/30/25 rule is well below that of most other states requiring 25/50/10 or greater. In short, Louisianans pay more than any other state for coverage and receive significantly less protection in return. See Insurance Information Institute, "Facts + Statistics: Auto Insurance" (2021B).

[7] For this in its entirety see Bowser (1997).

[8] This is what is meant by the law of free association. See on this: Alexander, 2008; Cavalluzzo and Telford, undated; Emerson, 1964; Galles, 2014; Harris, 1999; Hudson, 2009; Malek, 2003; McGee, 1992; McGee and Block; McMaken, 2014; Rockwell, 2012; Yost, 2020.

policies in order to drive on its roads, this organization has unjustly interfered in the private sphere of negotiation between sellers and consumers. With this type of mandate, states like Louisiana effectively tilt matters in favor of insurance suppliers. Motorists are thereby coerced into negotiating the price of their policies without their most important power—the ability to say no. In the withdrawal from the world of free-market competition, it is as if one hand of the consumer has been tied behind his back. It is no wonder that the price of car insurance has been a consistent and contentious topic of political debate for decades in Louisiana[9].

Former French President, Charles de Gaulle, once said "Genius … sometimes consists of knowing when to stop."[10] In the face of such a severe insurance dilemma, this state would be well-advised to abandon its compulsory insurance laws for all drivers within its territory. In this way it could restore at least a modicum of the bargaining power of consumers. With each passing day, the arguments in favor on compulsory auto insurance grow weaker, and the arguments against them strengthen given the trend lines for the imbalance of prices between this and the other 49 states.[11]

Let us now review some of the historical justifications in favor of insurance mandates and challenge those arguments in light of contemporary evidence and trends such as vehicle safety, automation, and their suspicious murky legitimacy under the U.S. constitution.

It seems worth pointing out that the state's mandate is not the sole contributor to the dilemma. After all, Louisiana is regularly subjected to severe weather events during the annual hurricane season. In addition, a significantly high number of the state motorists live at points that are at or below sea-level, further increasing the risk of flooding, and the costs of repairing damaged

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[9] In 2019, then President Donald J. Trump campaigned against the incumbent governor, highlighting his failed record of lowering auto insurance premiums, during a race for Governor. See this de La Chapelle (2019).

[10] https://quotefancy.com/quote/1202599/Charles-de-Gaulle-Genius-sometimes-consists-of-knowing-when-to-stop

[11] See fn. 7 supra

vehicles. Moreover, technological advances in auto-manufacturing have come at an increased cost in repairs. For instance, according to Stuart Harris of Mclure, Bomar, and Harris (a Shreveport-based insurance firm) "Ten years ago, you rear-end somebody and a new bumper cost you $300. That same bumper is going to cost you $3500 because it's got backup sensors, video cameras, [and those] kind of electronics in it" (Ostroff, 2018, para. 9).

While the state's interference into the marketplace is not solely responsible for increasing the costs of insurance, it can, however, be blamed for preventing consumers from exercising their reasonable judgement in response to the higher prices and preventing motorists from finding alternative market-based solutions. Normally, when faced with, for instance, worsening climate conditions or increased costs of repairs, a market participant's appetite for insurance would be influenced by a weighing of the risks of forgoing insurance against the benefits of that same decision. For instance, a driver in possession of a vehicle with a high safety grade and accident prevention assistance capabilities, such as a rear-view camera, and semi-autopilot driver features would be willing to bear more risk than a motorist who owns a vehicle with a low safety grade and little to no additional crash prevention capabilities. Other things equal the latter would be more inclined to buy an insurance policy than the former. In the absence of a mandate, the entire market would voluntarily adjust by taking into consideration all costs, benefits and consumer preferences. The shift would arise from voluntary exchanges between market participants. But the rigid, and strong arm of the state continues to create factors preventing free and open competition—forcing motorists into its preferred choice: many costly limited-liability policies.

Those in favor of the statist approach argue that insurance is not a "good" in the strict sense of the meaning.[12] A statist argues that

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[12] Arrow (1965) argued that "Insurance is not a material good…unlike goods and services, transactions involving insurance are an exchange of money for money, not money for something which directly meets needs" (p. 45). Found in Ehrlich and Becker (1972)

insurance is abnormal in that without some method of government compulsion, the marketplace for automobile coverage might collapse due to consumers' lack of desire to pay for coverage. However, according to Ehrlich and Becker (1972), "It has been argued that insurance is different from 'ordinary' goods and services because it is not desired *per se*, but…that distinction between goods and services purchased in the market and the more basic needs they satisfy…applies to all goods and services" (p. 624).[13]

