LITIGATION

GOVERNMENT BY LITIGATION: ARE CLASS ACTIONS SUBVERTING THE POLITICAL PROCESS?*

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The Honorable Viet Dinh, *U.S. Department of Justice Office of Legal Policy*
Dean Mark F. Grady, *George Mason University School of Law*
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MR. McCONNELL: My name is Bob McConnell, and I'm the Chairman of the Federalist Society Litigation Practice Group. On behalf of the Society and the practice group, I'm very happy to welcome you all here today.

I look forward to our panel discussion today, and to moderate and introduce our panelists is Brian Brooks of O'Melveny and Myer. Brian graduated from Harvard, and Chicago Law School. He's Co-Chairman of the Federalist Society Subcommittee on Class Actions, and his practice primarily deals with very complex class action litigation against highly regulated industries — banks, insurance companies, and telecommunications companies.

Brian will take over from here.

MR. BROOKS: Thanks very much, Bob, and thanks to everyone in the audience for coming to our panel discussion today. "Government by Litigation: Are Class Actions Subverting the Political Process?"

We at the Federalist Society are very, very excited about having such an extraordinarily distinguished panel of speakers today. Our first speaker will be Congressman Bob Goodlatte of the 6th District of Virginia.

When we first started planning this event a couple of months ago, we knew that the primary thing we needed for this to be a success was a leading congressional expert on litigation reform, and the very first name that came to our mind was Congressman Goodlatte. Congressman Goodlatte has emerged over the past several years as probably the House's most sophisticated and most serious student of the class action issue. Congressman Goodlatte is the primary sponsor of H.R. 2341, the Class Action Fairness Act. Among other things, that bill would expand federal jurisdiction over interstate class actions in cases where the amount in controversy, in the aggregate, exceeds $2 million, and the class members, or at least some of the class members, are citizens of different states from some of the defendants.

That sounds a little technical. Let me tell you from the defense bar that is the critical issue; it may well be the only issue in many lawsuits. As Congressman Goodlatte has recognized, there are fundamental justice issues in situations where a company may have to defend a nationwide class action which alleges damages in the billions of dollars in state courts some place. Congressman Goodlatte's bill will change all that — we in the defense bar think, for the better.

This legislation, as I say, is really considered critical by many of us in the business community, since the prospect of defending your nationwide business under one state's law in one state court really is perhaps the seminal class action issue of our day.

Congressman Goodlatte is a graduate of Bates College and the Washington and Lee University Law School, and practiced law in his town of Roanoke, Virginia for 13 years before being elected to Congress in the Class of 1992.

I am very pleased to have the Congressman with us today, if we could just give a warm welcome to Congressman Bob Goodlatte.

CONGRESSMAN GOODLATTE: Brian, thank you very much. I appreciate the opportunity to pitch this bill to you. I'm not sure this is the order that you originally wanted to have this go. I'm going to get very little lunch and do a lot of talking — and I have to warn you about that before I start.

I have to warn you that recently I spoke to a high school class in my district. At the end of the hour, I asked them if they had one hour left to live, what would they spend that hour doing. And a lot of hands went up and they had a lot of great suggestions about places they'd want to go or things they'd want to do. But one young lady raised her hand. She said, "Congressman Goodlatte, if I had one hour left to live, I would want to listen to you speak."

Well, I smiled and I said, "Well, now let me get this right. If you had one hour left to live, you would want to spend it listening to me speak?"

She said, "Oh, yes, because each moment seems like an eternity."

The bill that I want to talk to you about, the Class Action Fairness Act of 2001, is very similar to a bill that I introduced in the last Congress that passed the Judiciary Committee and in fact passed the House of Representatives with bipartisan support. We have introduced that bill with some new provisions, which we think enhance it and make it even better. But it still retains that core provision that Brian just referred to. And it's one that I think is very important. What we

are intending to do here is to place complex class actions in the courts that we feel were designed to handle the most complex litigation involving parties from a multitude of different jurisdictions.

There are many federal laws that become the basis for class actions and are brought in our federal courts and do result in, effectively, legislating through our courts, through the class action process. I have my concerns about that, but that is not the focus of this legislation.

The bill's focus is to get into federal court questions of diverse jurisdiction that have a national impact, that can have the effect of legislating through our judicial system, and place them in courts where we think a more consistent standard will be applied, especially on the question of what class actions should be certified as a nationwide class.

The problem arises in this way. For a case that does not involve a federal question but rather simple diversity of jurisdiction, the federal diversity rules require that you must allege at least $75,000 in damages for each plaintiff in the case.

So, if you have a case that involves a million plaintiffs and the average claim is $50,000, or what is effectively a $50 billion lawsuit, that case cannot be brought in federal court under our laws. That is because it doesn't meet the $75,000 per plaintiff test to get into federal court, even if the defendants are all over the country, the plaintiffs are in all 50 states, and you have the diversity that would be required.

What this bill does is change the $75,000 per plaintiff requirement to $2 million for the entire class. That will bring the vast majority of these cases into federal court. Now, if you have a class action that clearly involves exclusively plaintiffs and defendants in one particular state, they will not be able to move their class action to federal court, nor should they be able to.

But what this will do is greatly limit the ability of plaintiffs' attorneys to forum shop. Forum shopping in class action suits is a lot different than if you're bringing an individual lawsuit, where you can choose between a few jurisdictions and maybe you can choose between state court and federal court.

That is something that, in my opinion, is wrong, where in a federal class action case, you can choose from literally 4,000 different jurisdictions in the country, so that one state court judge in a county in Alabama several years ago could certify more nationwide class action lawsuits than the entire federal judiciary combined. The attractiveness, for whatever reason, of bringing the cases in his court, whether he was more generous than anybody else in terms of certifying class actions, or juries were historically known to be more generous in that jurisdiction, I don't know.

There are particular jurisdictions around the country that are favored by class action attorneys to bring these suits. Once they are brought there, because of the current federal rules, there is no way to remove them into the federal system, which is designed to hear cases involving people from a variety of different states. That, I think, is something that we need to correct.

I do not believe this is a states' rights issue. In fact, if I were to call it a states' rights issue, I would say that our bill creates more states' rights. Here is the reason why. It is, in my opinion, improper for that state court judge in that jurisdiction in Alabama to be deciding state laws in the other 49 states without anybody having the option of seeking another jurisdiction, a federal jurisdiction, to hear the case. The federal courts — in my opinion and the opinion of many others — will more uniformly apply a standard that will limit some of these class action abuses.

You've all heard the abuses, of cases where an ingredient was left out of a box of Cheerios. No harm was shown to anybody, but the case was brought. The plaintiffs received coupons for Cheerios. The plaintiffs' attorneys received millions of dollars in attorney's fees.

We have a case, a class action, against mortgage lenders, in which the plaintiffs were required to pay $91 and some odd cents each to pay their class action attorneys, in a case in which they supposedly had prevailed. Even though they were essentially made a party to a class, they had no idea they'd wind up getting a bill for their endeavors.

Most members who are parties to these classes have little or no understanding of what is entailed in their being made a part of the class. Just last Fall, I received notice of a proposed settlement in a class that I was a member of and never noticed whatever original paperwork was sent to me notifying me that I was a party in this plaintiff's class action suit. I happened to have Massachusetts Mutual Life Insurance coverage, and there is a case pending in a state court in Santa Fe, New Mexico, in which I have apparently been, for quite some time, a plaintiff, but had no knowledge that I was. I did somehow get the booklet that announced the settlement of the case, and it concerned me greatly. Basically, the basis for the class action is that Massachusetts Mutual has not told me that if I pay my insurance premium in one payment at the beginning of the year, instead of four quarterly installments, I'll effectively save money. I'll be saving a little bit of interest based on the fact that I paid it in the four quarterly installments. I'll save a little bit of money by paying the whole thing up front at the beginning of the year. I already know that I have the opportunity to do that, but apparently they didn't disclose it in a way that may be required under some laws.

So, the settlement was that, as a member of the class, I would get notification in the future that I could do this. That's my settlement.

There were two named plaintiffs in the case. One would receive $100,000; one would receive $50,000. I'm not sure why because they have not suffered those kind of damages. And the plaintiffs' attorney would receive a structured payment of attorney's fees worth $13 million. That's the kind of abuse that we're concerned about. We just believe that bringing these

cases into federal court will achieve a more standard way of dealing with these cases. Judicial scrutiny of this will, I think, lead to a fairer system.

