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## CONFERENCE

### AD HOC PROCEDURE

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*“Ad hoc procedure” seems like an oxymoron. A traditional model of the civil justice system depicts courts deciding cases using impartial procedures that are defined in advance of specific disputes. This model reflects a process-based account of the rule of law in which the process through which laws are made helps to ensure that lawmakers act in the public interest. Judgments produced using procedures promulgated in advance of specific disputes are legitimate because they are the product of fair rules of play designed in a manner that is the opposite of ad hoc.*

*Actual litigation frequently reveals the inadequacy of procedures created according to this traditional model. To fix the procedural problems that arise in such cases, litigants, judges, lawyers, and legislatures can design procedure on the fly, changing the “rules of the road” as the case proceeds. Ad hoc procedure-making allows the civil justice system to function when ordinary procedure fails, but it challenges the rule-of-law values reflected in the traditional model of procedural design. Instead of being created by lawmakers who operate behind a veil of ignorance, ad hoc proce-*

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ture is made by actors seeking specific outcomes in pending cases. The circumstances in which ad hoc procedure is created raise concerns about lawmakers' motivations, the transaction costs of one-off procedural interventions, the wisdom and fairness of those interventions, and the separation of powers.

This Article introduces the phenomenon of ad hoc procedure and considers its place in a world where much procedure continues to be made through the traditional model. Focusing on ad hoc procedural statutes, the Article contends that such statutes' legitimacy—or lack thereof—depends on different factors than ordinary civil procedure. Unable to claim legitimacy from the circumstances in which it is crafted, ad hoc procedural legislation must instead derive legitimacy from the need to address a procedural problem and the effort to produce substantively just outcomes.

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INTRODUCTION

On March 14, 1972, a short article on page fifty of the *New York Times* noted an AFL-CIO press conference held to call attention to a new cancer “afflicting an increasing number of asbestos plant workers and their families.”<sup>1</sup> According to a doctor who spoke at the press conference, “the cancer, mesothelioma, was so rare that some medical books did not recognize its existence as recently as two years ago.”<sup>2</sup> Eighteen months after the *Times* story, the Fifth Circuit affirmed a jury verdict awarding \$79,436.24 to the wife of an insulation worker who died from mesothelioma caused by asbestos in the defendants’ products.<sup>3</sup>

The Fifth Circuit’s decision spurred plaintiffs’ lawyers to sign up thousands of clients, who in turn filed thousands of claims seeking compensation for asbestos-related injuries.<sup>4</sup> Neither state nor federal courts were equipped to handle litigation of this size and complexity. The plaintiffs’ claims turned on individualized issues of causation and damages that prevented them from being resolved through conven-

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<sup>1</sup> *Asbestos Jobs Tied to Cancer Outbreak*, N.Y. TIMES, Mar. 15, 1972, at 50.

<sup>2</sup> *Id.*

<sup>3</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081, 1086 (5th Cir. 1973).

<sup>4</sup> STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 22–24 (2005).

tional forms of aggregate litigation.<sup>5</sup> Nor could defendants put a ceiling on their liability through aggregate settlements, given the long latency period for asbestos-related cancers.<sup>6</sup>

The lack of workable mechanisms for resolving the flood of asbestos claims affected each of the civil justice system's constituencies. Many plaintiffs with lethal asbestos-caused cancers died uncertain whether their claims would be paid.<sup>7</sup> Defendants could not remove asbestos liabilities from their balance sheets or expand into new areas of business because of the "overhang" of asbestos litigation.<sup>8</sup> Judges failed to discharge their basic obligation to resolve cases within their jurisdiction.

Even imaginative applications of ordinary procedural tools proved inadequate. In 1997, the Supreme Court in *Amchem Products v. Windsor* rejected an attempt to redirect asbestos claims to a quasi-administrative compensation scheme created through a class action settlement certified under Fed. R. Civ. P. 23(b)(3).<sup>9</sup> The problem, the Court reasoned, was that plaintiffs currently suffering from asbestos-related diseases could not represent those who had been exposed to asbestos but had yet to become ill.<sup>10</sup> In Rule 23(b)(3) terms, no "[common] question[ ] . . . predominate[d] over any questions affecting only individual [class] members" in those two groups to support certification.<sup>11</sup> With class litigation unable to deliver peace, filings

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<sup>5</sup> See *Cimino v. Raymark Indus.*, 151 F.3d 297, 311 (5th Cir. 1998) (rejecting a trial plan developed by Judge Robert Parker that proposed to group plaintiffs' claims into bundles and assign claim values based on statistical averages); *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (rejecting an earlier plan developed by Judge Parker).

<sup>6</sup> By 1994, more than 24,000 asbestos-related claims were pending in federal and state courts. CARROLL ET AL., *supra* note 4, at 71 tbl.4.1. Epidemiologists estimated that 312,380 asbestos-related deaths would occur before 2004, one quarter of which would be from mesothelioma. *Id.* at 15.

<sup>7</sup> See Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 384 (1993).

<sup>8</sup> *The Need for Supplemental Permanent Injunctions in Bankruptcy: Hearing Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 44 (1993) [hereinafter *Senate Manville Hearings*] (statement of Robert B. Steinberg, Selected Counsel for the Beneficiaries, Manville Personal Injury Settlement Trust); see also CARROLL ET AL., *supra* note 4, at 45-47 (describing asbestos litigation's impacts on defendant companies' finances and the settlements to which those pressures led).

<sup>9</sup> 521 U.S. 591, 622 (1997).

<sup>10</sup> *Id.* at 625-27.

<sup>11</sup> *Id.* at 622 (quoting FED. R. CIV. P. 23(b)(3)). The *Amchem* settlement applied to any individual who was exposed to asbestos in the workplace before 1993 and to family members of such individuals—a class that "encompass[e]d hundreds of thousands, perhaps millions, of individuals." *Id.* at 597. It applied both to individuals currently suffering an asbestos-related illness ("present" claimants) and to individuals who were exposed to asbestos but had yet to become ill ("future" claimants). *Id.* at 601. The settling defendants, a consortium that included most of the major U.S. asbestos manufacturers, agreed to establish a \$1.3 billion fund to compensate individuals who developed an asbestos-related

continued apace. On New Year's Eve 2009, the U.S. District Court for the Eastern District of Pennsylvania, where federal-court asbestos cases were consolidated for pretrial management before Judge Charles R. Weiner,<sup>12</sup> reported that 52,044 asbestos cases were pending on its docket.<sup>13</sup> Legal scholars spoke of a “never-ending asbestos crisis.”<sup>14</sup>

One manufacturer, however, overcame the crisis. While the *Amchem* lawyers had been working to devise a global class action settlement, the company that had once been the world's largest asbestos manufacturer, Johns-Manville Corporation (Manville), entered Chapter 11 bankruptcy protection.<sup>15</sup> Temporarily protected from litigation by the automatic stay, Manville, together with lawyers for asbestos plaintiffs and a “representative of . . . future claimants” appointed by the bankruptcy court to represent individuals who had yet to become ill, devised a new legal structure to address the company's asbestos liabilities.<sup>16</sup> A freestanding trust, funded with the majority of the reorganized company's common stock, would provide an “evergreen” source of funding for asbestos claims.<sup>17</sup> The bankruptcy and district courts issued a “channeling injunction” that redirected all asbestos claims against “new Manville” to the personal injury trust,<sup>18</sup> enabling the company to generate profits free of the pressure of asbestos litigation. But legal uncertainty over the trust structure—including doubts about the courts' authority to issue such an injunction—caused financial markets and, crucially, Manville's insurers, to doubt the plan's viability.<sup>19</sup> In response, Manville's man-

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illness. *Id.* at 633 (Breyer, J., concurring in part and dissenting in part). Individuals who developed such a disease would be entitled to compensation, keyed to the type of disease and the individual claimant's characteristics, upon submitting satisfactory medical documentation. *Id.* at 603–04. In exchange, every member of the entire plaintiff class—whether or not presently injured—gave up his or her right to pursue claims in the tort system except in limited circumstances. *Id.* at 604–05.

<sup>12</sup> See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422–24 (J.P.M.L. 1991) (transferring asbestos cases to the Eastern District of Pennsylvania).

<sup>13</sup> December 2016 MDL 875 Casewise Statistical Breakdown, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL-875 (J.P.M.L. E.D. Pa. Jan. 11, 2017), <http://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.report.dec31.2016.pdf>.

<sup>14</sup> Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 *Miss. L.J.* 1, 1 (2001).

<sup>15</sup> *In re Johns-Manville Corp.*, 7 F.3d 32, 33 (2d Cir. 1993).

<sup>16</sup> *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751–52, 771 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

<sup>17</sup> *Id.* at 753.

<sup>18</sup> See *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988) (describing the injunction).

<sup>19</sup> See Marj Charlier, *For Manville, a Sale or Breakup Appears Imminent*, *WALL ST. J.*, Mar. 23, 1992, at B4.

agers turned to Congress and persuaded it to adopt an amendment to the Bankruptcy Code, 11 U.S.C. § 524(g), that “codif[ied]” the personal injury trust structure.<sup>20</sup>

The new statutory authority for the Manville reorganization—along with the bankruptcy court’s decision to assuage the due process concerns that sunk *Amchem* by appointing a future claims representative—removed the most significant legal obstacles to the Manville reorganization. Where the *Amchem* settlement failed, Manville succeeded. Insulated from asbestos claims by the channeling injunction, Manville returned to profitability and was sold to Berkshire Hathaway in 2000 for \$1.96 billion.<sup>21</sup> But this success was not without costs. Claims against Manville were evaluated and paid by a special-purpose entity which followed procedures that looked nothing like those used in ordinary courts. The claims were paid at a fraction of their value in the tort system.<sup>22</sup> And Manville’s successful restructuring placed enormous pressure on other asbestos manufacturers to restructure via § 524(g) to avoid being held liable for injuries caused by Manville products on joint and several liability theories.<sup>23</sup>

The midstream reconfiguration of the procedures used to resolve Manville’s asbestos liabilities illustrates a broader phenomenon that this Article terms “ad hoc procedure.”<sup>24</sup> Ad hoc procedure is designed

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<sup>20</sup> *Special Problems in Bankruptcy: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 102d Cong. 61–62 (1991) (statement of W.T. Stephens, Chairman of the Board, President, and Chief Executive Officer, Manville Corp.) (asking the subcommittee to “codify the permanent nature of court-ordered and -issued injunctions in the context of a chapter 11 reorganization proceeding”).

<sup>21</sup> Devon Spurgeon, *Berkshire Hathaway to Acquire Johns Manville for \$1.96 Billion*, WALL ST. J. (Dec. 21, 2000), <https://www.wsj.com/articles/SB977318255230066002>.

<sup>22</sup> *In re Joint E. & S. Districts Asbestos Litig.*, 878 F. Supp. 473, 479, 568 (E. & S.D.N.Y. 1995) (noting the trust’s insufficient funds to pay all claims and certifying a settlement class providing pro rata distribution of funds to claims at a fraction of their value), *aff’d in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996).

<sup>23</sup> *Injunctions in Mass Tort Cases in Bankruptcy: Hearing Before the Subcomm. on Econ. and Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 63 (1992) [hereinafter *House Manville Hearings*] (testimony of Roger E. Podesta, Partner, Debevoise & Plimpton).

<sup>24</sup> By “procedure,” we refer broadly to the field of law, ordinarily termed “civil procedure,” that enables private parties to enlist the state’s help to assert claims against other parties. This understanding of procedure sweeps more broadly than the idea of procedure that is at issue in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules Enabling Act, 28 U.S.C. § 2072. The concern under *Erie* and the Enabling Act is to identify the set of policy decisions about the processing of civil claims that federal courts may legitimately make when exercising jurisdiction over claims that arise under state law and are heard in federal court pursuant to diversity jurisdiction. Our concern, by contrast, is with the broader set of laws and governmental institutions that govern private civil litigation. We are concerned with the institutions of “adversarial legalism” or the modern “litigation state” as opposed to the limited universe of rules that the Supreme Court may promulgate in the exercise of its delegated rulemaking authority. See generally SEAN

to address a procedural problem that arises in a pending case or litigation. It is then applied retroactively to that pending case or litigation in order to achieve a desired result.

This kind of procedure-making strays from the traditional model. Civil procedure traditionally has been established in advance of disputes by policymakers seeking to establish fair “rules of the road”<sup>25</sup> for the way that disputes are resolved,<sup>26</sup> a style of procedure-making that underpins the legitimacy of state action in civil litigation. As expressed by Friedrich Hayek, the rule of law “means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the [state] will use its coercive powers in given circumstances.”<sup>27</sup> Courts resolve claims through procedures established in advance of concrete disputes by policymakers who cannot anticipate the effects of their choices on specific litigants. This process for establishing procedures serves as a check against the arbitrary exercise of state power and helps to ensure that all parties—the state included—receive equal justice under law.<sup>28</sup> The traditional style of procedure-making also contributes to the legitimacy of state action in litigation by following the basic requirements of traditional separation-of-powers theory, separating the tasks of procedural design (legislation or rulemaking) from the resolution of specific controversies (adjudication).<sup>29</sup>

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FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 10–18 (2010) (examining the legal infrastructure for private enforcement of federal statutory rights); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3–18 (2001) (examining American adversarial methods of policy implementation). We take no position on the proper understanding of “procedure” for purposes of *Erie* and the Enabling Act. Nor do we take sides in the long-running debate over whether it is possible to isolate substance from procedure, other than positing the usefulness of “procedure” as shorthand for the large body of laws and government institutions that govern the processing of civil claims asserted by private litigants.

<sup>25</sup> For the “rule[s] of the road” analogy, see FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 74 (1944).

