President Ramo: Welcome back. A long time ago, when I was first about to become the President of The American Law Institute, I did what all really smart people do. I went to see Gerhard Casper. And I said Gerhard, if you owned The American Law Institute, what would you do right now?

And one of the things he told me was that I should gather together 10 of the best young scholars around the country and ask them what they would do. And of course, as all people who go to see Gerhard do, I did exactly what he

said, and the result was the establishment of The American Law Institute award to now early career scholars.

It's been an extraordinary experience, but it's an extraordinary amount of work. And I want to introduce the current Chair of our Committee, who will tell you a little bit about the process and also about our Early Career Scholars Award today.

Justice Cuéllar is everything a scholar—to me, the best legal scholar—should be. And that is not only has he been educated not just with an undergraduate degree, a law degree, but also he has a PhD. He has been in government. He understands what the practice is about. He has been a scholar, and now he is a member of the California Supreme Court.

He has been a member of our Council, and the quality that he brings to our discussions is exquisite, practical, and always warm and kind.

Ladies and gentlemen, the Chair of our Committee, Justice Cuéllar. (*Applause*)

Justice Mariano-Florentino Cuéllar (CA): Thank you, Roberta.

Welcome, everyone, and thank you for joining us to celebrate this award.

People around the world wait with bated breath to learn who wins the Nobel Peace Prize, the Oscar for best picture, the MacArthur Foundation's so-called "genius awards." But truly discerning observers pay special heed to who wins the award we're about to give today.

What I want to say at the outset is that what you're seeing here is like the tip of a very big iceberg. Beneath the iceberg, there is a whole bunch of work that's done, some by the Chair, but most of it really by our Committee members. And I want to give you just a little bit of a flavor of everything that happens behind the scenes to get this award to be given every two years.

We start with deans. Deans know their faculty members pretty well. We send letters to basically all the law deans in the country, and we ask them to invite—we invite them to submit one nominee per school. Last year, we got responses from 88 deans. The choice is not an easy one for them, and part of the challenge that we face is balancing what we understand is a set of constraints the deans have in picking one candidate with the incredible diversity of opinions, views, perspectives that we then get in that resulting pool of applicants.

There are few restrictions on the nominees. They should be full-time academics with three to 10 years of experience, working in any legal field using any methodology at all. Nominated scholars then submit up to three pieces of writing.

So we evaluate the entire corpus of this body of writing and its impact, its scholarly merits, the extent to which it really embodies the values we care

about in the ALI—scholarly excellence, but also practicality and directness of impact.

If this sounds like a difficult choice, that's because it is. We read a whole bunch of law-review articles, which is okay for some people. It's a challenge for others. But we really are looking to make sure that the writing demonstrate these ideals of the ALI.

The scholars have real influence at ALI by having the opportunities you're going to hear today to present remarks. And often, they become more and more involved in the work of the ALI.

Although we look for scholarship and for candidates that embody the values of the ALI, we don't necessarily look to see that their work is directly relevant to a current project. Sometimes projects develop and grow out of the work that scholars are doing.

At the end of the decisionmaking process, it feels a little bit dramatic, to be honest. Everyone waits with bated breath to find out who wins. And this year the award goes to (*laughter*) Emma Stone, *La La Land*. (*Laughter*)

Just kidding. In fact, I'm very pleased that we can extend the award to two absolutely stellar scholars, Professor Colleen Chien of Santa Clara University, whose work on intellectual property is probably known to a number of you, and Professor Daniel Schwarcz of the University of Minnesota, who is here today.

Colleen, unfortunately, could not be here, but I'm going to talk about her anyway.

Through her scholarship, her engagement with the profession, Colleen has shown herself to be energetic and creative. If you follow intellectual property, you have come across the term "patent assertion entity," and you've come across that term because she is the one responsible for bringing that into the popular lexicon.