That's the principal provision. There are other provisions in the bill, and let me refer you to those. First of all, it has a provision for consideration of administrative remedies. The bill provides that a judge entertaining a class action must determine, as part of the certification inquiry, whether consideration of the issue by an administrative agency with jurisdiction over the matter would be preferable to class litigation. If so, the class would not be certified. This provision codifies a current best practice used by the federal courts.

Next, it has a plain English requirement. The bill provides that notices sent to class members, which usually are incomprehensible and often are thrown away by the recipient — and I may in fact be guilty of that myself — must be written in plain English and must present essential information in an easily digestible tabular format.

It has a provision for these famous coupon settlements. It has special judicial scrutiny that is required for settlements that provide for class members where coupons are the only relief for their injuries.

It has a provision that bars approval of settlements in which the class members suffer a net loss. That would deal with that case I just referred to where the plaintiffs ended up paying $91 each.

It has a payment of bounties provision that precludes payment in cases that would result in the interests of the class representative significantly diverging from those absent class members.

And, it has a settlement based on geography provision, which provides assurance that out-of-state class members are not disadvantaged by settlements that award some class members a larger recovery because those class members live closer to the state court. That is the named plaintiff that I just mentioned in the Massachusetts Mutual case.

It also deals with interlocutory appeal of class certification decisions. Because the court certification decision is often decisive, a decision to certify may place insurmountable pressure on the defendant to settle, while a refusal to certify may force the plaintiffs to abandon their claims. The bill permits immediate appeal of certification decisions, as a matter of right.

That gets, I think, to the core of what you are considering today. That is, the effect of class action lawsuits to litigate effective changes in the law without them going through the legislative process, something that is of great concern to me.

I see a tendency on the part of defendants to evaluate these cases strictly on an economic basis — an entirely understandable perspective that they have — if the litigation and the risk of paying just a few dollars to millions of plaintiffs adds up to more than what it would take to give a nominal settlement of coupons or, in the case of Mass Mutual, a notification to their policyholders.

But a large recovery of attorney's fees that makes it attractive for the plaintiff's attorneys and defendant's attorneys to urge the settlement on the court because they can get out for less than whatever they consider their risk to be has the effect of changing law based simply upon the attractiveness of the settlement to the litigators, as opposed to even the plaintiffs in the case.

Being able to remove these cases to federal court seems to me to be appropriate, and will result in a fairer standard. It will greatly reduce the ability to forum shop and it will assure that complex cases get into federal court. Right now, if you have a simple slip and fall case involving a Maryland plaintiff and a Virginia defendant, involving $75,000 dollars, that case can be brought in federal court.

But, if you have a complex class action case involving claims of hundreds or thousands of dollars by each of a million plaintiffs, totaling billions of dollars in claims and involving plaintiffs in all 50 states and defendants in a multitude of states, that action cannot be brought in federal court. It will be left in a state court, where a judge may or may not be qualified and equipped to handle the case but will definitely be empowered to make decisions not only for parties in his or her state but also in the 49 other states. To me, this is a states' rights issue as well. It is something that the federal courts were designed to handle, equipped to handle, and should be allowed to handle.

Thanks for letting me join you this morning.

AUDIENCE PARTICIPANT: Mr. Goodlatte, my question regards state cases with state plaintiffs and state defendants within the same state. I believe there's an exception in your bill for that. To the best of my knowledge, it requires a substantial number of plaintiffs and a substantial number of defendants. I'm curious as to how you would like a judge to interpret that language and how much discretion you have to give federal judges to interpret that.

CONGRESSMAN GOODLATTE: Well, the bill gives them considerable discretion, and it's a good question. I do not have a number that I can give you and say, under these circumstances, you have to have a certain percentage of the plaintiffs in that state. But what we intend to say is that if the case is overwhelmingly oriented toward that state and you just happen to have a few plaintiffs that are outside that state, we want to give the federal judge discretion to say "That case really does belong in state court, and I am going to send it there." But there are no hard and fast definitions that I'm aware of for that.

AUDIENCE PARTICIPANT: Thank you.

CONGRESSMAN GOODLATTE: I also want to say that this is a bill that has strong bipartisan support. As I mentioned, it passed the House last time. Congressman Jim Moran, Congressman Rick Boucher, and a number of other Democrats are co-sponsors of this legislation, as well.

MR. BROOKS: Thank you very much for that terrific presentation on the bill. It reminds me of one of the formative experiences that I confronted as a young lawyer litigating the breast implant class action litigation in Louisiana.

In that case, a nationwide settlement class had been certified by a judge in Birmingham, Alabama, which did not deter the state judge in Orleans Parish, Louisiana from having her own state court proceeding at war with the federal settlement. And that has really shaped my view of the consistency issue ever since. So that is an exciting presentation.

Let me take a moment now to tell you a little more about the parameters of the discussion and the debate that we now hope to have on the topic of regulatory class actions — class actions that address policy questions that are often expressly covered by existing regulations or existing statutes at either the federal or state level, but that nonetheless are said to give rise to tort liability. That really is the substance of what we hope to get the remaining panelists to talk about.

We have on both sides of this issue, I think it is fair to say, the leading exponents of the opposing views — which is why we now have a chair between Mr. Dinh and Mr. Scruggs. That seems only safe.

Let me give you a few examples of the kinds of class actions that we are talking about today. Maybe the best example is the managed care litigation, which Mr. Scruggs and I are intimately familiar with, as are some members of the audience.

Managed care, in essence, argues that the use by insurance companies of certain practices, some of which are either permitted and blessed by state regulators, or even in some cases required by the Federal Department of Health and Human Services, nonetheless effectively amount to fraud if those practices are employed without express, detailed disclosures to the managed care subscribers.

To give one example, the Department of Health and Human Services requires that insurers that are Medicare providers in their part of the country use certain computer programs to review the claims submitted by doctors to make sure that the bills are submitted correctly. This is supposed to be a cost containment measure. They are required to do that by federal law. But one thesis, among others, of the managed care class actions is that doing so without expressly disclosing it to the managed care subscribers is fraud and racketeering conduct.

Example two — the national cell phone transactions pending in federal court in Baltimore. The allegation there is that manufacturers of wireless telephones, who are commanded by the FCC to emit power outputs at certain levels so that they can connect to the wireless network, are nonetheless producing an unreasonably unsafe product if they emit at their licensed level, unless they incorporate additional safety features.

Example three — the national litigation against the gun manufacturers brought by municipalities around the country. The theory here, at least in many of the cases, is that the manufacturers are liable if they fail to police the distribution practices downstream in the sales network, even though those kinds of requirements have been debated and rejected in various gun control legislation that has been considered at the federal and state level.

Example four — the rumored class actions, not yet filed, over the reparations issue associated with America's troubled history with race relations. Here is an issue that the country has fought wars about, passed laws about, and continues to debate in one of the most difficult social and political issues of our time. The question there is, is that an issue that ought to be hashed out by our elected representatives as part of the national debate, or is that an issue that ought to be resolved by an award of money through judicial fiat?

These are tough questions, and those are the kinds of class actions we'd like to talk about today. Now, I recognize that the cases that I've just described are each unique in their own ways. But there are common threads which I think this discussion will help us draw out.

One common thread that occurs in at least many of these cases is they challenge a practice that is expressly permitted or even compelled by existing law. Again, I think of the Health and Human Services example. If a Medicare carrier must use a claims review software or lose its Medicare license, how can it be fraud for the carrier to use that software? Another common theme is that a lot of these cases involve a novel theory of injury that the common tort lawyer wouldn't recognize. The traditional tort doctrine says that to recover in a negligence case, you must show that you have been injured by a practice.

Many of these regulatory class actions that we are talking about today, though, don't allege injury, and indeed they disclaim it. Here, the best example that comes to mind is the cell phone class actions. The class that Peter Angelos and others allege in that case is the class of all cell phone users except those who have acquired cancer. So it's everyone who hasn't been injured and who uses a cell phone. The allegation is that there is a forward-looking risk that can be compensated through damages today. That is a theory of injury which may be viable or may not but is certainly not an injury that a common tort lawyer would recognize.