<sup>26</sup> See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 *Geo. L.J.* 887, 890, 926–30 (1999) (highlighting advantages of procedural rules promulgated ex ante by a centralized procedure-making body); Roscoe Pound, *Some Principles of Procedural Reform*, 4 *ILL. L. REV.* 388, 388 (1910) (asserting that procedure serves “to eliminate . . . the personal equation in judicial action”).

<sup>27</sup> HAYEK, *supra* note 25, at 72.

<sup>28</sup> Simon Chesterman, *An International Rule of Law?*, 56 *AM. J. COMP. L.* 331, 342 (2008). While the ideals of the rule of law are hotly contested, it is typically agreed that the rule of law contains some or all of these basic tenets. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 *EUR. J. INT’L L.* 315, 316–17 (2011).

<sup>29</sup> See, e.g., *THE FEDERALIST* NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.” (quoting 1 CHARLES-LOUIS DE SECONDAT, *BARON DE*

Civil procedure, however, can also be established while litigation is pending, in response to problems that arise in specific disputes, resulting in ad hoc procedure. We refer to the timing of such procedural changes as occurring “midstream”—the litigation has progressed to a point where parties are able to tell whether the ordinary processes of law are likely to give the parties closure and other outcomes they expect from litigation. When procedure is created at this stage to right the course, it can take the form of a court’s order, a privately-negotiated agreement, a new entity established to pay claims, or new legislation. Ad hoc procedure overcomes problems that cannot be solved using the existing procedural structures, and may be necessary to ensure that the civil justice system is able to provide the ordinary desiderata of civil litigation in cases that defy customary judicial management. Yet by dictating how claims will be resolved at the very moment they are asserted, ad hoc procedure seems to violate basic tenets of the rule of law. Designed to address specific problems, ad hoc procedure cannot rely on the fact that it is crafted behind a veil of ignorance in advance of concrete disputes as proof of its fairness.

The Article has two goals. First, it aims to introduce the general phenomenon of ad hoc procedure. Second, it considers whether the specific type of *statutory* ad hoc procedure illustrated by § 524(g) and similar statutes can be reconciled with the rule-of-law commitments that have long informed the way that civil procedure is designed in western, liberal democracies—in both the United States and Europe.

Part I provides an overview of ad hoc procedure and the challenges that it presents to the traditional image of procedural design that underpins much U.S. and European procedure. Proceduralists have long posited that the state should resolve legal disputes using processes that are established in advance of concrete cases by neutral policymakers who aspire to treat litigants fairly and evenhandedly. But such procedures cannot anticipate all potential procedural problems that can arise in specific cases. Ad hoc procedures respond to these problems. They may be formalized in court orders, administrative adjudication schemes, special-purpose claims facilities, or statutes, such as § 524(g). These forms of procedural ad hocery differ in their specificity, their power to bind third parties, and the ease with which they are established. Yet each addresses a problem that arises in a specific case through a midstream intervention that changes the way that claims are processed.

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MONTESQUIEU, *THE SPIRIT OF LAWS* 181 (Edinburgh, A. Kincaid & W. Creech 1773) (1748)).



Focusing specifically on ad hoc procedural statutes such as § 524(g), Part I then considers the challenges that this form of ad hoc procedure-making presents to the traditional view that procedure should be established in advance of disputes by policymakers who are not motivated to favor particular parties or political objectives and who aspire to treat like cases alike. On the surface, ad hoc procedural legislation seems to combine the most objectionable aspects of procedure that is created for nakedly partisan purposes and procedure that singles out a group for special treatment. It applies retroactively to pending litigation, where the winners and losers of the procedural change are well known, and draws lines that appear to treat similar cases differently. Moreover, ad hoc procedural legislation is enacted without the level of vetting that generally applicable procedures usually receive.<sup>30</sup>

Moving beyond the normative challenges presented by ad hoc procedural legislation, Part II traces the development of four statutes—two from the United States and two from Europe—that responded to particular problems in complex litigation. The case studies reveal the extent to which ad hoc procedural legislation challenges the traditional image of civil procedure. But they also show that ad hoc legislation addresses important problems that cannot be solved using the ordinary processes of law. Although such legislation conflicts with deeply held intuitions about what procedure is and should be, it is to some extent inescapable and necessary to ensure the functioning of the civil justice system in these cases. We call this the “double aspect” of ad hoc procedural legislation.

Building on this intuition, Part III returns to the normative challenge of ad hoc procedural legislation and reevaluates that challenge in light of Part II’s case studies. Going beyond ad hoc legislation’s surface tension with the rule-of-law values that have traditionally informed procedural design, we show that ad hoc procedure-making involves two tradeoffs that bear on any evaluation of particular ad hoc procedural statutes. First, ad hoc procedure’s retroactivity—changing procedural rules of the road just in time to process claims in pending litigations—is inextricably tied up with its capacity to overcome proce-

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<sup>30</sup> Writing two decades ago, one commentator estimated that the average time to promulgate a new federal court rule is “two to three years.” See Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1671–72 (1995). This analysis may underestimate the length of the modern rulemaking process. The associate reporter to the current advisory committee on the Federal Rules tells us that significant rule reforms, such as the 2016 amendment to Rule 23, now take much longer than two to three years. E-mail from Richard Marcus, Distinguished Professor of Law, Univ. of Cal. Hastings Coll. of the Law, to authors (Apr. 30, 2017, 9:51 PM) (on file with the New York University Law Review).

dural problems that are not anticipated by ordinary processes of law. Second, the specificity of much ad hoc procedural legislation reflects the distinctive dynamics of ad hoc procedure-making, which generate a large amount of information about the procedure-generating case but relatively little information about an ad hoc intervention's effects on third parties.

Recognizing these dynamics highlights unavoidable costs of ad hoc procedural legislation, but those costs do not show that such legislation should be categorically avoided. Ad hoc procedural legislation may be necessary, and can help the civil justice system do justice in cases that cannot be resolved using ordinary processes of law. Nonetheless, the circumstances in which it is created bear on its legitimacy. Ad hoc legislation in one sense is the most legitimate form of ad hoc procedure, because it is law under the relevant constitutional norms. But its formal legal status does not answer the rule-of-law objections that follow from the timeframe in which it is enacted and lawmakers' awareness of how their interventions will affect particular litigants. Instead of following from the fact that procedure is designed in advance of concrete disputes by actors who are not motivated by a desire to help particular actors, ad hoc procedural legislation's legitimacy follows, if at all, from its necessity and from the substantive fairness of the outcomes that it enables. Ad hoc procedural legislation is legitimate when it enables the legal system to provide ordinary goods from litigation and allocates them fairly. It is illegitimate when either condition fails to hold. Ad hoc procedural legislation thus depends upon a different conception of legitimacy than traditional civil procedure—one less concerned with lawmaking processes than the legislature's reasons for acting and the equity of its action.<sup>31</sup> We close by

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<sup>31</sup> Richard Fallon distinguishes among legal legitimacy (whether a directive is lawful), sociological legitimacy (whether “the relevant public regards [the directive] as justified, appropriate, or otherwise deserving support for reasons beyond fear of sanctions or mere hope for personal reward”), and moral legitimacy (whether the directive is morally justified). Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005). In this framework, ad hoc procedural legislation enjoys at best a thin form of legal legitimacy that reflects its status as formal, enacted law. An ad hoc procedural statute may—but need not—be strongly legitimate in the sociological and moral senses, depending on the legislature's reasons for acting and the distributive implications of its legislative design choices. For other efforts to organize intuitions surrounding the concept of legitimacy, see, for example, Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712, 725 (1988) (identifying pedigree, determinacy, symbolic validation, coherence, and adherence as sources of legitimacy in international law), and Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 412–15 (distinguishing among formal and “substantive order” legitimation and suggesting that the sociology of law abandon the legitimation concept entirely). The *locus classicus* remains MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of

explaining this point's implications for legislatures and courts considering ad hoc procedural legislation.

I  
THE LANDSCAPE OF AD HOC PROCEDURE AND THE  
CHALLENGE OF AD HOC PROCEDURAL  
LEGISLATION

The development of the Manville personal injury trust and ratification of the trust's structure in § 524(g) is not the only time that a form of dispute resolution procedure has been created on the fly in response to problems that emerged in a specific litigation. To illustrate the scale and diversity of ad hoc procedure-making, this Part zooms out and describes how ad hoc procedure relates to traditional images of procedure and non-traditional procedural interventions. We then sketch a typology of ad hoc procedure and, focusing specifically on the type of legislation illustrated by § 524(g), consider the challenge that it presents to deeply held intuitions about procedural design.

*A. Civil Procedure and the Rule of Law*

The idea of “ad hoc procedure” seems almost to be an oxymoron. When U.S. law students first encounter the field of civil procedure, they typically<sup>32</sup> study the Federal Rules of Civil Procedure, the “great trans-substantive code”<sup>33</sup> forged under the authority of the Rules Enabling Act (Enabling Act).<sup>34</sup> The Federal Rules are established in advance of specific cases by a group of experts, who work to create procedures that will “secure the just, speedy, and inexpensive determination of every action and proceeding” across the landscape of civil disputes.<sup>35</sup> The same set of rules govern “the procedure in all civil actions and proceedings in the United States district courts.”<sup>36</sup> Rule amendments apply prospectively by default and take effect only after

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Cal. Press 1978) (1922), which distinguishes among legitimacy derived from habit of use (traditional authority), legitimacy derived from the personal qualities of a leader (charismatic authority), and “rational” legitimacy (legal authority). *See id.* at 212–16.

<sup>32</sup> *But see* David L. Noll, *A Reader's Guide to Pre-modern Procedure*, 65 J. LEGAL EDUC. 414, 414 n.1 (2015) (noting exceptions to the federal focus of U.S. procedure education).

<sup>33</sup> Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

<sup>34</sup> 28 U.S.C. § 2072. For a history of the Rules' drafting, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943–75 (1987).

<sup>35</sup> FED. R. CIV. P. 1.

<sup>36</sup> *Id.*

they have sat before Congress for a minimum of seven months.<sup>37</sup> Indeed, a major argument for the Enabling Act's delegation to judicial experts of the power to make procedure was to change the preexisting status quo, where Congress frequently amended procedural rules.<sup>38</sup> The Rules are decidedly *not ad hoc*.

The Federal Rules and the process through which they are created reflect the influence of a process-based model of the rule of law that equates the "rule of law" with the state acting through laws that are designed in a manner aimed to ensure that lawmakers act in the public interest.<sup>39</sup> Perhaps the most famous statement of this model appears in Hayek's *The Road to Serfdom*.<sup>40</sup> Hayek observed there that when the state acts through formal, *ex ante* rules, lawmakers operate behind a veil of ignorance that prevents them from using the power to make law to redistribute resources to favored groups. Unable to anticipate how their enactments will affect particular parties and interest groups, lawmakers can do no more than create general laws that provide ground rules for private ordering.<sup>41</sup> In contrast, when lawmakers address specific problems through "ad hoc action," the state acts as a "moral agent," that picks "winners and losers."<sup>42</sup> Hayek claimed that it is only when lawmakers act in the former mode—when they are ignorant of their handiwork's distributional

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<sup>37</sup> See 28 U.S.C. § 2074(a) (directing the Supreme Court to send "to the Congress not later than May 1" proposed amendments to the Rules, to take effect "no earlier than December 1"). With respect to the temporal scope of amendments, § 2074(a) provides: "The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except . . . to the extent that . . . the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies." *Id.*

<sup>38</sup> See 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1001 (4th ed. 2015).

<sup>39</sup> The process-based account is of course only one of the ways that the "rule of law" ideal is used in contemporary discourse. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 140–45 (2002) (surveying the multiple conflicting uses of "rule of law" in contemporary jurisprudence).

<sup>40</sup> HAYEK, *supra* note 25. The "*cri du coeur* of a nineteenth-century Viennese liberal against the worldwide drift toward dictatorship and totalitarianism," MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 228 (1992), *The Road to Serfdom* broadly argued against economic planning and government activity "deliberately aiming at material or substantive equality of different people," on the ground that "[t]o produce the same result for different people, it is necessary to treat them differently." HAYEK, *supra* note 25, at 79.

<sup>41</sup> See HAYEK, *supra* note 25, at 75 (explaining that formal *ex ante* rules "are expected to be useful to yet unknown people, for purposes for which these people will decide to use for them, and in circumstances which cannot be foreseen in detail").

<sup>42</sup> See *id.* at 76–77 ("Where the precise effects of government policy on particular people are known, where the government aims directly at such particular effects, it cannot help knowing these effects, and therefore it cannot be impartial. It must, of necessity, take sides, impose its valuations upon people and, instead of assisting them in the advancement of their own ends, choose the ends for them.").

consequences—that a law complies with the rule of law. He therefore distinguished enactments that have the formal status of law under the relevant constitutional norms from enactments that complied with the rule of law. Although an enactment might *formally* qualify as law because it was established through constitutional procedures, it only complied with the *rule* of law if lawmakers were insulated from the law’s effects.<sup>43</sup>

Hayek did not distinguish between substantive and procedural legislation, and the benefits that he associated with broadly applicable *ex ante* rules do not depend on whether a law is classified as substantive or procedural. Even so, there are special reasons for governments to follow the Hayekian model when establishing rules of dispute resolution procedure.

An important body of work in social psychology establishes that “authorities and institutions are viewed as more legitimate and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through procedures that people experience as being fair.”<sup>44</sup> This procedural effect has been documented in a range of countries and institutional settings.<sup>45</sup> For example, a simulation

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<sup>43</sup> See *id.* at 82–83 (“If the law says that such a board or authority may do what it pleases, anything that board or authority does is legal—but its actions are certainly not subject to the Rule of Law. By giving the government unlimited powers, the most arbitrary rule can be made legal . . .”).