She did a survey and analysis in 2012, and the results of her survey and other empirical work have led to legislation in 32 states dealing with frivolous demand letters. She has testified before the House Judiciary Committee and worked on patent reform at the White House as a senior advisor at the Intellectual Property and Innovation Office.

Her policy recommendations have been adopted by federal and state legislatures, by the U.S. Patent and Trademark Office, and she has been cited by the U.S. Supreme Court.

Equally impressive is Daniel, from whom you'll hear more in a minute. He is a prolific scholar of insurance law and regulation. He's really a maven, to be honest.

He is someone who uses theory and empirical analysis, has deep knowledge of doctrine and statutes and uses that to answer questions that mat-

ter in the here and now, such as how the lack of transparency hinders consumers from comparing differences in homeowner insurance policies.

This review in particular prompted officials at the National Association of Insurance Commissioners to do something truly remarkable, which is to read a law-review article and to create a working group on this issue.

Likewise, Daniel's work has been influential among a number of states, developing new practices for transparency, and has helped prompt the U.S. Treasury Department and Congress to develop reforms.

After law school, Daniel worked for Judge Sandra Lynch as a clerk at the U.S. Court of Appeals for the First Circuit. He's also served as an expert witness in quite a few cases, and now you get to hear what he has to say.

Please join me in congratulating Daniel and Colleen, and welcoming Daniel today. (*Applause*)

Professor Daniel Schwarcz (MN): Thank you so much, Justice Cuéllar.

I'm truly honored to receive the ALI's Early Career Scholars Award.

As many of you may know, the award was until recently known as the "Young Scholars Award." The ALI assures me, though, that it was not my own lack of youthfulness that caused them to change the award's name.

Youthful or not, I could not have won the award without the support of my wife, Tamar; my three children, Orly, Tovah, and Esther; and my parents, who are here today.

My colleagues at the University of Minnesota Law School have also consistently nurtured and supported my scholarship. Finally, one person in particular, Professor Kenneth Abraham, has stood out for his advice, encouragement, and inspiration.

Past winners of this award have devoted their time, during this speech, to describing broad themes in their scholarship, and I'll do the same. But before I regale you with my worldview about insurance law and regulation, and I know you can't wait, I want to take a moment to explain how I came to this field.

At the outset of my academic career, I focused on insurance law and regulation because I believed there was a huge gap between its importance to practicing lawyers and the attention that it received in the legal academy. As the ALI's Liability Insurance project suggests, insurance is fundamental to our civil litigation system, funding a substantial percentage of defense attorneys' fees and plaintiffs' recoveries.

Insurance is also a key part of the U.S. regulatory state. Over 50 different state insurance departments employ more than 11,000 personnel to implement a complex web of state insurance laws and regulations. Meanwhile, the role of federal regulators in insurance has rapidly expanded in recent years as a result of statutes like the Dodd–Frank Act and, of course, the Affordable Care Act.

Despite the importance of insurance law and regulation in the real world, the field is notably underrepresented in the legal academy. Insurance-law classes are rarely offered at many law schools, and remarkably few law professors devote their scholarship principally to insurance-law issues.

I'm particularly grateful to have received the ALI's Early Career Scholars Award in light of insurance law's low profile at law schools. By providing invaluable opportunities like this very speech, the ALI Early Career Scholars Award helps offset the occasional challenges to working in a field that is not naturally glamorous or heavily trafficked but that has an outsized potential to influence the law.

So now that I've described how much I value the opportunity to explain my research to audiences like this one, let me actually do so. If there's a single theme to my work, it's that many of the assumptions on which state insurance regulation is premised are outdated or simply wrong.

As a result, much of the current system of state insurance regulation is, in my view, obsolete, ineffective, and inefficient. As you can imagine, I'm not always the most popular person at gatherings of state insurance regulators.

Before I can elaborate on these conclusions, however, I'll need to explain some limited background about the history of insurance regulation. So brace yourselves. The regulation of property/casualty insurance markets has long been premised on the idea that insurers sell standardized products in naturally uncompetitive marketplaces.