And finally, the common theme is that these cases all involve very fundamental questions of public policy. We're

not talking here about a plane crash or an oil tanker explosion — a product defect. That's not what we're talking about. We're talking about issues that are nationwide in scope, that are recurring, that don't associate themselves with any one instance of wrongdoing, but instead focus on broad questions and broad practice. Is managed care a good method for delivering healthcare? Are cell phones a reasonably safe means of communication, or ought there be a different means? Should there be reparations for slavery or a political and social settlement of that issue? Those at the nub are the issues that we're going to talk about today.

Now, the panel that we've assembled is, as I've said, truly distinguished. The first person who we're hoping will stand up and speak to the social issues today is Mr. Dick Scruggs of Mississippi. Mr. Scruggs, I think, can explain the good points of these kinds of class actions, if anybody can, which I take to be a debatable topic. Mr. Scruggs' achievements in the plaintiff's bar and in court are nothing short of legendary. Anyone who has seen the motion picture *The Insider* is well aware that although he did not get the movie part, he was nonetheless the architect of the highly successful plaintiff's class action structure.

I first became acquainted with Dick a couple of years ago when we met in a hotel in Miami preparing for the opening hearing in the *In re Managed Care* litigation, the plaintiffs' bar's assault on the nation's healthcare system. And his leadership in shaping the kinds of class actions that we're talking about today, his effectiveness, the fact that he beats us so often, has been recognized in nearly every major news outlet — *The Washington Post*, *The Wall Street Journal*, *60 Minutes*, *Forbes*, *Business Week* and others.

But I think the story of his career that I like the best, or that rings the truest to me as a member of the defense bar, was the December 1999 story, "Who's Afraid of Dickie Scruggs?" And that, as they say in the Academy, is the kind of question where to ask it is to answer it.

Dick is a graduate of the University of Mississippi and its law school. He is a fellow of the International Academy of Trial Lawyers and is a principal in the law firm in Pascagoula, Mississippi. He also is a noted civic leader, having received the 1997 Mississippi Citizen of the Year Award from the March of Dimes Foundation. And in my view, in my humble opinion, he is perhaps the most eloquent exponent of the plaintiff's side of the debate.

With that, I'd like to introduce Mr. Dick Scruggs. Thank you.

MR. SCRUGGS: You know, I want to thank the Federalist Society for having me here today. I understand we have a distinguished jurist here, Judge Boggs from the 6th Circuit. Judge, I appreciate your coming and indulging this. I don't know if there are any other federal or state court judges, but I want to recognize you, if you are.

Every time I've been to a Federalist Society gathering like this, I always felt a bit tarred and feathered when it was all over with — politely, of course. My wife, Diane is here today — my wife, who's joined me today for support.

Are there any other people here who claim to be trial lawyers? I talked to one person. Can I see a show of hands of trial lawyers. My goodness. There are four. I thought the alarm bells would go off in the Federalist Society if trial lawyers came in.

But, my wife always asks me why I come back for more. And I guess the best explanation I have for being here today, or in prior meetings with the Federalist Society, is it's sort of like professional wrestling. I'm the guy who dresses up like the Taliban, comes into the ring and flips everybody off to incite the crowd. So, that's me. I'm the Taliban here today. At least, I feel like a Taliban at a Bar Mitzvah.

But everybody has been very nice to me.

Let me see if I can say a little bit on Brian's message. And I would like to respond, maybe later on, to some of the Congressman's proposed reforms — what he terms reforms — to the class action mechanism that we have in place now.

As you already know, I was part of the core group of trial lawyers that, along with a group of attorneys general, took on the tobacco industry seven or eight years ago. It resulted in litigation, which was ultimately very successful — probably the largest monetary recovery, at least, in civil litigation history — some $250 billion. It could have been more if legislation had passed.

During that endeavor, I made friends with a number of other distinguished trial lawyers who cared about the profession, cared about advocacy of groups who had theretofore been inadequately represented due to money or cohesion or organizational skills. But when we finished that litigation, there was a belief among some groups that we were invincible, that litigation was a panacea for all social ills.

I, for one, don't believe that. I don't believe litigation is a panacea for every social ill, but I think it has a role. And the role of litigation, and class action litigation in particular, is one that I would defend. Although there have been many abuses of it, most of those abuses have been rectified on appeal. So, I don't believe there's a need for a fundamental change, except in one area that I'll cover in a few minutes.

My group and my firm have decided on basically three criteria for handling big cases like these that Brian discussed with you a minute ago. First, they have to involve a widespread effect on public health. I don't mean the *Microsoft* case. I don't mean cases that might be otherwise meritorious. But they've got to have some widespread effect on public health. Tobacco is an example; asbestos is an example; managed care is an example — a widespread effect on public health.

The second criteria is that they've got to involve some subjective measure of outrageous conduct; just some gross overreaching by whoever it was who sold the product or engaged in a practice that injured public health.

The third, which is probably the most important one for this debate, is that the issue must just be justiciable. It's got to be something capable of being fixed by the courts.

Again, I don't think every social issue is fixable in court. I shied away from the gun litigation, for example, because I didn't think there was any court order in the country that was going to get 3- or 400 million guns off the street. It's just not going to happen. You can make gun manufacturers pay something, but they don't have a lot of money.

Those guns are out there and they will be forever. They're not consumables like cigarettes, gone in a few months. These guns live for hundreds of years or however long somebody wants to keep one, and you can't get them off the street with a court order; nobody would obey it. So, I thought that was a bit of a windmill that I was not going to tilt at.

But litigation like the managed care litigation has come about, in essence, by default of the political branches of government, I should say, to distinguish both the legislative and executive from the judicial branch.

If you think about it, it's a natural consequence of our governmental system. We are a government of checks and balances. Our founding fathers created three separate branches of government to prevent any one branch or any one man or group of men and women from gaining too much power. It's an ecological system that's set up to prevent anybody from gaining too much power. And I know everybody here agrees with that because one of the Federalist Society principles is freedom.

The price we paid for that, though, was a large measure of inefficiency in government. It's hard, except on issues of the most compelling national interest, to get legislative action. There's a lot of action around the edges. But right now, and for the last decade or so, we have had very divided government. Republicans or Democrats narrowly control the Congress. One president got elected with fewer than 50 percent of the popular vote, or a majority of the popular vote. So, we have very divided government now, and it's very difficult without accepting errors of compelling national interest to get anything done legislatively. What has happened — and I think it's a bit unfortunate — is that fundamental issues of national importance are being defaulted to the courts. The Patient's Bill of Rights is an example. That thing has been all over the place. And I've predicted nothing's going to pass. No Patient's Bill of Rights is going to pass. It might, and I hope I'm wrong. But if it does, it'll be watered down, it'll be compromised and it won't be a fundamental fix for the healthcare system.

That's one of the reasons that litigation, I think, is important. The courts have always provided a safety net when the legislative or political branches of the government are stalemated. They've always provided a safety net. Now, it's not their job to do that but it's just a fact of life. And if the courts don't do it, is isn't going to happen.

I'm going to talk about class actions for a minute. Most of you in this room, I suspect, think class actions are bad because of some of the abuses that the Congressman talked about earlier, and others will talk about, and many of you have read about. There have been many abuses of the class action mechanism.

But right now, you're worried about class actions as a sword. It's a very effective — I won't say it's an effective sword. It can be an effective sword, properly used, to vindicate rights, if there are lots of people who have been injured. It raises the stakes very high for a company that might have to bet its existence on one trial before one judge.

What this bill the Congressman described a minute ago was intended to do was to essentially not to change that, but to put the debate from the state courts into federal court. And that's a political judgment actually, is what it is. It's not because the federal judges — Judges Boggs, no offense — are all smarter than state court judges or that complex litigation was designed only for federal court and not state court. It's because the political reality is that most federal judges over the last two decades have been appointed by Republican presidents. That doesn't mean they are not fair; it just means that they have a different philosophy of life and of society than of judges appointed by, perhaps, Bill Clinton would, who were are arguably more activist and more ready to change things.