<sup>44</sup> Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376, 379 (2006) (reviewing and summarizing the psychological literature on legitimacy, “a property that, when it is possessed, leads people to defer voluntarily to decisions, rules, and social arrangements”).

<sup>45</sup> See generally Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117 (2000) (surveying recent research). For specific study results, see, for example, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 7 (2002) (finding, based on surveys of citizens who interacted with the police or the legal system, that the degree to which people feel they have been treated fairly helps to shape their acceptance of the legal process), Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163, 194 (1997) (finding that use of fair procedures on the part of police officers called to the scene of a domestic assault is associated with a reduction in future assaults), and Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL’Y & L. 211, 242–45 (2004) (finding that disputants prefer mediation processes in which a neutral third party helped them reach a resolution and disputants were entitled to introduce information on their own behalf without the help of a representative). The seminal study is JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975), which first established that disputants—in that study, undergraduates who participated in a business simulation experiment—are more likely to accept the outcome of a decision process if they perceive that it is reached through fair procedures. See *id.* at 118; see also TYLER & HUO, *supra*, at 81–96 (discussing findings supporting a process-based strategy for fostering acceptance of an authority’s decisions).

experiment conducted in seven countries revealed that employees who were fired from their job or denied a position when applying for a new job were more likely to accept the decision when they were given an opportunity to explain their point of view and perceived the decision maker to be impartial.<sup>46</sup> In contrast, unfair decision procedures such as racial profiling have been shown to diminish confidence in legal institutions.<sup>47</sup>

The Enabling Act model of procedural design—which seeks to ensure that lawmakers design procedural rules in a way that advances the public’s interest in fair and efficient dispute resolution—provides an important guaranty of the procedural fairness that is central to public perceptions of the legitimacy of legal judgments.<sup>48</sup> Given the connection between fair procedure on the one hand and people’s acceptance of legal judgments on the other, it is unsurprising that many procedural systems share the Enabling Act’s high-level commitment to ex ante rules that are established in advance of particular controversies. A Dutch statute enacted in 2000, for example, provided for uniform court rules that, in a parallel to the Enabling Act, would be

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<sup>46</sup> Ellen S. Cohn et al., *Distributive and Procedural Justice in Seven Nations*, 24 *LAW & HUM. BEHAV.* 553, 553 (2000). The magnitude of the “voice” and “impartiality” effects depended on the simulation that subjects participated in, however. *See id.* at 554–55, 559 (discussing the differences between scenarios with more procedural fairness and less distributional justice, and vice versa).

<sup>47</sup> Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 *CRIMINOLOGY* 253, 276 (2004).

<sup>48</sup> During debates over the Enabling Act, the bill’s backers contended that the technicality and complexity of common law procedure corroded public confidence in the law. For instance, an American Bar Association report urging enactment of the Enabling Act compared court procedure to a municipality’s infrastructure and argued that good legal infrastructure was needed for the law to accomplish its objectives. *See* Thomas W. Shelton, *Putting Courts on Business Basis*, *AM. INDUS.*, Apr. 1923, at 27, 29 (“A city might construct the most modern and capacious reservoir . . . but the quality and quantity that reaches the consumer will be measured by the pipes through which it is conveyed. So . . . the potency and merit of the law will be measured by the machinery through which it is administered . . .”). The Supreme Court echoed the good-infrastructure theme in a seminal early decision interpreting the Enabling Act. *See* *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). “[T]he new policy envisaged in the enabling act,” the Court wrote, “was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.” *Id.* The theme continues to be invoked by supporters of court-developed procedure. *See, e.g.*, Letter from Hon. Jeffrey S. Sutton, U.S. Circuit Judge, Sixth Circuit, Chair, Comm. on Rules of Practice & Procedure & Hon. David G. Campbell, U.S. Dist. Judge, Dist. of Ariz., Chair, Advisory Comm. on Civil Rules, to Hon. Bob Goodlatte, Chairman, Comm. on the Judiciary, U.S. House of Representatives 2 (Apr. 13, 2015), <http://www.afj.org/wp-content/uploads/2015/04/Judicial-Conference-Letter.pdf> (“Congress designed the Rules Enabling Act process . . . to produce the best rules possible through broad public participation and review by the bench, the bar, and the academy. The Enabling Act charges the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation.”).

“created by a committee of judges and laid down in so-called *proces-reglementen* (procedural regulations).”<sup>49</sup> A 2001 German statute granted trial judges new case-management authority and imposed tighter deadlines on the pre-trial process in an effort “to foster transparency and acceptance of court decisions.”<sup>50</sup>

Enactments such as these reflect a belief that *how* procedure is made affects whether courts’ work product is accepted as fair and legitimate. Across legal systems, the law of civil procedure expressly or implicitly promises litigants a fair system for resolving controversies. That procedural rules are cast at a broad level of generality and defined in advance of disputes by lawmakers who are unaware of how their enactments will affect particular groups provides a powerful guaranty of procedural fairness. Procedural fairness, in turn, contributes to the courts’ work product being perceived as legitimate. Judgments are legitimate in large measure because they are the product of fair procedures that are defined in advance of disputes.

### *B. Politically Motivated Procedure, Substance-Specific Procedure, and Ad Hoc Procedure*

The model of procedure-making that we have just sketched seeks to ensure the fairness of dispute resolution procedure by establishing procedural rules in advance of concrete controversies. In this Article, we will treat this model as the traditional model of procedural design.<sup>51</sup>

Notwithstanding the traditional model’s intuitive appeal, scholars have recognized that not all procedure is made in the manner that the model envisions. Departures occur along three dimensions: The field of civil procedure is neither as politically neutral, nor as trans-substantive, nor as forward-looking as the traditional model suggests. From the perspective of the traditional model, each of these departures diminishes procedure’s presumptive legitimacy.

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<sup>49</sup> C.H. (Remco) van Rhee & Remme Verkerk, *The Netherlands: A No-Nonsense Approach to Civil Procedure Reform*, in CIVIL LITIGATION IN CHINA AND EUROPE: ESSAYS ON THE ROLE OF THE JUDGE AND THE PARTIES 259, 264 (C.H. (Remco) van Rhee & Fu Yulin eds., 2014) [hereinafter LITIGATION IN CHINA AND EUROPE].

<sup>50</sup> Andrea Wall, *Austria & Germany: A History of Successful Reforms*, in LITIGATION IN CHINA AND EUROPE, *supra* note 49, at 141, 161.

<sup>51</sup> Historians debate when the traditional model took hold. In the United States, the 1851 Field Code is generally considered the first modern code of civil procedure. See Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 155–60 (2015). But see Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988) (same); Subrin, *supra* note 34 (describing the 1938 Federal Rules as the beginning of modern procedure).

First, scholars have shown that procedure is rarely as free from political motivations as the traditional model would have one believe. “Politically motivated procedure-making” has goals—like regulatory deterrence, wealth transfer, and changes in social mores—that are extrinsic to the civil justice system as opposed to seeking to ensure that claims are resolved fairly and efficiently.<sup>52</sup> When policymakers who lack authority to make substantive regulatory policy (like members of the Rules Committee) engage in such procedure-making, their procedural interventions are presumptively illegitimate: We suspect that a decision framed in nominally procedural terms is, in fact, driven by a substantive regulatory agenda.<sup>53</sup> Even when democratic legislatures with unquestionable authority to make substantive regulatory policy enact politically motivated procedures, as in the Civil Rights Attorney’s Fees Awards Act of 1976,<sup>54</sup> their efforts challenge technocratic policymakers’ monopoly over procedural design, and with it, the assumption that procedural design is necessarily apolitical.<sup>55</sup>

Second, procedure is not as “trans-substantive” as the traditional model suggests.<sup>56</sup> A notable example in U.S. civil procedure is the Private Securities Litigation Reform Act of 1995 (PSLRA),<sup>57</sup> which responded to the securities litigation defense bar’s complaints that

<sup>52</sup> In suggesting that this is a “political” use of procedure-making, we follow Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1688–89 (2004). See also STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 2 (2017) (noting debates over “aspects of the agenda to diminish or disable the infrastructure for the private enforcement of federal rights”).

<sup>53</sup> In response to such concerns, 1988 amendments to the Rules Enabling Act mandated open meetings and extended the period during which a proposed rule must lie before Congress. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4642, 4648–50 (1988) (codified at 28 U.S.C. §§ 2072–74); BURBANK & FARHANG, *supra* note 52, at 108–12. For criticisms of procedural changes that trade on the changes’ political appearance, see, for example, Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 600 (2010) (arguing that the Supreme Court’s changes to procedural rules “manifest[] political objectives”), and Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 852 (2010) (suggesting that the Supreme Court was addressing a perceived “litigation-crisis” in developing the “plausibility” pleading standard).

<sup>54</sup> Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988(b)).

<sup>55</sup> See generally FARHANG, *supra* note 24, at 94–128 (discussing the passage of the Civil Rights Act of 1964 and political compromises regarding its private enforcement scheme).

<sup>56</sup> See generally Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535 (discussing arguments that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), should be confined to antitrust cases); Cover, *supra* note 33 (exploring tensions between the Rules and particular substantive procedural needs); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010) (discussing the history of and departures from trans-substantivity).

<sup>57</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).



plaintiffs' lawyers routinely filed frivolous lawsuits whenever a securities issuer's stock price changed, on the hope that surviving a motion to dismiss would lead to a sizable settlement to avoid discovery and further litigation.<sup>58</sup> To assuage this perceived litigation abuse,<sup>59</sup> the PSLRA heightened pleading requirements and changed other procedures under the Federal Rules exclusively for claims under the federal securities laws.<sup>60</sup> The statute explicitly departs from the norm that civil claims are resolved through cross-cutting rules that apply to "all civil actions and proceedings in the United States district courts."<sup>61</sup>

Third, scholars have noted that not all procedure is established in advance of proceedings, in part because not all procedural problems that arise in the course of litigation can be anticipated. Writing on the Enabling Act's fortieth anniversary, Professor Robert Cover observed that the rule makers' achievement was "all the more remarkable when one realizes that the river of litigation constantly erodes the architecture of process-oriented codes, leaving us with its case law incidents of application."<sup>62</sup> Fifteen years after Cover's essay, Professor Linda Silberman detailed the ways in which magistrate judges and special masters "customize procedure for particular and individual cases."<sup>63</sup>

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<sup>58</sup> H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730.

<sup>59</sup> The PSLRA appears to have developed in response to a perceived problem throughout a category of cases—securities litigation—rather than in response to a particular procedural problem that developed in a particular case, making it *unlike* the ad hoc procedural statutes discussed *infra* in Part II.

<sup>60</sup> For example, under the PSLRA, a plaintiff must identify in her complaint "each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1); see also *id.* § 78u-4(b)(2) (requiring allegations of scienter); *id.* § 78u-4(b)(4) (allocating to the plaintiff the burden of proof on loss causation); *id.* § 78u-4(b)(3)(B) (staying discovery pending the resolution of a motion to dismiss).

<sup>61</sup> FED. R. CIV. P. 1. The conflicts between the procedures in the PSLRA and the trans-substantive federal rules have generated substantial criticism. See, e.g., William D. Browning, *Comment on "The New Securities Fraud Pleading Requirement,"* 38 ARIZ. L. REV. 709, 709–10 (1996) (criticizing the PSLRA's new pleading requirement for its potential to produce extensive litigation); Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L.Q. 457, 459–60 (1998) (summarizing criticisms).

<sup>62</sup> Cover, *supra* note 33, at 732.

<sup>63</sup> Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2131 (1989). Professor Silberman's thoughtful article contends that "trans-substantive rulemaking in fact has been eroded and replaced by ad hoc versions of specialized rules" through a close case study of customized procedures put in place by special masters and magistrate judges. *Id.* Here, we define and explore a broader phenomenon, expanding the understanding of "ad hoc procedure" to encompass the work not just of special masters and magistrates, but also judges of all levels, parties,

As the next section will show, ad hoc procedure is a distinct phenomenon. But it can exhibit all of the above features. Ad hoc procedure can be politically motivated, it is often (but not always) substance specific, and it is inherently backward-looking. Because of this overlap, ad hoc procedure invites the normative objections voiced against those varieties of procedure. Nevertheless, it is its own animal. Our aim in this Article is to define the phenomenon of ad hoc procedure-making, begin to integrate it into the civil procedure literature, and investigate both the intersections among substance-specific procedure, politically motivated procedure, and ad hoc procedure, and the legitimacy of procedural interventions that are designed to bring about specific litigation outcomes.<sup>64</sup> We focus on ad hoc procedural statutes that address procedural problems created by the inadequacies of provisions such as Rule 23, but we also investigate the phenomenon on a broader scale.

### C. *A Typology of Ad Hoc Procedure*

As this Article defines it, “ad hoc procedure” is (1) motivated by a problem (or problems) that is specific to a case or set of cases and (2) addresses that problem in the midst of a faltering pending litigation, through an intervention that changes the “rules of the road” for the case or litigation as it proceeds. The problems that ad hoc procedure addresses characteristically involve a failure to deliver a good that the civil justice system provides in ordinary cases, such as a means of processing claims or offering peace when litigation concludes.<sup>65</sup> It is the desire to address such a problem as opposed to a desire to address systemic concerns that distinguishes ad hoc procedural design. Ad hoc

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legislatures, and other actors who establish procedures motivated by a particular problem in a pending case that apply to that pending case and potentially beyond.

<sup>64</sup> In doing so, we seek to contribute to debates about trans-substantivity and the possibility of neutrality in a world with increasingly politicized attitudes toward procedure. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2069 (1989) (arguing that the rulemaking process is “ill-suited to resolving political contests between competing groups who seek at the expense of their adversaries to advance their short-term interests in litigation outcomes”). See generally Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776–79 (1993) [hereinafter Marcus, *Babies and Bathwater*].