As a historical matter, this description was roughly accurate. Throughout the 19th and much of the 20th century, competing insurers sold coverage through standardized contracts that they collectively drafted in various industry organizations.

Rival insurers cooperated in devising their insurance policies to support an even more aggressive form of collusion—price-fixing of the rates at which their policies were sold. Lawmakers initially attacked insurers' collusion as anti-competitive violations of antitrust laws. But eventually, they came to understand these efforts as natural and even socially beneficial. Collective rate setting and policy design across competing insurers, they determined, allowed property/casualty insurers to develop the infrastructure necessary to accurately predict losses and avoid ruinous competition.

In the absence of such cooperation, insurers would have limited historical data upon which to price their coverage, regulators figured. This lack of historical data would then exacerbate the risk that insurers would underprice their policies in response to competitive pressures. If policyholders' losses were less than expected, insurers would make a profit, and if they were much more than expected, then the losses would be borne, at least in part, by policyholders who wouldn't receive full payment on their claims.

These concerns weren't just theoretical. The 19th and early 20th century repeatedly witnessed this pattern of insurer boom and bust, most notably in the wake of the 1906 San Francisco earthquake.

Modern insurance regulation responded to this history. In particular, insurance regulation evolved in the mid-20th century to explicitly permit property/casualty insurers' cooperation on rates and the contracts they sold.

But to try to prevent the usual problems associated with collusion among competitors, states, the primary regulators of insurance markets, established elaborate procedures to review property/casualty insurers' rates to ensure that they were not excessive or unfairly discriminatory. This approach drew from the regulation of public utilities, which were also understood to supply consumers with essential standardized products in naturally uncompetitive marketplaces.

States also developed an elaborate scheme of solvency regulation to ensure that carriers were financially healthy enough to pay claims when they came due. These rules applied with particular force to life insurers, which posed unique financial risks due to the long-term nature of their policies and the fact that they incorporate both savings and investment components.

Okay. So with this historical background in place, let me now elaborate on why I believe that so much state insurance regulation is premised on outdated or incorrect assumptions. My scholarship develops this theme in three broad areas—the lack of transparency in property/casualty insurance markets, the failure of rate regulation also in property/casualty insurance markets, and the limitations of state solvency regulation, particularly in life insurance markets.

Turning to the first of these themes, the regulation of property/casualty insurance markets has fundamentally failed, I believe, to promote transparent insurance markets. Historically, the standardization of policy forms across competing insurers limited the perceived importance of market transparency. After all, purchasers don't have much of a need to know what their products consist of if they can't effectively choose among competing carriers that sell different products.

But the premise that property/casualty insurance markets are completely standardized across different carriers, it turns out, is simply false in modern-day property/casualty insurance markets. For instance, competing carriers' homeowner's policies differ radically with respect to numerous important coverage provisions, with a substantial majority of these deviations decreasing the amount of coverage relative to the presumptive industry baseline.

These variations in coverage span fairly straightforward coverage issues like "Is mold covered?" to relatively more obscure, but perhaps even more important coverage provisions like subrogation rights, concurrent causation, intrinsic loss, and increase-of-hazard clauses.

These variations in policy terms can have a dramatic effect on the value of the products that competing carriers sell. Yet ordinary consumers and market intermediaries have virtually no capacity to observe these variations in insurers' coverage obligations. Not only do insurers generally refuse to provide consumers with insurance contracts until after they purchase coverage, but they also generally refuse to make these contracts readily available to the public by posting them online.

In many cases, not even state insurance regulators have ready access to competing insurers' policy forms. And the vast majority of states do not require insurers to disclose the central terms of coverage in a standardized format that might be comprehensible to policyholders or, at the very least, market intermediaries.

Nor is the lack of product transparency in most insurance markets limited to the terms of competing insurers' contracts. For instance, a key component of any insurance product is not just the contract itself, but the carrier's approach to interpreting and applying that contract when a claim is made.