So, the bill that I heard described before is designed to federalize it, just to gain an advantage of the playing field. The fundamental changes — the coupon settlements, those settlements — nobody's going to defend coupon settlements. I think you all know what that was, where all the alleged plaintiff or class member gets is a discount off the next purchase of whatever product it was that hurt him. Those things are preposterous and they don't speak well for the class action bar. I've only been involved in two class actions. One was the managed care litigation. In the other, I'm actually defending the company — I've gone over to the dark side of the Force. I'm defending an orthopedics company. It sold about 30,000 defective hips that had to be recalled, many of them after implantation.

One of the reasons that I think class actions are necessary is because there is no legal vehicle for a company to extricate itself from litigation, even if it wants to, even if it wants to pay substantial sums, if it wants to put all of its insurance in the pot, there's no way for a company who does business nationwide to extricate itself from mass tort litigation other than the class action vehicle, or bankruptcy.

I would argue that there should be an intermediate vehicle available for companies who have a manufacturing accident that injures a lot of people. There ought to be some intermediate vehicle for them to make recompense without going bankrupt.

Now, there's a lot of economic interest here, and some of this is inside baseball. There are a lot of economic interests

that want to keep the current system, and there are a lot of economic interests that want to change the current system. Strangely enough, many of the proponents of class action reform are the traditional trial lawyers.

There are two camps of trial lawyers on this issue, at least. One is the traditional trial lawyers who want to try their cases one by one. Most of those are led by my good friend Fred Baran and others, who have developed relationships in rural counties or in other counties around the country where they have an elective judiciary.

Many of the judges were elected with voter money. So, they have basically what I call judgment bills. They can beat everybody in the country to trial, large numbers, huge verdict numbers. The jury will come back with whatever the lawyer writes on the board. What happens in the courtroom is almost irrelevant. These cases are won in the back roads of the counties.

They put a company in an impossible position to have to bond the huge judgment. They'll come back with a billion dollars in the most trivial case. And you put a company under pressure that won't even get a chance to appeal it and get it reversed. That group is opposed to the present class action system and would probably advocate many of the things that Congressman recommended a few minutes ago.

Another group that would oppose class action reform is the defense bar. Large defense firms — some of you may be here today — defense firms are structured to defend cases all over the country. They've got, in some cases, thousands of lawyers that they've got to feed. They're vested in the traditional trench warfare, case-by-case, run up a lot of money, discovery, make it as expensive as they can not only for the plaintiff but for the client until they have exhausted the insurance policy.

And the client, in most cases, like 70 percent of the asbestos companies, ends up going into bankruptcy.

The traditional defense firms are opposed to class action reform, many because it's their bread and butter.

But I'll close this part of what I'm saying by asking you to carefully consider the class action vehicle before you throw it out, or before you make fundamental changes that might have unintended results. It's the only present bill for settling mass tort cases short of bankruptcy. And I think if you throw the baby out with the bathwater, you're also going to be sorry about it.

Thank you.

MR. BROOKS: What I thought we would do is go through the panel presentations, and then take questions and we'll get into it a little bit, with some interaction among the panelists, if that is agreeable to everybody.

Our next speaker is an old friend of mine, Viet Dinh, and it is a real treat to be here to introduce him in his capacity as Assistant Attorney General of the United States. Viet and I started our legal careers together at O'Melveny and Myers back in the day. And even then, I must say it was clear that his intellect and energy would make him, one day, a leading force in American law; here he is today to prove that.

Viet's life story is an inspiration to me. He came to the United States at the age of 10 as a refugee from Vietnam. Twelve years after that, he found himself graduating magna cum laude from Harvard College. It took only three more years to graduate with high honors from Harvard Law School, two more to clerk for Justice O'Connor at the Supreme Court.

Since then, his rise has been truly meteoric, if you ask me. He has served as associate special counsel on the Senate Whitewater Committee, special counsel to Senator Pete Domenici on the impeachment trial. He was professor of law at Georgetown Law Center and now is Assistant Attorney General for the Office of Legal Policy at the Department of Justice. In that capacity, he is the nation's highest official on legal policy questions, such as those we're here to talk about today.

One reason I'm so excited to have Viet here with us today talking about this particular topic is that in 2000 he wrote a *Georgetown Law Journal* article entitled, "Reassessing the Law of Preemption," which I think to be an early classic in the field. When we talk today about the interplay of running a federal regulatory regime, on the one hand, and policing the conduct of regulated entities through the civil litigation system, on the other, there is not a lawyer in Washington more qualified than he is to talk about those implications.

So, with that, let me welcome Assistant Attorney General, the Honorable Viet Dinh.

MR. DINH: Thank you, Brian. And now I'm at the podium and have the honor of disproving everything that Brian just said about my capacity.

My name is Viet Dinh, and it's great to be here at the Federalist Society. I am looking forward to learning what the Federalist Society stands for. A little inside joke — sorry.

I think there's a lot of agreement here. Certainly, even if we play true to our role as the two primary antagonists — Dick Scruggs and I represent the two polarities on the topic of debate — I think there would still be a lot of disagreement. But the disagreements, while they are very vigorous and vociferous, will deal with the details and the margins, rather than over the broad concept.

After the famous B is greater than PL formulation of Learned Hand in tort law that we all learn in first yearand certainly with the law and economics movement that is championed by Mike Grady and so many others at the George Mason Law School, we all recognize that litigation is policy.

Litigation is regulation. Even minor litigation, single case litigation, is tort policy, simply because the judgment in any one particular case will affect future primary conduct. Otherwise, future actors will be subject to potential liability, and people want to avoid that potential liability. So, any single judgment, to a smaller or greater degree, has an effect on primary conduct and in that sense is regulation.

There is a role for litigation in shaping that regulatory policy. I think that one of the great advances in the law and economics movement and the legal realism movement of the last century is that people recognize that the tort system is not principally — and I would argue, not even primarily — about traditional remediation or redress, but by and large and increasingly so in many contexts, the primary purpose is for regulatory change and prospective relief.

There is a role for class action in litigation. I think the classic economic analysis, and even policy analysis, is Judge Posner's in the Rhone Pullane case. A number of articles came out of that, as progeny of that economic analysis.

Given those parameters, the question really comes down to, in what cases, in what circumstances, is a class action case the proper place to litigate policy? Again, in what circumstances is a case justiciable in a court, rather than in a policymaking context of the traditional type, like the political branches of Congress or the President.

As we all know, justiciability breaks down into two subparts,who decides, and under what standards? That's a strict constitutional justiciability standard. I don't mean to apply that legal framework to this discussion. It's more a way for us to shape the policy thinking. In what context is it appropriate for the courts to decide versus the political process to decide a matter of public policy, knowing that litigation affects public policy and political processes make public policy to be applied by the courts? And so, there is a symbiotic relationship among the three branches of government here.

Secondly, what standards would apply if the court were to adjudicate, make policy through litigation, or what processes or standards would come out of a political process? There are pros and cons on both sides.

I think that where I would ultimately come down, just to give you the bottom line, is that there is a very important role that class action litigation plays in our legal system. Otherwise, class action reform would not be taking the steps that Congressman Goodlatte has proposed and others have proposed in the past.Rather, such reform would simply eliminate the class action mechanism — take Rule 23 out of the Federal Rules of CivilProcedure and eliminate class action in all the 50 states. The role of class action litigation is why I have not heard anyproposal to do away with it, to throw the baby out with the bathwater. Everybody recognizes that class actions serve a very important function. That is, to solve the collective action problem in cases of numerous plaintiffs and de minimis or marginal remediation, and perhaps beyond.

The reform efforts have been to curb the abuses of the class action mechanism — that is, to answer at a more structural level that question of justiciability. Who decides, and under what standards? And I think that Congressman Goodlatte's bill and the equivalent Senate bill are very, very good proposals to answer those questions.

I constantly get questions, like just now, as I sat down with the Congressman. Where are we, where is the Administration and the Department on the views on those bills? I'm happy to say that the Department and the Administration support, in full, the bill as proposed by Congressman Goodlatte and its equivalent in the Senate.

The reason we support those identical bills is that they bring some rationality to this process and ensure that class action is utilized in a way that would advance the core purposes of the proper administration of justice and curb some of the abuses that exist in the system. I think the minimum diversity requirement for cases over $2 million is a good way to advance the classic rationale behind the diversity requirement: That is, to prevent forum shopping and local discrimination against out-of-state interests.