<sup>65</sup> We do not attempt to catalog all of the goods provided by the judicial system here. Cf., e.g., Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (listing the eight goals of dispute resolution systems to be finality, obedience, guidance, efficiency, availability, neutrality, conflict reduction, and fairness); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 609–12 (1985) (listing the features of a procedural system as litigant persuasion opportunities, litigant autonomy, mechanism for allocating decision makers’ power, impartiality, visibility, rational decision-making, finality, revisionism, economy, consistency, differentiation, and ritual).

procedure may or may not be cast in cross-cutting trans-substantive terms, but it is decidedly procedure of the particular.

Once one begins to look for ad hoc procedure, examples of it appear everywhere. These examples can helpfully be organized according to the formal type of legal enactment in which a procedure appears.<sup>66</sup> Doing so yields the following typology of ad hoc procedure:

1. *Case-Specific Procedure: Ad Hoc Applications, Court Orders, and Party Agreements*

The drafters of the Federal Rules intended to bestow considerable discretion upon judges to adjust to procedural issues as they come up in litigation.<sup>67</sup> Some ad hoc procedure is simply created within the confines of these flexible rules when parties and judges confront a procedural impasse in the course of a case.<sup>68</sup> But ad hoc procedure created in such a context can also try or exceed those bounds.<sup>69</sup> For example, the judge may use her general authority to manage litigation and regulate the bar to craft an ad hoc procedural fix, such as a protocol governing the use of predictive coding software in e-discovery<sup>70</sup> or limitations on attorneys' fees in multidistrict litigation.<sup>71</sup>

Alternatively, parties may devise a procedural fix on their own, with or without a court's formal sanction.<sup>72</sup> In the Enron and Lehman

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<sup>66</sup> Thanks to Sergio Campos for suggesting this organization.

<sup>67</sup> See Subrin, *supra* note 34, at 923–25 (arguing that the Rules “enlarged judicial discretion,” reflecting the “equity mentality” of the new procedural system); cf. Lawrence B. Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW: NOMOS XXXVI* 120–21 (Ian Shapiro ed., 1994) (arguing that case-specific equity and the rule of law are reconcilable).

<sup>68</sup> See generally Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

<sup>69</sup> See Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1030 (2013) (arguing that Judge Alvin Hellerstein's ad hoc procedural innovations in the 9/11 first responders litigation were within his authority due to “the distinctive liability policies” behind the statutory scheme that defined and limited that litigation, and that the scope of a judge's authority to engage in procedural ad hocery depends on the substantive legal policies at issues in the litigation).

<sup>70</sup> See, e.g., *Da Silva Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 WL 1446534, at \*1 (S.D.N.Y. Apr. 26, 2012).

<sup>71</sup> See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 119 (2d Cir. 2010) (Kaplan, J., concurring) (addressing the authority of district court judges to alter fee awards in MDL litigation); see also Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 149–52 (2010) (questioning the lawfulness and merits of judicial control over attorney appointments and fee awards in MDLs).

<sup>72</sup> See generally Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329 (2012); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389 (2014); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865 (2015).

bankruptcies, for example, the parties devised a novel dispute resolution system to liquidate the debtor's claims against third parties.<sup>73</sup> Through an order on notice, the bankruptcy court subjected all third parties to the procedure that the lawyers leading the bankruptcy devised.<sup>74</sup> Such measures, too, can spark controversy over the extent of the parties' authority and the legitimacy of procedures that result from party maneuvering.<sup>75</sup>

In spite of criticism, party agreements and the exercise of case-by-case discretion are contemplated throughout much of American civil procedure.<sup>76</sup> Moreover, case-specific applications may lead to established forms of procedure when a case-specific application is invoked in future cases or disseminated as a best practice by law firms, bar organizations, and standard-setting bodies.<sup>77</sup> Judicial control of contingent-fee arrangements, for example, was quickly adopted by

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<sup>73</sup> See Order Pursuant to Sections 105 & 365 of the Bankruptcy Code to Establish Procedures for the Settlement or Assumption & Assignment of Prepetition Derivative Contracts, *In re Lehman Bros. Holdings Inc.*, 469 B.R. 415 (Bankr. S.D.N.Y. 2012) (No. 08-13555) [hereinafter *Lehman Order*]; Order Amending Procedures for Settlement of Terminated Safe Harbor Agreements, *In re Enron Corp.*, 298 B.R. 513 (Bankr. S.D.N.Y. 2003) (No. 01-16034) [hereinafter *Enron Order*].

<sup>74</sup> *Lehman Order*, *supra* note 73, at 3–8; *Enron Order*, *supra* note 73, at 2–5.

<sup>75</sup> A particularly sharp point of contention among bankruptcy scholars is the legitimacy of the pre-packaged asset sales through which the GM and Chrysler bankruptcies were effected. Compare, e.g., Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375 (criticizing the sales), with Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531 (2009) (defending the sales).

<sup>76</sup> See, e.g., FED. R. CIV. P. 16 (granting courts management discretion to issue pretrial conferences and scheduling orders); N.Y. C.P.L.R. 3401 (McKinney 2017) (granting the chief court administrator discretion to adopt rules regulating hearings); see also Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 528 n.72 (2006) (“By Professor Subrin’s count, judicial discretion is explicitly or implicitly provided for in twenty-eight of the eighty-four Federal Rules; the list includes many of the most significant of these rules.” (citing Subrin, *supra* note 34, at 923 n.76)). Internationally, few countries follow the American model of permitting such extensive judicial innovation. See, e.g., Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1569 (2003) (describing English judges as “much more constrained than American judges”). But see, e.g., Ianika N. Tzankova, *Case Management: The Stepchild of Mass Claim Dispute Resolution*, 19 UNIFORM L. REV. 329, 339 n.42, 342–43 (2014) (discussing a Dutch example of involved judicial case management).

<sup>77</sup> See generally Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 988 (1995) (noting the trial-and-error development of mass tort litigation); Silberman, *supra* note 63, at 2175–77 (arguing that judicial innovations in complex litigation have eroded the trans-substantive character of federal civil procedure); William H. Rehnquist et al., *Tribute: In Honor of Judge William W. Schwarzer*, 28 U.C. DAVIS L. REV. 1059, 1059–168 (1995) (collecting comments that reflect upon Judge Schwarzer’s case-specific procedural innovations); Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225, 2234–36 (2000) (discussing the role of the *Manual for Complex Litigation* in doctrinal innovations).

courts outside the Eastern District of New York after Judge Weinstein pioneered it in the *Zyprexa* multidistrict litigation, and today it is a standard feature of multidistrict litigation.<sup>78</sup>

## 2. *Ad Hoc Administrative Adjudication Schemes*

Just as the problems presented by a particular case or type of litigation may prompt a court to develop a new form of procedure, they may motivate lawmakers to redirect claims to a new tribunal that is designed to work better than courts. For example, in response to a “downpour of litigation” triggered by highly publicized vaccine accidents,<sup>79</sup> the National Childhood Vaccine Injury Act established a specialized tribunal within the U.S. Court of Federal Claims that pays claims for vaccine-related injuries via a no-fault liability scheme created in the Act.<sup>80</sup> The tribunal aims to provide compensation to individuals who are injured by covered vaccines via “less-adversarial, expeditious, and informal proceeding[s].”<sup>81</sup> To this end, the Vaccine Act “discards the Federal Rules of Civil Procedure, permits neither pretrial discovery nor cross-examination as of right, relaxes rules for the admission of evidence, and eliminates the need to provide live testimony (instead permitting the parties to introduce evidence by affidavit, sworn declaration, or via telephone or videotape).”<sup>82</sup> The U.S. Court of Federal Claims is not an Article III court, but the Supreme Court’s jurisprudence allows specialized tribunals to be located in non-Article III agencies so long as doing so does not compromise “the institutional integrity of the Judicial Branch.”<sup>83</sup>

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<sup>78</sup> See sources cited *supra* note 71 (describing doctrines courts developed to regulate attorneys’ fees in multidistrict litigation).

<sup>79</sup> ARTHUR ALLEN, *VACCINE: THE CONTROVERSIAL STORY OF MEDICINE’S GREATEST LIFESAVER* 266 (2007).

<sup>80</sup> Pub. L. No. 99-660, §§ 2110–23, 100 Stat. 3755, 3758–74 (1986) (codified at 42 U.S.C. §§ 300aa-10 to -23) (establishing procedures for the administration of the scheme).

<sup>81</sup> 42 U.S.C. § 300aa-12(d)(2)(A).

<sup>82</sup> Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1663 (2015).

<sup>83</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986). Under *Schor*, an agency adjudication scheme’s effect on the institutional integrity of the Article III courts depends upon the jurisdiction and powers the agency court exercises, “the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” *Id.* But see *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (stating that “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789” must be tried by an Article III court when it falls within federal jurisdiction (quoting *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment))).

### 3. *Ad Hoc Entities*

In the face of potential or pending litigation, “claims facilities” with their own unique (or borrowed) procedures are sometimes established to provide a forum for victims of a mass harm to liquidate claims. Because such facilities are not formal state institutions, they often are presented as a form of “alternate dispute resolution” that litigants may choose to invoke as an alternative to asserting claims in public court. The economic barriers to public court litigation, however, can make that “choice” illusory.<sup>84</sup> Domestic examples of such entities include the black lung compensation program,<sup>85</sup> the September 11 Victims Compensation Fund,<sup>86</sup> and the Gulf Coast Claims Facility.<sup>87</sup> Foreign governments have established claims facilities to provide compensation to victims of mass harms, and facilities have also been established by international agreements, for example, to provide reparations to victims of the Holocaust.<sup>88</sup>

### 4. *Ad Hoc Procedural Legislation*

Each of these forms of ad hoc procedure raises distinct institutional and normative questions that we intend to address in future work. In this Article, we focus on a fourth category of ad hoc procedure—that established in legislation such as § 524(g). This category encompasses new forms of procedure, established by statute, that govern proceedings in ordinary courts that preexisted the procedure-generating problem. Statutory ad hoc procedure is created through “ad hoc procedural statutes” or “ad hoc procedural legislation.”<sup>89</sup>

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<sup>84</sup> See, e.g., Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 *LAW & SOC'Y REV.* 645, 648 (2008) (describing the strong incentives and encouragement 9/11 victims received to participate in the September 11 Victims Compensation Fund and to forego bringing claims in court).

<sup>85</sup> See Black Lung Benefits Act, 30 U.S.C. §§ 901–45 (providing monthly compensation and medical benefits to coal miners totally disabled from black lung disease).

<sup>86</sup> See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–09, 115 Stat. 230, 237–41 (2001) (creating an administrative system to compensate September 11th victims in exchange for their agreement to forego litigation).

<sup>87</sup> See GULF COAST CLAIMS FACILITY: PROTOCOL FOR EMERGENCY ADVANCE PAYMENTS (2010), [https://www.restorethegulf.gov/sites/default/files/imported\\_pdfs/library/assets/gccf-emergency-advance-payments.pdf](https://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-emergency-advance-payments.pdf) (outlining a privately-funded plan that allowed individuals and businesses damaged by the Deepwater Horizon accident to receive financial compensation).

<sup>88</sup> See Adam S. Zimmerman, *The Global Convergence of Global Settlements*, 65 *KAN. L. REV.* 1053, 1077–78 (2017) (describing the agreement by American diplomats, European regulators, and insurance companies that created the International Commission on Holocaust Era Insurance Claims).

<sup>89</sup> Ad hoc procedural statutes are just one subset of legislative interventions in procedure. The PSLRA and the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119

Like other forms of ad hoc procedure, ad hoc procedural legislation varies in the extent to which it is motivated by a specific case.<sup>90</sup> Likewise, the procedures established may be limited to a single case,<sup>91</sup> or, at the other end of the spectrum, establish a generally applicable, trans-substantive rule.<sup>92</sup> Regardless of where a statute falls along these dimensions, it changes the rules for resolving disputes mid-stream in response to problems revealed by specific litigation.

Two statutes that are well known to scholars offer initial examples that help to frame our discussion. The first is the Multidistrict Litigation (MDL) statute,<sup>93</sup> which established a mechanism for consolidating related cases before a single judge for consolidated pretrial management and now accounts for thirty-six percent of open cases on the federal docket.<sup>94</sup> The MDL statute was developed in the 1960s “to address a deluge of antitrust litigation spawned by revelations of price-fixing in the electrical-equipment industry.”<sup>95</sup> The statute’s drafters used the judicial response to the electrical equipment industry litigation, described by one judge as “the greatest challenge to the administration of civil justice in the history of the federal judicial system,”<sup>96</sup> as a jumping off point, but their plans for the MDL statute

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Stat. 4 (codified as amended in scattered sections of 28 U.S.C.), are two other prominent examples of statutory regulation of procedure that are not ad hoc legislation as we describe it here. *See also, e.g.*, Lawsuit Abuse Reduction Act of 2017, H.R. 720, 115th Cong. (as passed by House, Mar. 10, 2017) (mandating the imposition of sanctions for the filing of actions found to violate FED. R. CIV. P. 11); Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (as passed by House, Mar. 9, 2017) (imposing an assortment of new limitations on the certification of class actions under FED. R. CIV. P. 23).

<sup>90</sup> Compare *infra* text accompanying notes 194–95 (discussing the scope of § 524(g)), with *infra* text accompanying notes 233–44 (discussing the Dutch WCAM).

<sup>91</sup> See *infra* text accompanying note 302 (discussing § 502 of the Iran Sanctions Act).