Yet insurance regulation does virtually nothing to make information on this crucial issue publicly available. To the contrary, while state regulators already collect robust information on how quickly different carriers pay claims, how often they deny claims, how often they're sued by policyholders, state insurance regulators affirmatively refuse to make any of this information publicly available, citing consumer confusion and, you guessed it, greedy plaintiffs' lawyers.

This lack of transparency in insurance markets harms consumers in a variety of ways. Most obviously, it undermines socially efficient competition among carriers, creating incentives for them to water down their insurance policies and strategically deny certain large claims when they believe doing so is unlikely to generate negative publicity or lawsuits.

The opacity of insurance markets also undercuts consumer choice, limiting the ability of policyholders to make individualized and informed tradeoffs between costs and coverage.

The second broad theme of my work is that insurance-rate regulation in property/casualty insurance markets is also based on outdated assumptions, erroneously drawn from public-utility regulation when the more apt paradigm is one centered on civil rights and social inequality.

Recall that modern-day insurance-rate regulation is premised on the idea that insurance markets are akin to a natural monopoly because insurers must naturally collude when setting their rates. Regulation prohibiting insurers from charging excessive rates was originally designed to counteract the social harms that ordinarily result from such price-fixing arrangements among competing insurers.

But not only do insurers depart from standardized policy forms, they also no longer collectively set their rates, a practice that was formally terminated several decades ago. Although insurers do continue to pool certain data, there is limited risk that these efforts could, in any way, facilitate price-fixing of the type that originally motivated the prohibition on excessive rates in the first place.

In light of these realities, public-utility-style regulation prohibiting excessive rates in insurance quite simply makes no sense. States' continued focus on public-utility-style rate regulation not only inefficiently distorts insurance markets, but it also, in my view, undermines the type of rate regulation that insurance markets actually require—regulation to prevent unfair discrimination against socially disadvantaged groups.

Borrowing further from public-utility regulation, which requires public utilities to charge rates that are demonstrably based on cost, state regulators have long understood laws prohibiting unfair discrimination in insurance to require only that insurers' rates be based on the projected costs of covering policyholders.

As a result, insurers in many states are free to discriminate against socially disadvantaged groups so long as they can amass supporting actuarial data to do so. Although laws prohibiting such actuarially fair discrimination exist, they're radically inconsistent across state lines, group characteristics, and coverage lines.

Thus, insurers in many states can charge higher prices to individuals or refuse to insure them at all on the basis of their sex, income, sexual orientation, and age. Even when states do prohibit insurance discrimination against discrete groups, they almost universally interpret such prohibitions narrowly so that they only apply when insurers directly discriminate against protected groups.

By contrast, states have almost universally ignored the prospects that insurers might indirectly discriminate against socially disadvantaged groups by relying on facially neutral risk-classification schemes that have a disparate impact on these groups.

To take just one example, commercial-property insurers in many states have long refused to provide coverage for buildings that rent units to tenants who receive Section 8 federal housing assistance. These tenants, not surprisingly, are disproportionately poor and minority.

The result of such insurance discrimination is predictable. It harms low-income and minority renters by increasing the cost and decreasing the availability of housing for these groups. Yet most states have not required insurers to consider whether less discriminatory options are available in addressing any distinct risks that may be posed by buildings that rent to Section 8 beneficiaries. And in many cases, they haven't even asked whether there are any such risks in the first place.

Ironically, states' failure to seriously grapple with unfair discrimination in insurance has also allowed criticisms against legitimate forms of insurance discrimination to persist. For instance, insurers' use of credit information in rating and underwriting auto and homeowner's insurance has long proven quite controversial. Some consumer advocates argue that the practice harms minority and low-income communities.

Even more importantly, they often suggest that insurers use credit information specifically because it correlates with policyholder wealth or race. This is not merely a disparate-impact argument, but an argument that insurers indirectly discriminate against suspect groups to avoid laws and norms prohibiting more direct forms of discrimination.