For the same reasons that the Congressman elucidated, minimal diversity makes sense in the class action context, especially as formulated in the bill, in order to discourage advantageous gaming behavior by disparate players, primarily led by plaintiffs' counsel and representative plaintiffs, to amass individual advantage relative to other plaintiffs and other lawyers, rather than the collective advantage of the entire class or the proper public policy. And so, these bills would go a long way to ensure that the system is not gamed, but rather that the administration of justice proceeds in an orderly way.

Likewise, the section of the bills dealing with the notice provisions ensures that the notice is properly given in plain English so that the class members understand to what they are actually agreeing, or what they would choose to opt out of. That way, we ensure a greater, but still very limited, degree of control of the management of the case to the actual plaintiffs themselves, rather than through obfuscation or legalese, thereby rendering control of that case only to the representative plaintiffs and to their attorneys.

I think these are some of the steps that go a significant way toward curbing the abuses, toward ensuring that those cases, as a policy matter, should be justiciable in court and remain in court. But these cases are adjudicated under a system that is orderly and ensures uniformity in the application of these particular procedural rules.

One other note and as an example of something in which Dick Scruggs and Iboth have personal experience is the Patient's Bill of Rights, which seeks to address some of the issues that are raised in the HMO litigation. Those cases, and especially the ones that are very successfully championed by Mr. Scruggs, reach the criteria that he sets out with respect to the widespread effect and subjective measure of outrageous conduct, depending on whether or not the allegations pan out in court. The question then becomes whether those cases and that kind of policy make sense as a matter of litigation to be made in court as opposed to policy to be made by a political branch.

I hope we all know, because I hope we listen to the President when he speaks — I listen to the President, the ultimate legal policymaker in our system, when he speaks— that he supports a Patient's Bill of Rights. Why does he support a Patient's Bill of Rights? Because some of the efforts in litigation have brought up the fact that our system of ERISA preemption may leave some patients without redress. A Patient's Bill of Rights is basically a relaxation of some of the preemptive effects of the classic ERISA preemption regime. He supports a Patient's Bill of Rights in order to assure that those who are hurt can be compensated and can get redress in a proper manner that advances the public policy. That's why he and all of us worked so hard in crafting what became the Bush-Norwood Compromise in the House, in order to find, through the political process, a solution to this very dramatic public policy problem.

If we did not step up to the plate, policy would be made by individual courts in various locales without assurance of proper participation of affected players, and without proper assurance of uniformity of policy across the land, and therefore fairness to all, which is where policy ultimately should be aimed. So, that is an area where I think that policy should be made, and is being made, at the federal level, in order to make sure that the policy that results is not an *ad hoc*, paperclip and band aid regime that plugs little holes in the system as it exists, but rather results from a comprehensive, duly authorized democratic process of policymaking, as envisioned by the founders of our country.

I obviously think that litigation is very important in filling out the interstices of public policy. But I do not think, where there is a public policy problem as dramatic as, say, patients' rights in the ongoing market redefinition that is shifting toward HMOs, that policy should be made by paperclips and band aids; rather it should be made much more comprehensively so that we address the entire problem from root cause to symptoms, rather than simply just addressing the boo-boos that may arise from case to case.

With that, I'll close.

MR. BROOKS: Having listened to Dick and Viet talk about these issues, I recognize the tantalizing nature of the rule I've imposed, where there won't be any questions until after our last speaker. Let me assure you, our last speaker is, in my humble opinion, the very most interesting legal academic working in America today.

Mark Grady is Dean of the George Mason University Law School, a law school that he has led straight into the *U.S. News and World Report* Top 50, an achievement of which Northern Virginia is justly proud.

Mark began his legal career in the Office of Policy Planning in the Federal Trade Commission, and went on to serve as Republican counsel to the Senate Judiciary Committee in the late 70s. He has been a law and economics fellow at my alma mater, the University of Chicago; a fellow in civil liability at Yale; and a faculty member at the law schools of the University of Iowa, Northwestern University and UCLA.

His *Yale Law Journal* article, "A New Positive Economic Theory of Negligence," really has profoundly affected the way that I understand and think about tort law. And his work exploring the nature of the common law generally is perhaps the basic underpinning of today's conference.

In an article entitled "Positive Theories and Grown Order Conceptions of the Law," Mark develops the notion that was first expounded by F. A. Hayek in the '60s and '70, that systems that grow by small evolutionary steps tend to be more efficient than systems that proceed based on a comprehensive master plan. The implications of that idea for a class action practice should be obvious, or at least in 15 minutes will be obviously.

DEAN GRADY: Well, thank you very much, Brian, for that very generous introduction. I think part of its generosity may derive from the fact that Brian actually met his wife in my torts class. They were both students one year. And in fact, I went to the wedding. They were both wonderful students, and I still remember how enthusiastic Brian was about torts, and the wonderful discussions that we had in that class.

I'd like to recognize some of the George Mason people here. I notice Michael Kraus in the audience, one of our professors. Nice to see you here, Michael. And some of our students over here — Miss Crawford and your colleague.

I'm sure there are many others of you out in our audience because amazingly, although we are only 20 years old, we have the third largest contingent of lawyers up here on Capitol Hill. And considering that the law schools ahead of us are Harvard and Georgetown, on a per capita basis we are clearly the first. So, it's quite a presence that George Mason does have up here.

I was going to say, I feel a little bit conflicted about debating or even commenting critically on what Mr. Scruggs has said because I took the liberty of asking him whether he and his wife Diane would like to put their name on our law school. And he's considering that proposal. He's a very generous donor, which is what gives me hope. I understand he's made a very large gift, both of them, together, to the University of Mississippi, and I congratulate you for that.

It's also nice to see Judge Boggs, who is an alum of George Mason Law School programs offered through our Law and Economics Center. And Viet Dinh, it's very nice to see you again. So, this is a very distinguished panel, and I'm so glad that Brian, my former student, has allowed me to be on it.

I am sure many of you would like to get to the question. I'm a big fan of tort law. The substitute for tort law is none other than command-and-control regulation. And, to the extent that we would lose tort law, I think we would encounter more

of this command-and-control regulation.

The tort system plays a very valuable social role. Certainly, there are abuses and I would like to talk a little about these, too. I don't believe that Mr. Scruggs is responsible for all of them, and maybe not any of them. But many do have the idea right now that there are abuses in the tort system, and perhaps there are. But overall it's a very, very valuable system. The reason it is so valuable is that it is such a flexible system of social control.

If you look, for instance, at when negligence claims became very prominent, it was even before the automobile became common in London. The first negligence cases were basically carriage accidents. In other words, people in an increasingly crowded London were not using enough care. And so, tort liability became prominent then. Then and now, tort law is our leading social control on inadvertent behavior.

I could give you a couple of short examples. One famous case, *Lynch v. Nurdin*, comes from the early part of the 19th Century, when someone left a cart on a street where children played. These were very curious children, and when one of them jumped on it — this is a case from about 1830 — and hurt his playmate, that was a case of liability for the carriage owner, the person who had left that dangerous instrumentality on the street.

If you fast-forward to 1960, we had the famous case of *Richardson v. Hamm* out in California, where a contractor left several bulldozers with the keys in the bulldozers by a school yard, and curious children got into these bulldozers and knocked down several buildings. That was also a case of liability very similar to *Lynch v. Nurdin*.

And lately, I have been reading in the newspaper that there is a dam out in Arizona and, like everything we've got, it was controlled by a computer. This computer's defenses were very slack. They were negligently slack and because of that, a kid was able, with his home PC, to break into this computer controller and actually was able to adjust the floodgates. I told my students, that this gives "opening the floodgates" a whole new meaning in tort law because he reported to have been was in a position to do that. Luckily, he did not. There was a huge community of farmers down below that he could have easily opened the floodgates upon. It was a large dam. And I believe there would have been tort liability in that type of situation, too.

So, you ask yourself, what would the world look like if there were not tort law? We are a country now very much looking for standards in the cyber-security area, and the legislature cannot move fast enough. What we have in this country is basically a social control system, a very elaborate social control system, that is decentralized, that depends on the individual decisions of courts, and that works together with insurance companies, for instance, because ultimately they would be examining these computers and they would be writing insurance policies upon these break-ins and establishing standards for the owners of computers and enforcing those standards.