<sup>92</sup> See *infra* text accompanying notes 93–99 (discussing the MDL statute); *infra* text accompanying notes 227, 233 (discussing the Dutch WCAM).

<sup>93</sup> See 28 U.S.C. § 1407.

<sup>94</sup> See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 3). On the growth in multidistrict litigation, see Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211 (2015), and Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775 (2010).

<sup>95</sup> Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 838 (2017).

<sup>96</sup> William H. Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 269 (1978). In the electrical equipment cases, Chief Justice Warren convened an ad hoc committee of judges to coordinate discovery and other aspects of the litigation. “The Committee had no power to enter any orders or to require any judge assigned to any of the cases to do anything—its efforts depended entirely on the voluntary cooperation of the district judges involved . . . [and] the level of cooperation by district judges was remarkable.” Bradt, *supra* note 95, at 857.

were more ambitious. As Professor Andrew Bradt describes in his illuminating account of the MDL statute's origins: "The drafters believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way."<sup>97</sup> The drafters believed that, to accomplish this, the statute "needed to endow the judges overseeing these litigations with plenary power to manage them and with the flexibility to innovate when doing so."<sup>98</sup> Thus, the MDL statute was itself an example of a trans-substantive ad hoc procedural statute that addressed problems raised in a particular set of ongoing litigations, as well as a platform for encouraging and enabling judicial procedural innovations in the form of ad hoc procedure in future complex litigations.<sup>99</sup>

The second initial example is the Prison Litigation Reform Act of 1996 (PLRA), which created a unique set of procedural hurdles for prisoners challenging their conditions of confinement and limited federal courts' authority to impose institutional reforms on prisons via injunctions and consent decrees.<sup>100</sup> The PLRA's institutional reform provisions originated in conservative opposition to federal court orders that attempted to ensure that prisons complied with the Eighth Amendment prohibition of cruel and unusual punishment.<sup>101</sup> At a July 1995 hearing on a predecessor to the PLRA, the Stop Turning Out Prisoners (STOP) Act,<sup>102</sup> Philadelphia District Attorney Lynne Abraham expressed outrage<sup>103</sup> at a consent decree entered in *Harris v. Philadelphia*, a long-running case that sought to remedy unconstitu-

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<sup>97</sup> Bradt, *supra* note 95, at 839.

<sup>98</sup> *See id.*

<sup>99</sup> *See, e.g.,* Silver & Miller, *supra* note 71, at 109–10 (discussing ad hoc procedure within MDL); Linda S. Mullenix, *Policing Non-class Aggregate Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. (forthcoming 2017) (manuscript at 38–39) (arguing that the All Writs Act, 28 U.S.C. § 1651, provides MDL judges wide discretion in reviewing non-class aggregate settlements).

<sup>100</sup> Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

<sup>101</sup> *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 53 (Ed Gillespie & Bob Schellhas eds., 1994) (pledging to enact the Taking Back Our Streets Act, a predecessor to the PLRA). For descriptions of the PLRA's origins, see Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 610 (2012) (noting that the PLRA was enacted in part due to a prisoner reduction consent decree in Philadelphia that allegedly led to dangerous inmates being released from prison), and Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1565–69 (2003) (describing the legislative debate over the PLRA).

<sup>102</sup> H.R. 554, 104th Cong. (introduced Jan. 18, 1995).

<sup>103</sup> *Prison Reform: Enhancing the Effectiveness of Incarceration, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 49–50 (1995) [hereinafter *STOP Act Hearing*] (statement of Lynne Abraham, Philadelphia District Attorney) (arguing that the consent



tional conditions in the Philadelphia Prison System.<sup>104</sup> Abraham pointed to Patrick Boyle, a member of the audience whose son was killed in the line of duty, and maintained that the officer's killer had been "released under the prison cap" the City of Philadelphia agreed to in *Harris*.<sup>105</sup> Senator Kay Hutchison (R-TX) similarly testified that one of her sorority sisters from college—"one of the 10 most beautiful girls on campus"—was murdered by a prisoner who had been released pursuant to a consent decree in *Ruiz v. Estelle*, a long-running prison conditions case in Texas.<sup>106</sup>

In direct response to such complaints, the PLRA limits the scope of injunctions and consent decrees "in any civil action with respect to prison conditions."<sup>107</sup> Likely responding to DA Abraham's frustration at the district court judge's ruling that she could not intervene in the *Harris* case,<sup>108</sup> the Act also provides that in any action involving "prison conditions," affected government officials are entitled to intervene and seek the immediate termination of a consent decree or injunction that fails to comply with the prescribed limitations on the scope of such decrees and injunctions.<sup>109</sup>

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decree led to an increase in outstanding bench warrants, criminal activity, and the rate of defendants failing to appear in court).

<sup>104</sup> *Harris* began in 1982 when inmates at Holmesburg Prison filed a class action complaint against the City of Philadelphia and Philadelphia prison officials alleging that overcrowding violated their constitutional rights. See *Harris v. Philadelphia*, No. CIV.A. 82-1847, 2000 WL 1239948, \*1 (E.D. Pa. Aug. 30, 2000). The district court abstained from hearing the case but the abstention decision was reversed on appeal. *Harris v. Pernesley*, 755 F.2d 338 (3d Cir. 1985). On remand, the parties entered into a consent decree that applied to "all past, present, and future inmates of the Philadelphia Prison System." *Harris*, 2000 WL 1239948, at \*12. There followed many years of litigation and modifications to the consent decree as Philadelphia sought, with varying degrees of energy, to bring its prisons into compliance with the standards defined in the consent decree. Following eighteen years of litigation, the population of the prison system had "nearly doubled." *Id.* at \*10. The presiding district judge found that "[a]lthough new facilities have been, and are being built, they are immediately filled beyond capacity." *Id.* For an account of *Harris* by Judge Shapiro, see Norma Levy Shapiro, *Reflections on the Philadelphia Jails Consent Decree*, in *CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES 91-96* (Andrew Rachlin ed., 2006).

<sup>105</sup> *STOP Act Hearing*, *supra* note 103, at 47.

<sup>106</sup> *Id.* at 8.

<sup>107</sup> 18 U.S.C. § 3626(a)(1)(A). For a description of how PLRA's limitations on remedial orders parallel federal interventions previously rejected by the Supreme Court, see Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 51 (1997).

<sup>108</sup> District Judge Norma Shapiro observed, when terminating the *Harris* consent decree, that "the District Attorney led the efforts to enact the PLRA." *Harris*, 2000 WL 1239948, at \*8.

<sup>109</sup> 18 U.S.C. § 3626(b)(2). On the connection between *Harris* and the intervention provision, see Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 *HARV. C.R.-C.L. L. REV.* 165, 170 n.26 (2013) (noting that *Harris* is "[t]he

In addition to modifying other aspects of prison litigation, the PLRA aimed squarely at changing the course of proceedings in *Harris* and *Ruiz*. In this sense, it epitomizes the process of ad hoc procedure-making via federal legislation. While the Philadelphia jails remained overcrowded four years after the PLRA became law, Judge Shapiro noted that the PLRA tied her hands in the *Harris* litigation because the law made existing decrees “unenforceable if challenged.”<sup>110</sup> Insofar as it was motivated by lawmakers’ desire to address litigation in *Harris* (as well as other similar cases), the PLRA can be understood as an example of a substance-specific and politically motivated ad hoc procedural statute. The Act remains deeply controversial.<sup>111</sup>

#### D. *The Challenge of Ad Hoc Procedural Legislation*

Many of the risks of ad hoc procedural legislation follow both from the fact that it is often substance specific and from the appearance that it is motivated by political considerations.

Consider the PLRA. Critics charge that the PLRA does not seek to ensure that prison litigation is resolved fairly and efficiently, but “is explicitly dedicated to creating unequal justice under law.”<sup>112</sup> The Act accomplishes this “by establishing a code of special restrictive rules” which applies to a single “unpopular group of litigants” that does not enjoy strong representation in the federal legislative process.<sup>113</sup> In critics’ view, the PLRA’s special-purpose code of procedure conflicts with courts’ obligation to treat litigants fairly and impartially, and creates unjustified transaction costs for courts, litigants, and attorneys who must apply the new special-purpose code in covered cases.<sup>114</sup>

If one credits the critics’ view, the PLRA’s singling out of a particular class of litigants for special treatment, based on legislators’ displeasure with their success in prior litigation, also raises questions of institutional legitimacy. Separation-of-powers theory traditionally posited the necessity of a sharp distinction between legislative and judi-

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lawsuit that looms the largest” in the PLRA’s legislative history), and Richard J. Costa, Note, *The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End the Alleged Micro-Management of State Prisons or a Violation of Separation of Powers?*, 63 BROOK. L. REV. 319, 331 (1997).

<sup>110</sup> *Harris*, 2000 WL 1239948, at \*10.

<sup>111</sup> Compare, e.g., *Jones v. Bock*, 549 U.S. 199, 203 (2007) (reasoning that the PLRA reflects Congress’s judgment that “[w]hat this country needs . . . is fewer and better prisoner suits”), with Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1672 (2016) (arguing that the PLRA inhibits use of civil litigation as a mechanism for developing and enforcing constitutional rights).

<sup>112</sup> John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 429 (2001).

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* at 429–33; Tushnet & Yackle, *supra* note 107, at 48–70.

cial functions, which is violated when the legislature revises final judgments or directs that ongoing cases be resolved in a particular manner.<sup>115</sup> Since the nineteenth century, U.S. constitutional law has struggled to identify the precise circumstances in which legislation invades the judicial power reserved to Article III courts.<sup>116</sup> Applying doctrine that attempts to mark the boundary line between Articles I and III, the Supreme Court rejected an Article III challenge to the PLRA on the ground that it changed the substantive law applicable to prisoner claims on a prospective basis.<sup>117</sup> Critics charge, however, that the Act's disruption of final judgments obtained "through years of labor," which reflected courts' considered application of constitutional norms, "significantly compromised the independence of the judiciary."<sup>118</sup>

We identify five overarching concerns with the legitimacy of ad hoc procedural statutes, most of which can be illustrated through the PLRA example. First, the statute was deliberately limited to specific claims or litigants.<sup>119</sup> Lawmakers who voted on it did not operate behind a veil of ignorance or act on the basis of recommendations developed by technocratic experts, but could anticipate precisely how the law would affect specific, ongoing litigation.<sup>120</sup> This knowledge

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<sup>115</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995) ("This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution.").

<sup>116</sup> That Congress may change the law applicable to a pending case has been clear since *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1855), which upheld a statute that "declared" two bridges that were the subject of nuisance actions "to be lawful structures in their present positions and elevations." Beyond this basic principle, the Supreme Court has struggled to articulate standards to determine when other legislative interventions that affect ongoing litigation exceed Congress's power under Article I or infringe courts' Article III authority. Compare *Plaut*, 514 U.S. at 240 (invalidating an amendment to the Securities Exchange Act that directed courts to reopen certain judgments previously dismissed on statute-of-limitations grounds), and *United States v. Klein*, 80 U.S. (13 Wall.) 128, 129 (1871) (refusing to give effect to a statutory provision stating that presidential pardons could not be used as evidence in actions to recover damages for property seized during the Civil War and directing the Supreme Court to dismiss actions based on a pardon for lack of jurisdiction), with *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 429 (1992) (rejecting an Article III challenge to a statute in which Congress "determine[d] and direct[ed]" that compliance with certain standards satisfied the statutory requirements at issue in two ongoing actions (quoting Act of Oct. 23, 1989, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747)). See also *infra* text accompanying note 304 (discussing *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016)).

<sup>117</sup> *Miller v. French*, 530 U.S. 327, 350 (2000).

<sup>118</sup> Boston, *supra* note 112, at 447-49.

<sup>119</sup> Ad hoc procedural legislation that is trans-substantive, like the MDL statute, can generate its own issues if it is overly broad.

<sup>120</sup> See *supra* notes 101-11 and accompanying text (discussing the PLRA's origins in the Philadelphia prison overcrowding litigation).

raises the question whether lawmakers who approve ad hoc legislation are motivated by the desire to reward a popular group (or punish an unpopular one) rather than pursuing some more neutral definition of public policy.<sup>121</sup> We term this the “legislative partiality” problem.

Second, ad hoc procedural legislation that is limited to specific claims or litigants creates transaction costs for courts, litigants, and attorneys who must operate under its new, special-purpose regime. When an ad hoc statute is over- or underbroad relative to its animating objective, it threatens the ideal that like cases be treated alike. Carried to its logical limits, ad hoc procedural legislation created in response to problems revealed in specific cases threatens to create a garden of forking paths in which no two cases are treated alike. This can be either because a substance-specific statute like the PLRA singles out prison litigation for special (negative) treatment, or because an ad-hoc-procedure-encouraging law like the MDL statute permits so much discretion that judges can cater procedures individually to each litigation.<sup>122</sup> We term this the “special treatment” problem.

Third, ad hoc procedural legislation like the PLRA raises questions of institutional legitimacy. If the separation of powers prevents the legislature from dictating the outcome of pending cases or reopening judgments that have become final, can the legislature nonetheless change the procedures through which claims are resolved in a way that makes particular litigation outcomes more likely, if not inevitable? We term this the problem of “legislative interference.”

Fourth, the time frame in which ad hoc legislation is enacted departs from the rule-of-law ideal that legislation operate prospectively. Because ad hoc procedural legislation is enacted midstream—when ongoing litigation has revealed a problem that cannot be resolved through the ordinary processes of law—it involves an intuitively troubling form of retroactivity.<sup>123</sup> Admittedly, Supreme Court doctrine denies that “jurisdictional” or “procedural” changes are ever

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<sup>121</sup> See Marcus, *Babies and Bathwater*, *supra* note 64, at 773–74 (defining neutrality and arguing that it “is at least a pursuable goal in designing procedures for civil litigation”).