But empirical research provides reasons to doubt these criticisms. In fact, the predictive effect of credit information for assessing auto and homeowner's risk is unrelated to policyholder income or wealth—or race as well.

The third and final theme of my work that I want to emphasize today involves yet another outdated assumption that I believe undermines the effectiveness of state insurance regulation. As you may recall, a central goal of insurance regulation is to ensure that insurers have the financial capacity to pay claims when they come due, particularly in the life-insurance sphere.

State insurance regulation generally accomplishes this quite well. But its emphasis on this goal obscures other critical financial regulatory objectives, such as preventing insurance firms from undermining financial stability.

And as the 2008 financial crisis so vividly illustrated with the collapse of AIG, the assumption that insurance firms cannot be systemically risky is no longer accurate. Life insurers in particular play an increasingly vital role in capital markets and engage in a variety of activities—including securities lending, guaranteeing against financial risk, and issuing products that allow policyholders to withdraw funds on command—that can and do pose systemic risks to the broader financial system.

As with market transparency and rate regulation, though, state insurance regulation has not adjusted to this new reality. Instead, state regulators continue to focus solvency regulation almost exclusively on individual insurance companies rather than on groups of affiliated companies.

This legal-entity-based approach to insurance regulation is fundamentally ill-equipped to prevent insurance-focused conglomerates from becoming systemically risky. Indeed, state regulators' narrow focus on individual insurance entities is the primary reason that they failed to prevent the AIG fiasco in the first place.

State insurance regulators did not observe AIG's derivatives operations, because they took place in a legal entity that was not technically an insurer at all. Meanwhile, state regulators overlooked the grave risks associated with

AIG's security lending operations because they, too, were channeled through noninsurance affiliates.

More broadly, as in the parable of the visually impaired men examining an elephant, state regulators failed to identify and prevent the AIG collapse because they each focused on discrete entities, within the sprawling conglomerate, without appreciating the ways in which these parts related to one another.

And in this regulatory domain at least, the law has adjusted to the limitations of state insurance regulation. Dodd–Frank empowered a council of federal regulators, known as the Financial Stability Oversight Council, with the authority to designate nonbank financial conglomerates like AIG as systemically risky.

Such a designation enables the very holistic enterprise-wide financial-stability regulation that is absent from state insurance regulation. Nonetheless, this reform has occasioned considerable controversy, and the primary Republican financial-reform plan would eliminate it. To be sure, criticisms of FSOC's designation mechanism are not without justification.

FSOC designation decisions have not always been a model of transparency or analytical precision. But critics of FSOC's designation power generally misunderstand the primary purpose of this tool. As these critics have themselves demonstrated, FSOC does not and cannot precisely distinguish between firms that pose a systemic risk and firms that do not.

Quite simply put, none of us understand enough about systemic risk to confidently make such predictions. But the answer to this limitation is not to replicate the regulatory structure that brought us AIG in 2008 by deferring to state insurance regulation and its lack of effective enterprise-wide financial regulation.

Instead, the possibility of FSOC designation ultimately deters nonbank financial firms from seeking out systemically risky strategies or activities, notwithstanding the questionable precision or predictability of the designation process.

Perhaps just as importantly, the prospect of FSOC designation induces primary financial regulators generally, and state insurance regulators in particular, to pay more careful attention to systemic risk issues by threatening to impose additional restrictions in supervision on the firms they regulate if they fall short in these efforts.

Let me conclude where I started. Insurance regulation is vital to our economy and to the work of thousands of lawyers. Yet insurance regulation is in various fundamental ways premised on outdated assumptions about the structure of insurance markets and the risks posed by insurance firms.

At times, this results in excessive regulation, and at other times, it results in inadequate regulation. Either way, I continue to believe that these issues are deserving of more attention than they currently receive.

I hope that my work will begin to move both the legal academy and the practicing bar in that direction, and I am immensely grateful to the ALI for assisting me in these efforts by awarding me with the Early Career Scholars Award.

Thank you. (*Applause*)