It all works much better than if we had NHTSA doing the same thing, or some sort of Department of Computer Safety doing this kind of activity. Or on I-66, if there weren't a decentralized tort system — if it were entirely up to the Virginia State police, I would think that many libertarians would be very concerned about the prospect of adding so many more police to the system, and all of these obligations that are enforced in a decentralized way would be enforced by federal agencies or by police officials. Certainly, we would encounter many more police and regulators if we were to move into that type of world.

Let's think about the common law and its strengths. One of its strengths has been remarked upon by many libertarians and conservatives, for instance, by Bruno Leoni. I feel I have almost got to make a defense of the tort system. I mean, you are not the only one who feels embattled here, I think, Dick.

What they have stressed, and what Lord Coke stressed before them, is the extent to which all common law embodies a kind of artificial reason, a kind of artificial intelligence, I think we would say. The reason for that, Coke, and many more modern Libertarian and conservative commentators have thought, is that a case-by-case litigation process allows judges to decide issues and compare their decisions to other difficult cases, and through that slow, incremental process, a rule emerges – a rule that is in many cases much wiser than the rule that a legislature could develop.

I personally think there is a kind of equilibrium process that is involved in this. Here is one example. Harry Kalven of the University of Chicago said that the common law works itself pure. I think maybe what he meant by that is if they decide a stupid case, they can fix it. Certainly there are many stupid cases decided in my home state of California in the products area. I'm thinking specifically of *Barker v. Lull Engineering Co.*, which was a case where a high-lift loader collapsed on its operator with everyone around. They fully expected that it was going to collapse because the operator, who was also the plaintiff, was attempting a load that the loader was obviously not designed to carry. In fact, the regular operator called in sick because he refused to lift that load. They recruited the plaintiff. Everybody was standing by at the time of the accident waiting for the plaintiff to be injured. When he was injured, the Supreme Court of California held that the loader manufacturer was liable because of strict liability and in tort.

Well, that is a pretty bad case, but how about the case after that where a plaintiff who was feeling a little bit depressed got into the back of a very commodious — she said inviting — trunk of a Ford LTD, a very large trunk that she took as an invitation. She shut the trunk door thinking to end it all, and then, after she was inside, thought better. She later sued Ford Motor Company for failing to have an interior latch. I have noticed that they have put those latches on these Fords at this point. But I think, if I'm recalling correctly, that is a case of no liability. So, that is really the equilibrium process that I think exists in the common law.

In other words, if they decide a stupid one today, they're going to get an even more stupid one tomorrow. And the fear is they won't be able to distinguish it. But often what happens is they will use that second case to overrule or strongly limit that first case. So, there is a kind of equilibrium, again, that depends on this case-by-case litigation process.

What I worry about with class actions — and it's not just class actions, frankly, that I have this worry about — is legal actions that are based on extremely novel legal theories. If we have a class action that is aggregating a number of claims that have been recognized by the common law courts in individual cases, then it seems to me unproblematic to aggregate these plaintiffs into classes.

What happens — perhaps this is the situation with the managed care cases and some of the other cases that Brian mentioned — when the purpose instead is to vindicate through a class action a totally novel legal theory? The legal theory, I believe, with managed care is quite novel, from what I understand of it. The best analogy to it that I've heard is the "Chevy-mobile" case. This was a situation where disappointed Oldsmobile owners discovered that they actually had Chevrolet engines in their cars. And although they had not suffered any damages of the type that would be cognizable as a traditional tort, nevertheless they were able to recover. I don't know whether that is the only analogy, or whether there are other analogies in this particular case.

Let's face it. Managed care was a big problem for our country. Ten years ago, we were in a crisis because medical costs were skyrocketing. So, of course, there were limitations, contractual limitations, that were proposed in these managed-care contracts to control those costs. From what I understand, the problem of skyrocketing costs was largely solved by these restrictions.

If some of these restrictions are less than perfect, to now expose these same managed care operators to massive liability — I mean, let's face it, that's what it would be because of a mistake in a relatively new system — would tend to, as all similar liability tends to do, create a kind of brownfields in what could be a very important industry, namely, healthcare or managed care.

I have no doubt of the motives of anyone involved in these cases, but we ought to proceed very carefully. This is the type of situation where, if we want a new rule, we really ought to proceed in an incremental fashion so each court can benefit from what other courts have decided. They can distinguish cases. They can decide in individual cases that maybe they've gone too far, rather than solve a massive issue in a very sensitive industry, as if a court were a kind of philosopher-king.

Courts are not philosopher-kings. Even Judge Boggs, although he knows quite a bit, does not pretend to be a philosopher-king. He is aided by the system of precedent, and these massive cases really cut judges loose from that system of precedent. That, from my point of view, is really the vice of them. So I think we ought to proceed very cautiously in this area.

I should say another thing, just one final thing. I think that many of the important rules of the common law are unglossed. In other words, there are many quirky things that are designed to avoid these brownfields problems or, as economists put them, activity-level-reduction problems. These are often very quirky limitations.

One limitation is that if you've got correlated financial losses, there's hardly any recovery for that. So if you look at the *Chicago Flood* litigation from 1991, when the waters yet again burst forth from the deep and flooded all the basements in Chicago due to the negligence of the City of Chicago — really almost the conceded negligence of the City of Chicago. They knew about the problem six months ahead of time. There was hardly any liability for the financial losses, the purely economic losses. Waterlogged Frango mints, yes — Marshall Fields was able to recover for those. But lost business, no. And the reason for that type of quirky limitation I think, and other economists think, is when these economic losses are correlated, they become very uninsurable not only for the companies themselves but also for insurance companies.

Insurance works on the principle of large numbers, which really depends upon uncorrelated losses. Some automobile accidents occur today; others occur tomorrow, and so on. If the insurer has a whole book of policies on these losses, then under the law of large numbers, it becomes almost totally predictable to insure that book, and a very valuable social function is carried out.

If all of the losses are happening on one day, then insurance fails. It fails not only for insurance companies, but it also fails for people like managed care companies that might be exposed, or automobile companies, or asbestos companies, that might be exposed to that same type of massed liability for financial losses.

So, we want to be very careful when we depart from the traditional standards of the common law because there is a potential to do great harm. I'm sure that no one would do that intentionally, that everyone is acting from the best of motives in these cases, and there are certainly legitimate reasons for class actions. But I think that it is really fraught with peril.

MR. BROOKS: Well, if anybody else had a law school professor like that, let him stand now or forever hold his peace.

Let's take some questions. And I would like to exercise the moderator's prerogative to ask the first question. This is a question that each of the panelists might want to address.

My question is this. All of the panelists agree, from both the left and the right, that there are efficiencies to bringing similar claims together. It doesn't make any sense to have the court try the same set of facts and the same legal issues over

and over and over again. There are some cases where a class action makes sense. We also all agree that there are situations in which the injury theory is unique; novel. And in all of the examples that we've talked about today, that is a common theme.

In managed care, the allegation is not that anybody has been denied covered services. The allegation instead is that, simply by virtue of holding a policy, you are at risk, that you have suffered some monetizable risk that you might be denied covered services, and that risk somehow affects you in an economic way.

In the cell phone cases, it's the same issue. No one alleges that they were actually injured or have brain cancer as a consequence of cell phone use. They instead say that there is a risk that I might in the future be hurt.

In terms of performing the socially valuable function of making companies internalize the cost that they actually foist on people, making them actually pay for the injuries that they cause, aren't there other mechanisms short of this class action mechanism that would perform that function?

For example, punitive damages. To prove up a case of punitive damages, one would have to first show an actual injury. Somebody would have to be hurt. But once you have proven the actual injury — you know, the oil tanker explosion, the plane crash, etc. — the punitive damages device permits you to force the company to internalize all the costs of its conduct, but only in the context of an actual present injury. Isn't that preferable, I ask the panel, to a class action regime, which fuzzes the question of injury? Whoever wants to go first.

MR. SCRUGGS: I believe you guys are dodging the punitive damages question. We had an opportunity to really hold forth there.

The short answer to the punitive damages question — and then I want to respond to one other thing — is that punitive damages in the modern world will reward the first few plaintiffs to get the courthouse and break the company, usually, so that if there's a disproportionate, widespread injury, only the first few that get there will get disproportionately compensated at the expense of others who may have equal injuries but don't get there first. So, I think punitive damages play a role in deterring aberrant behavior, but I don't think it's the answer to this question.