<sup>122</sup> See Bradt, *supra* note 95, at 839; Silver & Miller, *supra* note 71, at 109–10.

<sup>123</sup> In contrast to Rules amendments, which also may apply retroactively, *see supra* note 37, ad hoc procedural statutes purposefully seek to affect particular pending cases. This feature distinguishes ad hoc procedure from procedures that are changed prospectively in response to perceived injustices in particular cases. *See, e.g.*, Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 620 (1987) (explaining that Congress enacted the “Hinkley Amendment,” FED. R. EVID. 704(b), after a jury found would-be presidential assassin John Hinkley not guilty by reason of insanity). Such procedures also suffer from legislative myopia and other problems, but they are not the focus of this Article.

retroactive in a manner that offends due process.<sup>124</sup> But this principle, based on the intuition that procedural changes merely affect the way that rights are enforced rather than defining primary obligations, has more intuitive appeal when applied to procedure produced through the traditional model. It hardly eliminates the concern about ad hoc procedural legislation's retroactivity.<sup>125</sup> For example, Section 524(g) unlocked two billion dollars in value for Manville's shareholders by reducing the value of asbestos claims against the firm to a fraction of their pre-bankruptcy value and greatly reducing the costly uncertainty that accompanied those claims.<sup>126</sup> The "procedural" nature of this intervention does not answer whether it was fair to retroactively change the way that Manville's asbestos liability was resolved after a substantial number of claims against Manville had accrued. We term this the "retroactivity" problem.

Lastly, we show below that because ad hoc procedural legislation is enacted in the midst of litigation, it is less likely to be the product of sustained consideration of all of its potential consequences than generally applicable procedures.<sup>127</sup> The (comparatively) slap-dash manner in which ad hoc procedural legislation is enacted increases the likelihood that it will fail to anticipate—or address—problems that arise when it is put to use. This, in turn, may generate demand for new legislation. We term this the problem of "legislative myopia."

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Ad hoc procedural legislation, then, presents a multi-faceted challenge to the traditional image of procedure-making. Not only does ad hoc procedural legislation depart from the norms of legislative impartiality and generality that have long guided the federal rulemaking process, but it is also made on the fly, challenging the assumption that the fairness and legitimacy of adjudication follows from cases being decided according to procedures established in

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<sup>124</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274–75 (1994) (discussing the lightweight presumption against statutory retroactivity that applies to jurisdictional and procedural legislation).

<sup>125</sup> See *id.* at 275 n.29 (rejecting the suggestion "that concerns about retroactivity have no application to procedural rules").

<sup>126</sup> See *supra* note 21 and accompanying text (discussing Manville's sale to Berkshire Hathaway); *infra* notes 197–98 (discussing the prevalence of bankruptcy filings under 524(g) for other asbestos manufacturers).

<sup>127</sup> On the standard process for making federal procedural rules, see Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1546 (2014) (describing statutory changes in the 1980s, including open meeting requirements and multiple levels of review, that slow federal court rulemaking). See also sources cited *supra* note 30 (noting that a federal rule takes two to three years or longer to navigate the rulemaking process).

advance of disputes that aspire to ensure that similar cases are treated alike. Ad hoc procedures raise these legitimacy questions even when they are enacted as legislation because the legislative process, unlike the federal rulemaking process, does not incorporate procedural safeguards that are meant to ensure the procedures' impartiality. This is not to say that procedure must necessarily be trans-substantive, or prospective, or enacted through the Enabling Act in order to be legitimate. Rather, we claim that procedure that shares those features enjoys a presumption of legitimacy; without them, legitimacy must come from somewhere else.

With this challenge in mind, the following Part traces the development of four ad hoc procedural statutes in three legal systems. The case studies reveal a tension that is fundamental to the legitimacy of ad hoc procedural legislation. While the profiled statutes appear to transgress the rule-of-law norms that traditionally animated procedural design, they also share the Federal Rules' basic objective of ensuring that claims are resolved "on the merits."<sup>128</sup> Often, ad hoc procedural statutes *restore* the legal system's ability to provide a good that it provides in ordinary litigation. This restorative function suggests that ad hoc procedural legislation performs a vital—if poorly understood—role in ensuring that the complexity of the modern world does not prevent the civil justice system from providing the basic goods it was established in the first instance to provide.

## II

### CASE STUDIES OF AD HOC PROCEDURAL LEGISLATION

Ad hoc procedural legislation provides an important gateway to understanding the broader phenomenon of ad hoc procedure. To illuminate the problems that motivate such legislation and the choices that legislatures face in enacting it, this Part profiles three problems that prompted legislatures to consider ad hoc procedural statutes, and the legislation that resulted.<sup>129</sup> These studies showcase a tension at the

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<sup>128</sup> See generally Subrin, *supra* note 34, at 986–87 (tracing the importance of the “on the merits” concept in the development of the Federal Rules).

<sup>129</sup> The statutes profiled here are far from the only examples of ad hoc procedural legislation. See, e.g., *supra* notes 93–111 and accompanying text (describing how the MDL statute and the PLRA also qualify as ad hoc procedural statutes); see also, e.g., An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005) (granting a single federal district court jurisdiction to adjudicate any federal or constitutional “suit or claim by or on behalf of Theresa Marie Schiavo” if the suit was filed “within 30 days after the date of enactment of this Act”); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–09, 115 Stat. 230, 237–41 (2001) (prescribing procedures, enacted after September 11, 2001, for claims arising out of terrorist attacks); cf. Robin J. Effron, *Event Jurisdiction and Protective Coordination*:

core of ad hoc procedural legislation: While such legislation conflicts with traditional images of procedure and procedure-making, it often serves important interests, most prominently by overcoming procedural problems that cannot be resolved using ordinary processes of law. The case studies show that the problems that motivate ad hoc procedural legislation are not unique to the United States, and that constitutional law has only a modest influence on the design of ad hoc procedural legislation. Whether it occurs in the United States or abroad, ad hoc procedural legislation is only weakly constrained by norms of the separation of powers and due process.

### A. *Adjudication: The Deutsche Telekom Act and the Rise of Aggregate Litigation in Germany*

As the asbestos litigation crisis illustrates, the unexpected filing of a large number of lawsuits can overwhelm courts' ability to adjudicate claims using existing procedures. Germany faced a similar crisis in the wake of an alleged securities fraud perpetrated by Deutsche Telekom. As in the asbestos litigation context, legislative intervention was necessary to devise an effective mechanism for handling the massive number of claims filed in that case. The controversy led to a statute known as the Deutsche Telekom Act, which sought to tackle the problem of adjudicating the claims, rather than settling them.

#### 1. *The Deutsche Telekom Crisis*

In 1996, the German government privatized the national telecommunications carrier, Deutsche Telekom (DT), in what was then Europe's largest initial public offering.<sup>130</sup> The DT offering was a crucial part of a larger government effort to inspire ordinary investors to participate in the securities markets instead of stashing savings under the proverbial mattress.<sup>131</sup> In the lead-up to DT's IPO, a media blitz portrayed DT stock as a conservative investment that would generate

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*Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199 (2007) (analyzing the Air Transportation Safety and System Stabilization Act).

<sup>130</sup> See John Schmid, *Demand Said to Soar for 500 Million Shares: Telekom Sets Price Range for Its IPO*, N.Y. TIMES (Oct. 22, 1996), <http://www.nytimes.com/1996/10/22/business/worldbusiness/demand-said-to-soar-for-500-million-shares-telekom.html>.

<sup>131</sup> The campaign portrayed DT shares as *Volksaktie* or "the people's share[s]." See Michael Halberstam, *The American Advantage in Civil Procedure? An Autopsy of the Deutsche Telekom Litigation*, 48 CONN. L. REV. 817, 832 (2016). The actor Manfred Krug—a German Fred Thompson "who usually played trustworthy, down-to-earth, common-people characters"—appeared in television commercials and "advised everybody to buy Telekom shares." Axel Halfmeier, *Litigation Without End? The Deutsche Telekom Case and the German Approach to Private Enforcement of Securities Law*, in CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION 279, 281 (Deborah R. Hensler et al. eds., 2016).

a reliable income stream for investors.<sup>132</sup> The campaign persuaded many Germans to buy DT stock.<sup>133</sup> In 2000 and 2001, however, DT issued unscheduled disclosures about its real estate assets, its acquisition of VoiceStream, and its sale of \$8.2 billion of Sprint common stock.<sup>134</sup> By December 2000, DT stock was trading at thirty percent of its post-IPO high.<sup>135</sup>

The German Civil Procedure Code (ZPO) lacks a class action mechanism, and German courts have not traditionally entertained U.S.-style private securities litigation.<sup>136</sup> Yet the strengthening of E.U. disclosure requirements in the years before DT's IPO<sup>137</sup> and the seemingly blatant fraud committed by the company's managers raised the prospect that investors could recover some of their losses. As DT's stock price plummeted in the fall of 2000, plaintiffs' attorney Andreas Tilp appeared in a television interview and opined that the company could be held liable for misstatements in its IPO prospectus.<sup>138</sup> Investors flooded Tilp's office with inquiries, and he soon assembled a portfolio of thousands of clients.<sup>139</sup> To finance litigation against DT, Tilp and his plaintiffs used a form of legal expense insurance that most German households carry to cover litigation over small-scale personal and commercial disputes.<sup>140</sup>

Tilp and other plaintiffs' attorneys began to file lawsuits en masse. Under German jurisdictional law, all claims that arose out of

<sup>132</sup> See Halfmeier, *supra* note 131, at 281.

<sup>133</sup> See *id.*

<sup>134</sup> The 2000 disclosure revealed DT would purchase the U.S. telecommunications company VoiceStream for the astounding price of fifty billion dollars. DT's stock price dropped thirteen percent on the day of the announcement and the purchase—on the brink of a financial downturn—turned out to be a terrible business decision. The 2001 disclosure announced the reevaluation of DT's real estate portfolio at two billion euros below the company's previous evaluation. The stock price again dropped precipitously. See Halberstam, *supra* note 131, at 834. One news report put the cumulative stock drop at eighty-six percent. Corinna Budras, *Litigation Logjam: In a Case That Could Drag on Six More Years, a Frankfurt Judge Must Review 15,000 Separate Shareholder Claims Against Deutsche Telekom. No Wonder Europe Is Quickly Discovering the Benefits of Class Actions*, NAT'L POST, NOV. 24, 2004, at 10, 2004 WLNR 12484873.

<sup>135</sup> Halberstam, *supra* note 131, at 833–34, 863.

<sup>136</sup> See *id.* at 843.

<sup>137</sup> See generally Roberta S. Karmel, *Reform of Public Company Disclosure in Europe*, 26 U. PA. J. INT'L ECON. L. 379, 380 (2005) (discussing the Financial Services Action Plan and Prospectus Directive, and efforts to implement those measures at the E.U. and national level).

<sup>138</sup> See Halfmeier, *supra* note 131, at 282.

<sup>139</sup> Andreas W. Tilp & Thomas A. Roth, *The German Capital Market Model Proceedings Act as Illustrated by the Example of the Frankfurt Deutsche Telekom Claims*, in MASS TORTS IN EUROPE: CASES AND REFLECTIONS 131, 132 (Willem H. van Boom & Gerhard Wagner, eds., 2014).

<sup>140</sup> See Halfmeier, *supra* note 131, at 283.



the IPO were assigned to Judge Meinrad Wösthoff of the Frankfurt trial court.<sup>141</sup> At the peak of filings, documents literally were brought to the court by the truckload.<sup>142</sup> Judge Wösthoff estimated that claims against DT were equivalent to ten years of the court's ordinary commercial docket.<sup>143</sup>

## 2. *Judicial Management Fails*

The Frankfurt court was not equipped to handle litigation of this size or complexity. The ZPO is premised on a bipolar, plaintiff v. defendant model of litigation.<sup>144</sup> At the time the DT cases were filed, the Frankfurt court lacked an electronic filing system and worked off hard-copy papers. Judge Wösthoff personally entered filings on Excel spreadsheets.<sup>145</sup>

Judge Wösthoff's first instinct for handling the flood of claims was to use the court's inherent authority to devise a trial plan that would allow issues common to the DT claims to be resolved in a single authoritative proceeding. The device the judge proposed resembled the "issue class action" that some U.S. courts have used<sup>146</sup> following the Supreme Court's 2011 ruling in *Wal-Mart v. Dukes*.<sup>147</sup> A "test case" would first be heard to permit the court to resolve common issues.<sup>148</sup> In theory, the decision in the test case would streamline later cases by establishing fact-findings that would not have to be re-litigated. This court-devised procedure failed to resolve the DT claims, however, because German law generally does not allow findings from one case to be carried over to another.<sup>149</sup> In common law terms, the "test case" did not have issue-preclusive effect.

Pressure on the Frankfurt court increased when a June 2004 decision of the Federal Constitutional Court held that intentionally

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<sup>141</sup> See *id.*

<sup>142</sup> See Benjamin Lee & Benedict Heil, *The Role of Private Litigation 5* (Spring 2016) (unpublished seminar paper, University of Pennsylvania Law School), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1005&context=fisch\\_2016](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1005&context=fisch_2016).

<sup>143</sup> See *id.*

<sup>144</sup> BUNDESMINISTERIUM DER JUSTIZ [FEDERAL MINISTRY OF JUSTICE], DISKUSSIONSENTWURF: GESETZ ZUR WEITEREN VERBESSERUNG DES ANLEGGERSCHUTZES [DISCUSSION DRAFT] (2004) [hereinafter KAPMUG DRAFT].

<sup>145</sup> See Halfmeier, *supra* note 131, at 283.