In the state of Louisiana, homeowners are allowed to decide for themselves whether or not they would like to assume the entire risk of homeownership and forgo a portion of the cost by purchasing a flood-insurance policy. Neither for many years were citizens required to maintain health-insurance policies. One could, however, argue that a motor vehicle allows the owner to significantly endanger the lives and properties of others in ways that a home does not. But such logic is applied in no other field in this way. For instance, according to this line of reasoning, a father without a life insurance plan could be said to be endangering the livelihood of his child should he suffer an untimely demise. Yet, individuals are still allowed to assess the risk of such an event, by examining their health, lifestyles, and priorities to ultimately decide for themselves whether or not to purchase individualized life insurance policies. Thomas Sowell (2013, para. 9) wrote, "Different people have different risks and different willingness to take care of risks themselves, instead of paying to have them transferred to an insurance company". It should go without saying that at least some people, if not the wealthiest and the safest of drivers in society,

[13] Long ago it was fallaciously thought, under the baleful influence of the Physiocrats, that only agricultural products were "legitimate." Manufacturing and service were not. Later on, manufacturing was allowed access to the inner circle of economic legitimacy, but services were still precluded. Nowadays, hopefully, we have a more sophisticated perspective, and allow as economically licit any and all things that anyone could wish to purchase, even including pet rocks of all things.
https://www.google.com/search?q=the+pet+rock&rlz=1C1CHBF_enUS724US724&oq=the+pet+rock&aqs=chrome..69i57j0i512l2j0i22i30l7.2013j0j15&sourceid=chrome&ie=UTF-8

would opt out of such a system if given the chance to pursue an option more tailored to their specific needs.[14]

The binary theory, that individuals are either insured or "uninsured" is not entirely correct either. Even Grayston (1972), who in his article, *Compulsory Automobile Liability Insurance—An Economic Analysis*, ultimately took a sympathetic view of compulsory auto insurance, wrote that "In theory, 100 percent of all automobiles are insured. Either the owners of automobiles obtain liability insurance from the insurance industry or they self-insure" (p. 350). He continued to say that compulsory liability insurance must be judged solely on the "benefits it provides" and "its costs." The benefit of compulsory liability insurance is that it has created "secured" funding for injured plaintiffs[15] (Shimeall 1974). The downside is that it wrongfully collectivizes a tort dispute by driving up the costs of the insured community none of whom ever volunteered to participate in such a group. Under a more just system, unless an individual voluntarily purchases an insurance policy, the motorists would only be responsible for accidents and injuries they solely caused.

Another argument made by the proponents of compulsory insurance is that state mandating is commonplace. According to this "logic" if government officials can demand that drivers pay tolls and taxes used to build bridges, and compel them to carry a driver's license, then why shouldn't they be able to demand that motorists purchase insurance? The key difference here is that these licenses, tolls, and taxes are directly paid to the state. Louisiana does not, however, provide an insurance policy to its citizens, nor a policy at a subsidized rate, nor a single payer plan derived from the state's authority outlined in its constitution. In this instance, the authorities simply demand that motorists patronize private firms.

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[14] Were the roads, streets and highways privatized (Block, 2009), the owners would set up the rules of the road, including whether or not motorists could enter their premises with or without insurance. They would compete with one another for customers, in part, based on their insurance requirements.

[15] and law firms that sue on their behalf.

There exists a constitutional right to enter into a private contract that is explicit in Article 1, Section 10 of the U.S. Constitution—commonly referred to as the Contract Clause[16]. That same article outlines the national prohibition on any "Title of Nobility." It is important to note that at the time of the American Revolution, the title of nobility conferred more than just a superficial, honorary status. It carried with it an exclusive right to a patent from the Crown, a charter, land holding, or some sort of sanctioned monopoly, nearly guaranteeing patronage from the Crown's subjects[17]. The system of insurance today far more resembles the peerage system of the old world than one compatible with the liberal principles of the new world. The Contract Clause and the ban on special privileges for the nobility should, together, imply a right to refuse any good or service from a private seller or category of sellers in the United States free from government compulsion[18].

The practice of compelling consumers in this way was not always so in the United States. The justification for such a plan came about in the 1920s after the automobile became more commonplace. A few years after WWI, the Honorable Robert S. Marx, Judge of the Superior Court of Cincinnati Ohio, published an article in the American Bar Association Journal, titled *Compulsory Automobile Insurance*. In that article, Judge Marx described the degree to which the nation was struggling to figure out how to provide for safe travels and security given the revolutionary introduction of the automobile.