The theories of recovery that we are putting forth in the HMO litigation, the managed care litigation, really aren't new or novel. They're being characterized that way, but they're not. There are very few things that are new. What they boil down to is that the HMOs are essentially selling patent medicine and calling it a cure for cancer.

There's a guy being prosecuted out in Kansas City, a pharmacist, who diluted cancer treatment drugs to his patients to save money. He only gave them a tenth of what they were paying for. It is logically no different from what the HMOs are doing now. They are selling you a health package, a benefit, that they indeed have every intention of avoiding.

Some of the practices that these companies are engaged in — paying bonuses to claims examiners based on how many claims they deny, without reference to whether they're valid or not; paying doctors bonuses for doing less; gagging a doctor from telling his patient that other treatment modalities may be preferable to the one that he's going to prescribe — are built-in abuses that are designed to give less care than is being advertised.

Yet in all their brochures, in all of their advertising, everything they send to their patients, they are guaranteeing, bragging about quality care, calling it managed care. Really it is managed cost. This is litigation against the insurance companies is really what it is. Insurance companies don't make money paying claims. They make money by not paying claims. It's just that simple, and it always comes down to an economic incentive.

So, there is nothing new or novel about the litigation against the HMOs. Brian mentioned the Chevy mobile case. I don't know what Brian drives — a big firm like yours, you've probably got a nice big Mercedes. But if you bought a Mercedes Benz that had a Yugo engine in it, maybe you like Yugo. Would you be precluded from suing the company for fraud just because the engine hadn't quit yet? Would it be a defense that, "Yeah, the engine's running just fine. Until that engine quits on you, you haven't any injury?" That's the same thing with the HMO litigation. You are buying a parachute that is supposed to have a canopy of a certain circumference. But if you ever need it, it doesn't have it.

So, it is clearly actionable and there was nothing new about it. It's patent medicine litigation. It is just garden variety fraud.

DEAN GRADY: Let me just say one thing briefly in response to that. I understand that the Mall of America, this is the largest mall in the United States, out in Minnesota, is finding it very difficult to get insurance. The reason is that their notoriety creates a kind of target for terrorists. And insurance against it is very expensive because of this correlated losses problem. It's like earthquake insurance or hurricane insurance, only worse.

I understand there's also the same problem now with the construction work at Ground Zero in New York, in providing insurance. That is also a target for terrorists. So, we are acquiring a lot of sites where it's going to be very difficult to do business. The question is, do we want social sites of that type, too?

Every time we have a particular political issue, something that is very controversial among us — for instance, managed care — for that industry to be exposed to mass tort litigation, it creates the same problem that the Mall of America is having. That's really one of the arguments against that type of class action litigation.

MR. DINH: I think I agree with both comments, even though they are in disagreement. Let me tell you why I think that. Brian put the finger on the problem by asking the question, although the proposed solution may not be so readily apparent.

The problem is that if you have a classic denial of coverage case — that is, particular facts, whether or not this policy covers this particular claim— the adjudication of that case depends on the terms of the particular policy and the particular facts of that particular case. That would not, obviously, satisfy the commonality standard, if you're trying to aggregate a whole bunch of these claims under traditional class action mechanisms.

So, there is a tort system for you to get recovery, if that is actionable. But in order to get into a class action mechanism, you have to allege certain commonalities, and there have to be theories in order to allege those commonalities.

I will note that I don't know anything about the theory of the law and whether the theory passes the legal laugh test to satisfy the commonality standard. But there, I think, is where the difference between Mark's comment, which goes more to the core of the tort system, and Dick's comment, which goes more to the class action mechanism and the theory that you have to allege in order to get a class action mechanism, is elucidated.

DEAN GRADY: By the way, Dick, I hope that by my last comment, I didn't ruin the chance to create a Scruggs Law School.

MR. SCRUGGS: The price has gone up. Actually, the contribution's going down.

AUDIENCE PARTICIPANT: All three of our remaining panelists had alluded to the role of the courts as self-conscious social regulators self-consciously setting policy. My understanding of the predicate of common law decisionmaking historically was that it arose in a system which, one, it wasn't believed that political power derived from the people; two, there was really no system of statutory law; and three, it was believed that judges were not setting policy, but were rather discovering a pre-existing natural law or natural rights. I don't think any of those three hold up anymore.

Our system is based on the idea that political power derives from people. We have an extensive system of statutory law, and outside of a certain wing of the Federalist Society and the Cato Institute, no one believes anymore that there is an objectively knowable set of natural rights or natural law.

Also, for the federal government to invest the judicial branch self-consciously with legislative power I think is violative of both the letter and the spirit of the Constitution. Doesn't this lack of legitimacy pose some sort of problem, and shouldn't we, rather than nibbling around the edges of the class action system, be thinking about restricting or perhaps even eliminating the ability of judges to define broad new areas of non-statutory liability, and perhaps concurrently with that codifying some of the existing bases?

MR. DINH: God, it's great to be with the Federalist Society.

First of all, the short answer is "confirm the present judges." That's the easiest answer that I can give you — in particular, confirm Judge Pickering, somebody about whom Dick Scruggs and I both agree, very vehemently: he is a great man.

That's a great question. I think that I'll answer it by joining issue and agreeing with Mark's comment on incremental changes in the law. I do agree, although I'm probably less sanguine than Mark and some other adherents of the school, that the common law is almost by definition rational and optimal. I do agree that an incrementalist approach to the development of the common law, given the whole experimentation approach, is preferable to a command and control type of system. But that is not what we're talking about with this particular debate, where we're talking about basically institutional class litigation, the making of policy through litigation.

The question then is not incrementalism versus command and control policymaking. The question is who makes the policy? An unelected judge and a single jury or a duly elected and politically accountable policymaker or set of policymakers?

And with that, I think I agree with you that there is a role for law to be developed through a common system, the classic Anglo-American system of common law at the interstices. But I think, even now, there are very few of those interstices left.

The easiest explanation of this is in the difference between the last and the current edition of Hart and Wechsler, the classic casebook on the federal courts. There is a classic note called "The Interstitial Nature of Federal Law." It said that where there are gaps to be filled, Federal law would fill them to vindicate state-law-based rights. This is right after the *Erie v. Tompkins* discussion, for obvious reasons.

But the current edition basically backs away from that note and says that in the current modern post-welfare state world of federal regulation, everything is regulated and heavily regulated, so there is very little area for interstitial regulation.

MR. SCRUGGS: I think the fundamental premise of your question — if I state it wrong, you can correct me — is that under our system of government, the political branches make the laws and the judicial branch interprets the law. What has happened is encroachment back and forth over the centuries of this country, where judges make more or less law depending

on what the issue is and what the political climate is.

I would ask you if that isn't an argument for elected judiciary as opposed to an appointed judiciary. Right now, you have a majority of judges that are appointed by presidents that you probably agree with. But you might end up in another day, as we were in the 1960s, with a group of judges who were appointed by judges that you probably don't agree with — Kennedy, Johnson, Carter.

So, I think your argument that power derives from the people, with which I certainly have no argument and totally agree, would argue for an elected judiciary, and one that's not insulated by lifetime tenure so they can do whatever it is that they decide to do.

The tendency today is to appoint federal judges who are young, who are ideologically pure and who have no life experiences, unfortunately, or not many, and who have no track record with which they can have their confirmation denied.

That's what is going on with Judge Pickering right now. One of the reasons I am trying so hard to get him confirmed is because this is a man who has a variety of life experiences. If he is defeated, if his nomination is defeated, then what's going to come behind him is somebody that you would be more likely to agree with, and someone who is about 35, maybe 40, and who has never done anything that anybody can question. But you have no idea what he's going to do when he gets on the bench, other than to fulfill whatever discrete pledge he gives if he's appointed.

I think that your basic premise argues for an elected judiciary at every level.

DEAN GRADY: I really question whether judging has changed so much over the years. I wonder if it makes so much difference what judges have as a self-conception. I am an avid consumer of their work product.

You know, I actually test my students on case results. So, for instance, part of the examination would be for them to predict how courts will have come out in actual cases. This is total heresy in terms of what the legal realists have convinced us is true of the common law. And I really wonder why conservatives also believe it because I don't think it's true at all that common law is heavily influenced by the politics of the judges.