<sup>146</sup> See, e.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (allowing class-wide treatment for the issue of whether an employer's policies constituted discrimination against African-American employees under Title VII).

<sup>147</sup> See 564 U.S. 338, 352 (2011) (interpreting Rule 23(a)'s commonality requirement to require that a common issue drive the resolution of the class's claims).

<sup>148</sup> See Halfmeier, *supra* note 131, at 284 (describing the process by which the test case would be chosen).

<sup>149</sup> See *id.* at 283 (noting that there was no rule in the German Code of Civil Procedure that allowed a test case to be used in this manner).

staying the DT claims, as some U.S. courts had done during the asbestos litigation crisis,<sup>150</sup> would violate the plaintiffs' rights under the German Constitution.<sup>151</sup> In response to the decision, Frankfurt judges began what a press account describes as a "mutiny."<sup>152</sup> To enable the court to handle the litigation, judges demanded legislation that strengthened the legal basis for resolving the DT claims via the "test case" procedure. A German lawyer observed: "This was a cry for help, directed at the federal government in Berlin."<sup>153</sup>

### 3. *Legislative Recognition of the Test Case Procedure*

The Berlin government received the message. In April 2004, the Federal Ministry of Justice circulated a discussion draft of a bill that codified the test case procedure Judge Wösthoff devised.<sup>154</sup> The Ministry formally proposed legislation in November 2004.<sup>155</sup> On June 17, 2005, the Bundestag passed the *Kapitalmusterverfahrensgesetz*, popularly known as the KapMuG or "Deutsche Telekom" Act.<sup>156</sup>

The Act authorizes the trial court to certify a "model case" to the intermediate court of appeals, which serves as the trier of fact for "[a]ll points of dispute" identified in the trial court's certification

<sup>150</sup> See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 748 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (describing courts' different efforts at addressing floods of asbestos litigation, including "creat[ing] an inactive docket of cases with plaintiffs who have few if any objective symptoms").

<sup>151</sup> BVerfG, 1 BvR 1196/04, July 27, 2004, [http://www.bverfg.de/e/rk20040727\\_1bvr119604.html](http://www.bverfg.de/e/rk20040727_1bvr119604.html).

<sup>152</sup> Budras, *supra* note 134. That month, the President of the Court issued a press release that was equal parts mea culpa and a plea for institutional reform, describing the influx of extension requests from 630 different law firms on the last days before the filing deadline: "Every single file had to be physically brought into the judge's office, so that he could decide whether the deadline extension should be granted. . . . [A]n employee transfer[red] the decision into the computer system . . . and sen[t] it by mail to the affected parties." Halfmeier, *supra* note 131, at 284 (quoting a June 8, 2004 press release of the Regional Court of Frankfurt am Main).

<sup>153</sup> Halfmeier, *supra* note 131, at 284.

<sup>154</sup> KAPMUG DRAFT, *supra* note 144, at 18–19.

<sup>155</sup> Budras, *supra* note 134.

<sup>156</sup> Halberstam, *supra* note 131, at 847. As scholars have noted, "the KapMuG was motivated [in substantial part] by the fact that the biggest investors' action in Germany, the Deutsche Telekom case which involves more than 15,000 individual plaintiffs, 2100 individual lawsuits and 700 plaintiffs' attorneys, has congested the Frankfurt trial court to an unacceptable degree." Eberhard Feess & Axel Halfmeier, *The German Capital Markets Model Case Act (KapMuG): A European Role Model for Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reform*, 20 EUR. J. FIN. 361, 362 (2014); see also Gerhard Wagner, *Collective Redress—Categories of Loss and Legislative Options*, 127 LAW Q. REV. 55, 65 (2011) ("This case, which threatened to clog the Frankfurt court for years, even provoked the intervention of the federal legislator [sic], who moved fast to pass the [KapMuG].").

order.<sup>157</sup> The appellate court's findings and conclusions in the model case are binding in all cases identified by the certification order. Liti-gants may not opt out of the model case procedure. In solidifying the legal basis for the test-case procedure, the Act seeks both to overcome the crisis that caused the judges of the Frankfurt court to mutiny in the DT litigation and to strengthen enforcement of German securities law. As the bill's statement on the need for legislation observed, the ZPO does not provide effective mechanisms for asserting claims that involved small, dispersed damages. By reducing the transaction costs of private securities enforcement, the DT Act "contribute[s] to a stricter enforcement of the capital market laws."<sup>158</sup>

The Act changed the procedure for the DT litigation midstream, raising concerns about legislative interference and retroactivity.<sup>159</sup> After it was enacted, plaintiffs moved for and were granted certification of a model case proceeding.<sup>160</sup> Furthermore, the DT Act is expressly limited to claims for securities fraud or violations of Germany's Securities Acquisition and Takeover Act,<sup>161</sup> potentially raising a special treatment problem. During the legislative debate, members of the Bundestag referred to the statute as the "*lex Telekom*" because of its origins in the DT litigation.<sup>162</sup>

If the DT Act had allowed the Frankfurt court to successfully resolve the DT litigation, it would have presented a straightforward tradeoff between pragmatic problem-solving and adherence to the traditional image of procedural design. While enacted in the midst of litigation and limited to a specific substantive area, a successful statute could have claimed that these departures from traditional procedural design were necessary to handle the crush of DT claims that Tilp and his colleagues filed. As a normative matter, the question would have been whether the DT Act's violence to rule-of-law values reflected in

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<sup>157</sup> Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Aug. 16, 2005, BUNDESGESETZBLATT, Teil I [BGBL I] at 2438, § 4(2), *translation at* [http://globalclassactions.stanford.edu/sites/default/files/documents/Germany\\_Legislation\\_1.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Germany_Legislation_1.pdf).

<sup>158</sup> Halfmeier, *supra* note 131, at 285; *see also* KAPMUG DRAFT, *supra* note 144, at 18–22.

<sup>159</sup> Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Aug. 16, 2005, BGBL I at 2442, § 20; Halberstam, *supra* note 131, at 847.

<sup>160</sup> *See* Landgericht Frankfurt am Main [LG Frankfurt/M.] [Frankfurt District Court] July 11, 2006, 27 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1730, 2006 (lower court's brief of thirty-three issues for resolution by the intermediate appellate court); *see also* Halfmeier, *supra* note 131, at 286–90 (outlining a range of procedural issues in the early years of the case).

<sup>161</sup> Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Aug. 16, 2005, BGBL I at 2437, § 1(1).

<sup>162</sup> Halfmeier, *supra* note 131, at 284.

traditional procedural design was justified by the justice that the statute delivered.

A striking feature of the DT Act, however, is the extent to which it *failed* to accomplish the objectives that its backers set out for it, at least initially.<sup>163</sup> The DT litigation began in 2005 and has “dragged on” for more than a decade since<sup>164</sup> as a result of appeals to the Federal Court of Justice, procedural “ping-pong” between the trial court and court of appeals, protracted debates over whether individual cases would be stayed during model case proceedings, and the retirement of the presiding appellate judge in the midst of the model case proceedings.<sup>165</sup> By way of contrast, a U.S. securities class action seeking damages for securities law violations during DT’s IPO settled in January 2005 for \$120 million.<sup>166</sup> Commentators see the KapMuG’s failure to deliver justice in the litigation that inspired it as evidence that the statute’s basic design is flawed.<sup>167</sup>

But the legislation’s shortcomings also illustrate a potential model through which ad hoc procedural legislation can be adapted in light of experience and integrated into the broader fabric of proce-

<sup>163</sup> See Érica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law,”* 63 EMORY L.J. 1383, 1491 (2014) (noting the “limited success” of investor actions under the DT Act).

<sup>164</sup> Karin Matussek & Stefan Nicola, *Death of a Plaintiff: A Cautionary Tale for VW Investors*, BLOOMBERG (Oct. 27, 2016), <https://www.bloomberg.com/news/articles/2016-10-27/death-of-a-plaintiff-a-cautionary-german-tale-for-vw-investors>; see also DEUTSCHE TELEKOM, THE 2016 FINANCIAL YEAR 108 (2017) (listing ongoing prospectus liability proceedings as a risk factor for the company).

<sup>165</sup> Halfmeier, *supra* note 131, at 287.

<sup>166</sup> Halberstam, *supra* note 131, at 820. This comparison reflects a possible alternative timeline, but is not intended to take sides in the extensive debates about the fairness, efficiency, or wisdom of any particular aspects of U.S. securities class actions. Cf., e.g., Matteo Gargantini & Verity Winship, *Private Ordering of Shareholder Litigation in the EU and the US*, in THE ELGAR HANDBOOK FOR REPRESENTATIVE SHAREHOLDER LITIGATION (Sean Griffith et al. eds., forthcoming 2017/2018); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534 (2006).

<sup>167</sup> Halberstam criticizes the KapMuG for lacking discovery mechanisms, which he argues are effective at promoting settlement (and thereby cabining lengthy litigation) as well as deterring misconduct. *Id.* at 865–66. Feess and Halfmeier criticize the procedure for requiring individual shareholders to file their own claims to be a part of the model proceeding (rather than permitting opt-out aggregation or simplifying the mechanisms for opting in). Feess & Halfmeier, *supra* note 156, at 363. Brigitte Haar agrees and points out that requiring each claimant to file separately may increase court congestion or decrease claimants’ incentives to participate in the litigation, undermining the effectiveness of the Act’s regulatory goals. See Brigitte Haar, *Investor Protection Through Model Case Procedures – Implementing Collective Goals and Individual Rights Under the 2012 Amendment of the German Capital Markets Model Case Act (KapMuG)* 22–23 (Ctr. for Fin. Studies, Working Paper No. 2013/21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2352263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352263).

ture, thus mitigating the legislative myopia problem. The original Deutsche Telekom Act contained a sunset clause which provided that the Act would expire on November 1, 2010.<sup>168</sup> As the statute approached its expiration date, it was extended for two years “to gain time for discussion.”<sup>169</sup> In 2012, the Act was renewed through 2020<sup>170</sup> with modifications that were designed to facilitate aggregate settlements<sup>171</sup> and streamline model case proceedings.<sup>172</sup> In August 2016, a German court certified a model case proceeding for shareholder claims against Volkswagen that arose out of the clean diesel scandal, the second major test of the statute.<sup>173</sup>

The Bundestag’s decision to extend the DT Act through 2020 and the plaintiffs’ reliance on the statute in the VW litigation illustrate tensions fundamental to ad hoc procedural legislation. For private litigation to “contribute to a stricter enforcement of [Germany’s] capital market laws,”<sup>174</sup> plaintiffs require some mechanism for asserting claims that avoids the staggering transaction costs of individual litigation under the ZPO’s ordinary rules.<sup>175</sup> Reluctant to make far-reaching changes in response to the problems of a specific litigation, the Bundestag created a specialized procedure that changed the rules of the road midstream for the DT litigation, then revised that proce-

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<sup>168</sup> Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Aug. 16, 2005, BGBL I at 2442, § 20.

<sup>169</sup> Halfmeier, *supra* note 131, at 293.

<sup>170</sup> Kapitalanleger-Musterverfahrensgesetz [KapMuG] [Capital Markets Model Case Act], Oct. 19, 2012, BUNDESGESETZBLATT, Teil I [BGBL I] § 28, *translation at* [http://www.gesetze-im-internet.de/englisch\\_kapmug/englisch\\_kapmug.pdf](http://www.gesetze-im-internet.de/englisch_kapmug/englisch_kapmug.pdf).

<sup>171</sup> See Noah R. Wortman & Marc Schiefer, *Top Tips for Recovering Securities Damages Within Europe*, INVESTMENT EUR. (Dec. 5, 2014), <http://www.investmenteurope.net/opinion/top-tips-recovering-securities-damages-within-europe> (noting that settlement is confirmed if seventy percent of claimants agree). *But see* Haar, *supra* note 167, at 25–27 (criticizing the 2012 amendments as insufficient to address the Act’s shortcomings).

<sup>172</sup> See generally Feess & Halfmeier, *supra* note 156 (analyzing the Act’s effectiveness as a mechanism for enforcing German prospectus law).

<sup>173</sup> Alonso Diaz, *Germany Court: Lawsuits Against Volkswagen May Proceed*, JURIST (Aug. 9, 2016), <http://www.jurist.org/paperchase/2016/08/germany-court-lawsuits-against-volkswagen-may-proceed.php>.

<sup>174</sup> Halfmeier, *supra* note 131, at 285.

<sup>175</sup> See John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 166 U. PA. L. REV. (forthcoming 2017) (manuscript at 6). For analyses of how changes in U.S. procedure have contributed to the demand for private enforcement mechanisms outside the United States, see Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1090–98, 1110–15 (2015) (examining the connection between restrictions on personal jurisdiction, forum non conveniens, absence of comity, and the presumption against extraterritoriality in U.S. courts, and the adoption of American-style procedures in foreign courts), and David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 65–82 (2014) (describing how concerns about interference in foreign regulation have driven changes in U.S. doctrine governing forum selection, arbitration, personal jurisdiction, and extraterritoriality).

ture in time to be used for VW. While the interventions departed from the traditional image of civil procedure insofar as they targeted a specific category of litigation and changed the rules of the road as litigation progressed, they also addressed a glaring procedural problem and helped strengthen the enforcement of German securities law. Without the Deutsche Telekom Act, the DT or VW litigation in Germany would be nearly impossible to bring to a satisfying conclusion for any of the parties.