In the article, Marx (1925) compared the number of Americans who had either died or been wounded due to a car accident (630,000 in 1924) to the number of Americans killed in the War to End Wars (242,000). Without a doubt, the impact of cars

[16] See U.S. Constitution.
[17] See Beatie (2021).
[18] Additionally, in NFIB v. Sebelius (2011), the Supreme Court ruled that the Commerce Clause does not grant congress the power compel non-participants in commercial activity to "become active in commerce by purchasing a product." (p. 20)

being more prevalent took a severe toll on the population. It was in this context, that Marx (1925) began to advocate compulsory insurance as a means to: 1.) guarantee monetary relief for those injured in the event of a severe injury 2.) reduce the overall cost of car insurance by forcing more drivers to enroll 3.) reduce the tax payer burden by decreasing the cost of litigation and increasing the likelihood of a favorable outcome for the inflicted.

But near the end of his article, Marx begins to argue for compulsory insurance as a means to weed out undesirables from taking to the nation's roadways. He wrote, "If insurance is made a condition precedent to obtaining a license, only insurable risks will be permitted to drive. In this manner, the undesirable and unfit drivers will be eliminated before they cause accidents" (1925). While there is little doubt that by "undesirable," Judge Marx meant those drivers who are least responsible behind the wheel, however, in the modern application of his plan, "the undesirables" come in the form of the indigent and uneducated[19]. This is because firms today engage in a rationalization process in order to justify charging members of these groups more for their premiums than non-members—essentially everyone but affluent, educated men. This price discrimination compounds the injustice afflicting the discriminated against party. Once for being compelled to pay for an accident that he did not cause and a second time by being compelled to pay a higher premium than his peers, simply because he falls into the class of the undesirables. Also, according to statistics from the Insurance Institute for Highway Safety (2021), the number of motor-vehicle deaths per 100,000 people has trended down since 1975, weakening Judge Marx's essential point. No doubt that the technological advances in vehicle and highway safety improvements have contributed to the statistical improvement.

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[19] In 2021, a bill was introduced by Louisiana state senator Jay Lenau with the aim of preventing the common practice of insurance premium discrimination on the basis of being a widow or widower, the insured's credit score or gender if over the age of twenty-five. As of 2022, this bill has yet become law. (Insurance Journal, para. 2)

On the other hand, the free enterprise system can ride to the rescue here. Let us posit, for simplicity, that there are only two possible states of the world. One, the indigent and uneducated v. the affluent and educated. The former really are poor drivers, and the latter very rarely are involved in motor vehicle accidents. Two, this is all arrant nonsense. If the first scenario is correct, insurance companies that engage in such insurance premium discrimination will earn profits. More, they will be led by Smith's (1776) "invisible hand" to promote the public good, safety in this case, since their practices will tend to price off the roads those more likely to create mayhem. On the other hand, if scenario two is accurate, then they will suffer losses, and, given competition in the insurance industry, be forced to give way to companies that do not follow this policy.[20]

An alternative to the current system should be one in which the government at all levels abandons all forms of compulsion, and in its place begins to firmly protect individual property rights. The state could accomplish this by penalizing only those who cause damage to personal property, personal injury, or death by vehicular accident. A free-market system such as this would, in the event of a reported accident, require a violator to, upon request by a law enforcer, present proof of insurance or appear before a tribunal within a set amount of time in order to be instructed on the terms of compensation to the victim(s). Once the terms are laid out by the tribunal, the violator would then be required to completely meet the terms set forth. The violator would receive a suspension of all licensing privileges to drive on the roadways until the terms of compensation were met. If a violator is either uncooperative in remedying the injury, a warrant for arrest should be issued and the offender jailed.

For indigent offenders who are especially unable to pay compensation *and* are not criminally negligent at the time of causing severe damage or injury, alternatives to jail time should be made. Instead of unlicensed drivers receiving a ticket, they should suffer a more severe penalty, such as jail time, in order to prevent violators

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[20] Block, 1998B; Hoppe, 2006; Semmens, 1995

from refusing to pay and simply driving with a suspended license. Of course, no terms of compensation or punishment should be ordered apart for those expressed by the afflicted party invoking their rights. After all, there are many incidents and accidents that are forgiven by the victims. In the event of a death due to criminal negligence, current laws penalizing violators are in no need of change.

In conclusion, the state of Louisiana is in the middle of a severe insurance crisis. The current system of compulsory auto insurance, first established in the 1920s does not consider the significant improvements of safety standards in vehicles, as well as the far lower mortality in motor vehicle operations. In addition, the status quo also supports the present high premium prices. The current model, which was designed to prevent "undesirable" drivers from access to the roads, should be abandoned in favor of a system focused on enforcing property rights, thus saving lives. It should go without saying that such a system would still incentivize much of the state's population to carry auto insurance policies. For the ultimate goal is not to discourage people from obtaining auto insurance, but to allow for more freedom and competition, while creating the conditions in which insurance markets can promote safety. People should be able to decide for themselves exactly what amount of risk they are willing to take, especially considering that the one-size-fits-all approach is costly and dangerous for consumers in the state of Louisiana, and elsewhere too.

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