In fact, the difficulty is finding cases that are hard enough and close enough to the edge so that 100 percent of the class or 97 percent of the class won't tell you exactly what the right answer is. That is exactly what you'll find, which is something you would never predict if you relied totally upon this notion, which is so commonplace now, that judging has become a matter of politics, that the judges of the left will decide each and every case quite differently than the judges of the right. I really don't believe that. In fact, I've got ten years of examples from my classes that indicate that there are a lot of problems with that. Believe me, these students predicting case results on my exam don't know whether the judges were conservative judges or whether they were liberal judges.

You see these lists on the Internet, where someone does something stupid and then there's alleged to be a very large recovery. Are those appealed cases? I think there ought to be some sort of truth in torts for the newspapers. It's quite possible, of course, and Dick can tell us because he's got more experience than any of us, to get a plaintiff's victory in a crazy case before a court of first instance. But to have that stand up through the system, that's quite a different thing.

Personally, when I read these cases, they were among hundreds of thousands of cases that are tried in the U.S., the craziest fifteen. And I bet that almost immediately, all of these crazy cases were overruled. It seems very odd to have a political debate and to assail one of our most fundamental institutions of liberty based upon these hearsay accounts. I think it's quite irresponsible.

AUDIENCE PARTICIPANT: A couple of you are defending class actions on the basis of something I'd say is equivalent to either market failure or, in one case, failure on the part of the legislature. But I have seen a couple of instances of class actions — I'll be like Congressman Goodlatte and use an example because I think it fits — where I see the system breaking down.

I am a policy holder of a mutual insurance company that was sued. I was a member of the class. I supposedly benefited from the settlement by having a very small increase in the amount that I would be insured, for something like six months. So, if I'm fortunate enough to die in the next six months, I'm clearly better off than I would have been.

So, to me, the net effect is that my mutual insurance company is worse off and, consequently, I, as a policy holder, am worse off economically, personally.

If we are talking about torts and the ability for people to recover for their losses, why isn't there a mechanism for people like me who were injured by that suit to recover their loss?

MR. SCRUGGS: Well, you're representing them.

AUDIENCE PARTICIPANT: Of course.

MR. SCRUGGS: In fact, there's a mechanism. You can opt out of the class and file your law suit. You can do that.

AUDIENCE PARTICIPANT: But I can't recover my loss because the company is still out the attorney's fees.

MR. SCRUGGS: Well, you don't really care about that as an individual plaintiff. You want to recover your loss, and that is the company's problem to pay your claim, if you prevail on it.

The other remedy you have for that is, during the class action settlement process, you can object to the settlement. You can object to the fairness; you can object to the amount of attorney's fees. It is done every day. Class action settlements are one of the most contentious procedures in court. We're going through one right now in an MDL case up in Ohio, on the *Salzer* case. These settlements are very, very contentious, and you can either opt out, you can object, you have a number of remedies if you don't like the settlement.

AUDIENCE PARTICIPANT: That leads to my question. He can opt out. But what about the point that we're making policy by these large class actions — we're doing this politically. Let's say I just like stopping stuff. I should be allowed to stop stuff in the political process, and that's a win. That's not a loss that, "Oh, the system isn't working." The system's working great for me. So, the question is, aren't these class actions a way around the political process? I might not otherwise have the standing to intervene; I might not otherwise have the ability of getting the case.

Today, we see Arthur Andersen being sued. They would love to get out the way Mr. Scruggs was suggesting. And we have plaintiffs who obviously want to get money. We have lawyers who want to get money. But the public interest is not represented. A lot of people who might be affected have no way to intervene in a class action. They do have a way to intervene in a political process but don't have it in the class actions.

MR. DINH: It's a great question. It is absolutely a great question. But I'll start unpacking, again, what a substantive claim is versus the procedural mechanism of the class action, and they are intertwined.

There may be, and there are, problems with the existing procedural class action mechanism. I think Congressman Goodlatte's bill goes a long way toward correcting some of those problems, the notice in plain English, and provisions to ensure that any settlements are not coercive or to prevent side deals between the plaintiff's lawyer and the company that takes away the ultimate recovery from a plaintiff.We can tinker around with the procedural mechanisms to take care of objections to the procedural mechanisms.

On the other side are substantive claims that Congress or the state legislature have established as torts or as wrongs that are actionable, and if one disagrees with them, then I think that one properly brings that disagreement to the political process to repeal those rights. Or if a common law tort arises that seems wrong, the legislature can pass a law to override that establishment of a wrong common law tort. We have seen that happen from time to time in various legislative contexts.

But where the two meet, of course, is the fact that the class action mechanism is, in and of itself, a coercive mechanism in settlements that may have an effect on policy. It may not be meritorious, but simply too costly to defend. These are what are sometimes called strike suits, if you will, in order to get settlements. They may not be ultimately meritorious but the risk is so great and the downside is so great that the defendants simply want to settle.

That is where other reforms, like the immediate appeal of a class certification decision, would have dramatic impact on the dynamics of settlement negotiations. Immediate appeal is one of the changes to correct some of the procedural defects of this mechanism so that it does not bleed into substantive settlement coercion that influences the ultimate policy as to whether the claim is sustainable.

MR. SCRUGGS: I think part of the question implied that no decision by the legislative or political branches of government was a decision. It is an issue that is a good argument, that failure of Congress to change the laws is a decision that the law is good.

I don't think anybody in the public health debate likes the current law. Nobody likes it. So, it may be that there is mutual dissatisfaction. But it certainly reminds me of Will Rogers or somebody who said that — and I'll analogize the HMO enrollee with the guy who's got one foot frozen in a bucket of ice and the other foot in a bed of hot coals. His temperature may be normal, but nobody can say he's not in a lot of pain.

That's the situation right now. Nobody likes the current system except for a narrow interest that's trying to defend it because the cards are stacked in their favor, because of ERISA and other issues.

The bottom line with the ERISA preemption is that if a managed care company maliciously and wrongfully denies your claim, they take your premium and arbitrarily deny your claim for no reason at all, the worst that can happen to them, if you sue them, is that they have to pay you the cost of the claim of they denied. If they deny your children and you die as a result of that, they'll pay you for the x-ray and that's it. No liability.

No other industry in America has that kind of protection, nor should it have that kind of protection. There is absolutely no mechanism now to compel that industry to do the right thing.

MR. BROOKS: I think we have time for one very quick one question, and then we'll thank everybody.

AUDIENCE PARTICIPANT: There has been some discussion here about having an alternative between class action lawsuits and command and control regulation. One of the interesting things about insurance, which has been mentioned several times here, is that it's a very, very highly regulated business.

So, the kinds of things that Mr. Scruggs is talking about — and I don't agree with his characterization — he said that these things have been highly regulated at the state level, and there's a question about, he may not like it but, who died and made him God? I didn't vote for him.

There are people who are making these decisions at the state and federal level that we did vote for. So, we have a highly regulated business that is still going through a very brutal, coercive class action process. Now, that doesn't seem to be quite right.

MR. SCRUGGS: Am I all by myself on this one?

Of course, nobody elected me God or judge or jury or decider of law or fact. I'm an advocate. And I've got to tell you that the legal resources available to the insurance industry far exceed those available to the ordinary plaintiff. Sometime we can match up well and sometimes we can't. But you have enormous resources available to you legally.

Just because I take a position as an advocate doesn't mean that is going to be the result. It has to be decided by a court, in an appellate court, and usually another appellate court.

In terms of the degree of state court regulation of the insurance industry — I knew that would come up today; I felt like it would, and you posed the question very well — there is a huge degree of regulation, more or less, of the insurance industry. They're regulated for a reason, because of past abuses. But merely because they are regulated doesn't immunize them from the same sorts of judicial resolutions that any other industry that is arguably regulated has to face.

Just because you are given a driver's license and certified by the state to be a good driver doesn't immunize you from reckless driving and being sued for carelessness. In some cases — in fact, in the HMO litigation, our judge ruled just last week that in some states, the insurance industry there is so heavily regulated as to be preclusive of the common law lawsuits. I don't necessarily agree with him, but that is what he ruled.

Also, because you're regulated for one reason doesn't mean you're regulated for another.

So, I'll just go back to the basic issue. Just because you are given a license to do something by the government does not give you a license to do anything.

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