*B. Collective Settlement in the United States: Asbestos Personal Injury Settlement Trusts Under Section 524(g)*

In the era of “the vanishing trial,”<sup>176</sup> most claims are settled rather than adjudicated. Settlement might seem to provide a solution to the problems of scale that frustrated aggregate adjudication in the DT litigation. But no less than mass adjudication, mass settlement requires a supporting infrastructure that can, for example, define the settling parties’ authority, protect against self-dealing, and ensure the fairness of settlements that are agreed to without the individual consent of each party that the settlement binds.<sup>177</sup> In the absence of generally applicable procedures for effecting mass settlements, the need for peace has prompted ad hoc procedural legislation in both the United States and Europe.

*1. Codifying the Power to Redirect Asbestos Claims*

The leading example in U.S. law is § 524(g) of the Bankruptcy Code. As the Introduction describes, § 524(g) was enacted in the midst of unsuccessful efforts to resolve the asbestos litigation crisis outside of bankruptcy. In the Manville bankruptcy, the district court and bankruptcy court had jointly ordered a channeling injunction to redirect asbestos claims against Manville to a freestanding trust funded by the company’s stock.<sup>178</sup>

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<sup>176</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>177</sup> See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1022–23 (2010) (discussing ethical problems that arise in aggregate settlements); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1618–20 (2004) (demonstrating that mass settlements inevitably give rise to governance questions that law explicitly or implicitly addresses).

<sup>178</sup> See *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988); *supra* note 18 and accompanying text.

The insurance companies that ultimately would be responsible for the claims insisted on the channeling injunction.<sup>179</sup> But the courts' authority to issue such an injunction, which crafted an ad hoc procedure to control claims that had not yet accrued, was hazy.<sup>180</sup> The markets' uncertainty about whether the injunction would "stick" put downward pressure on the reorganized company's stock price. Because the Manville Personal Injury Settlement Trust was the majority owner of the reorganized company, doubts about the injunction depleted the capital available to pay claimants who had been harmed by Manville's products.<sup>181</sup> Thus, "the reorganized Johns-Manville firm, asbestos claimants, insurers who had participated in the bankruptcy, and other industrial firms facing mounting asbestos liability all had a combined interest in securing explicit statutory authority for the Manville innovations."<sup>182</sup>

Faced with the possibility of the reorganization failing, Manville's managers turned to Congress. The public lobbying effort for § 524(g) began in July 1991, when Manville's CEO, W.T. Stephens, appeared before a subcommittee of the Senate Judiciary Committee.<sup>183</sup> Stephens testified that legislation "to codify the permanent nature of court-ordered and -issued injunctions in the context of a chapter 11 reorganization proceeding" was needed "to create hundreds of mil-

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<sup>179</sup> As described by Justice David Souter, insurers "agreed to provide most of the initial corpus of the Trust, with a payment of \$770 million to the bankruptcy estate, \$80 million of it from Travelers. . . . There would have been no such payment without the injunction. . . ." *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 141 (2009) (citations omitted). In *Bailey*, insurers successfully urged the Supreme Court to read the channeling injunction to prohibit "state-law actions against Travelers based on allegations either of its own wrongdoing while acting as Manville's insurer or of its misuse of information obtained from Manville as its insurer." *Id.* at 140.

<sup>180</sup> The judge issued the injunction pursuant to his authority under § 105 of the Bankruptcy Code, which provides that, subject to exceptions, a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105. But recent amendments to bankruptcy court powers provided that core proceedings by the bankruptcy court could *not* include "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." 28 U.S.C. § 157(b)(2)(B). For the discussion of the issuance of the original injunction, see *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 842–43 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

<sup>181</sup> See Charlier, *supra* note 19, at B4 (discussing market responses to the reorganized entity).

<sup>182</sup> Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1014–15 (2012).

<sup>183</sup> *Special Problems in Bankruptcy: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 102d Cong. 61–81 (1991) (statement of W.T. Stephens, Chairman of the Board, President, and Chief Executive Officer, Manville Corp.).

lions of dollars to pay some sick people.”<sup>184</sup> The company’s proposed legislation was drafted to apply to all asbestos manufacturers to head off a constitutional challenge under Article I Section 8, which authorizes Congress to establish “*uniform* Laws on the subject of Bankruptcies.”<sup>185</sup> This provision reflects the Constitution’s opposition to legislative favoritism—the concern of the special treatment problem—in the bankruptcy context.

The Senate passed Stephens’s proposed amendments, but they were dropped in a House-Senate conference committee that was negotiating amendments to the Bankruptcy Code after opposition emerged from organized labor and W.R. Grace, a Manville competitor that had not entered bankruptcy.<sup>186</sup> Grace feared, presciently, that if Manville were allowed to channel claims to its trust where they would be paid at a discount, asbestos plaintiffs would seek to hold Grace and other manufacturers liable for asbestos injuries on joint and several liability theories.

Within a year, Stephens reappeared before subcommittees of the House and Senate Judiciary Committees.<sup>187</sup> He characterized his legislative proposal as a “win-win”<sup>188</sup> that permitted Manville to unlock the value of its stock and, in so doing, “produce[ ] a half-a-billion dollars in additional assets for the trust to use to pay claims.”<sup>189</sup> Robert Falise, managing director of the settlement trust, and Robert Steinberg, a veteran asbestos-claim plaintiffs’ attorney, both supported the legislation.<sup>190</sup> This time, the bill encountered strenuous opposition from a group of asbestos manufacturers represented by

<sup>184</sup> *Id.* at 61.

<sup>185</sup> U.S. CONST. art. I, § 8, cl. 4 (emphasis added). In *Railway Labor Executives’ Association v. Gibbons*, the Supreme Court held that Congress’s authority under the Bankruptcy Clause did not allow amendments to the bankruptcy code that applied to only one debtor. 455 U.S. 457, 471 (1982). The Court distinguished a law that applied to only one debtor from one that represented “a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad.” *Id.* at 470. Section 524(g) gave effect to *Gibbons* by establishing a scheme that applied to all companies facing asbestos-based liability—but no further.

<sup>186</sup> Kenneth H. Bacon, *Conferees Drop Bid to Shield Manville in Drive to Agree on Bankruptcy Reform*, WALL ST. J., Oct. 6, 1992, at A5.

<sup>187</sup> *House Manville Hearings*, *supra* note 23, at 7–24 (statement of W.T. Stephens, Chairman of the Board & Chief Executive Officer, Manville Corp.); *Senate Manville Hearings*, *supra* note 8, at 26–30 (statement of W. Thomas Stephens, Chairman & Chief Executive Officer, Manville Corp.).

<sup>188</sup> *Senate Manville Hearings*, *supra* note 8, at 28 (statement of W. Thomas Stephens, Chairman & Chief Executive Officer, Manville Corp.).

<sup>189</sup> *House Manville Hearings*, *supra* note 23, at 9 (statement of W.T. Stephens, Chairman of the Board & Chief Executive Officer, Manville Corp.).

<sup>190</sup> *See Senate Manville Hearings*, *supra* note 8, at 18 (statement of Robert A. Falise, Chairman & Managing Trustee, Manville Personal Injury Settlement Trust); *id.* at 45



Debevoise & Plimpton's Roger Podesta, who claimed that they would be pushed into bankruptcy if Manville were permitted to channel claims to its personal injury trust.<sup>191</sup> Their effort to kill the bill came too late, however. With plaintiffs, the debtor, and the future claims representative all backing § 524(g), the House and Senate Judiciary Committees reported the provision, and Congress enacted it in the Bankruptcy Reform Act of 1994.<sup>192</sup>

## 2. *Aftereffects of Codifying the Manville Trust*

Section 524(g) authorized a bankruptcy court to enjoin the prosecution of asbestos claims against a reorganized asbestos manufacturer if the manufacturer established a trust to pay personal injury claims, the debtor funded the trust and committed to continued funding, and the reorganization cleared a number of procedural hurdles.<sup>193</sup> The statute was limited to asbestos claims,<sup>194</sup> and expressly provided that it would be available for use in ongoing proceedings.<sup>195</sup> After the statute was enacted, the district court reissued the channeling injunction in the Manville reorganization,<sup>196</sup> leading to the firm's recovery and eventual sale to Berkshire Hathaway.

Section 524(g) succeeded in saving Manville from having to liquidate and made more money available to asbestos claimants than alternative mechanisms for resolving the company's asbestos liability would have. In doing so, however, the statute did violence to the idea that legitimacy of judicial action depends on courts acting through even-handed procedures that are established in advance of a dispute.

The statute also had follow-on effects that Congress at the very least failed to address. As W.R. Grace had predicted, Manville's successful bid to redirect its asbestos liability to a trust where claims would be paid at a fraction of their value in the tort system created intense pressure for other asbestos manufacturers to reorganize.<sup>197</sup> By 2007, "nearly all of the major manufacturers" had reorganized via § 524(g).<sup>198</sup>

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(statement of Robert B. Steinberg, Selected Counsel for the Beneficiaries, Manville Personal Injury Settlement Trust).

<sup>191</sup> See *House Manville Hearings*, *supra* note 23, at 26–39 (statement of Roger E. Podesta, Partner, Debevoise & Plimpton) (explaining the effects of the trust on "solvent codefendants" acting in the tort system rather than a bankruptcy trust).

<sup>192</sup> Pub. L. No. 103-394, 108 Stat. 4106 (codified at 11 U.S.C. § 524(g)).

<sup>193</sup> 11 U.S.C. § 524(g).

<sup>194</sup> *Id.* § 524(g)(2)(B)(i)(I).

<sup>195</sup> *Id.* § 524(h).

<sup>196</sup> *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 572 (E. & S.D.N.Y. 1995).

<sup>197</sup> *Id.* at 479.

<sup>198</sup> MASS TORTS SUBCOMM., AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 5 (2007).

They did so, moreover, through a process—the “pre-packaged” § 524(g) reorganization—that was a step removed from the one that lawmakers approved in § 524(g).<sup>199</sup> This process is illustrated by the bankruptcy of Combustion Engineering (CE).<sup>200</sup> A former manufacturer of asbestos-lined boilers, CE was acquired by a Swiss conglomerate, ABB, in 1990.<sup>201</sup> By the early 2000s, CE’s asbestos liability posed a substantial threat to ABB’s financial health.<sup>202</sup> In 2002, representatives of ABB and CE negotiated an agreement with Joseph Rice, a leading U.S. asbestos plaintiffs’ attorney who represented a substantial inventory of claimants, that would conclusively resolve CE’s existing asbestos liability.<sup>203</sup>

The agreement envisioned that CE would settle all of the asbestos litigation currently pending against it and use a pre-negotiated § 524(g) reorganization to limit future claims against the company. To do this, CE agreed to establish two trusts: The first, called the “CE Settlement Trust,” would pay claims that had been asserted against CE by November 2002; the second, known as the “Asbestos [Personal Injury] Trust,” would be established as part of a § 524(g) bankruptcy and used to pay future asbestos claims.<sup>204</sup> A channeling injunction issued by the bankruptcy and district courts during the § 524(g) reorganization would protect the reorganized firm from future asbestos claims by requiring that they be asserted against the Asbestos Personal Injury Trust.<sup>205</sup> Rice negotiated the terms of the CE Settlement Trust himself but left the design of the Asbestos Personal Injury Trust to be negotiated by CE and a “Future Claimants’ Representative” that the company would select.<sup>206</sup> CE promised to pay Rice a \$20 million “success fee” for his role in designing the settlement.<sup>207</sup>

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<sup>199</sup> Pre-packaged plans—themselves a type of party-designed ad hoc procedure—developed in non-asbestos bankruptcies like that of the overly-leveraged Southland Corporation and migrated to § 524(g). See Stuart Silverstein, *7-Eleven Parent Files ‘Prepackaged’ Bankruptcy*, L.A. TIMES (Oct. 25, 1990), [http://articles.latimes.com/1990-10-25/business/fi-4478\\_1\\_prepackaged-bankruptcy](http://articles.latimes.com/1990-10-25/business/fi-4478_1_prepackaged-bankruptcy) (describing pre-packaged bankruptcies as still a “new” and uncertain legal device).

<sup>200</sup> See *In re Combustion Eng’g, Inc.*, 391 F.3d 190 (3d Cir. 2004). The account that follows draws from Mark D. Plevin, Robert T. Ebert & Leslie A. Epley, *Pre-packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883, 898–907 (2003).

<sup>201</sup> *Combustion Eng’g*, 391 F.3d at 203.

<sup>202</sup> See *id.* (noting that “[b]etween May 2000 and March 2002, U.S. ABB contributed \$900 million in cash and other assets toward Combustion Engineering’s asbestos obligations”).

<sup>203</sup> Plevin et al., *supra* note 200, at 899.

<sup>204</sup> *Combustion Eng’g*, 391 F.3d at 204–05.

<sup>205</sup> *Id.* at 206.

<sup>206</sup> Plevin et al., *supra* note 200, at 900.

<sup>207</sup> *Id.* at 911.

The process used to create the CE settlement differed from the Manville reorganization in critical respects. When CE entered bankruptcy, it was not initiating a process that would culminate in a reorganization that resolved present and future asbestos claims against the company. Instead, CE presented the court with a deal that had already been negotiated among ABB, attorneys representing current asbestos plaintiffs, and the future claimant's representative. Instead of the bankruptcy court appointing the future claimants' representative, CE selected the representative before filing a bankruptcy petition. Present and future claimants were not subject to a single reorganization plan, but channeled to different trusts whose structures and terms were negotiated by different attorneys. The CE future claimants' representative played second fiddle, joining the negotiations after CE had already pledged approximately half its assets to the CE Settlement Trust to settle existing claims.<sup>208</sup> And although the attorneys in the Manville bankruptcy earned hefty fees, none was promised a success fee like the \$20 million Rice stood to gain.

On appeal from the district and bankruptcy courts' orders approving the plan, the Third Circuit concluded that future claimants had not been adequately represented in settlement negotiations and remanded for fact-finding on whether the settlement treated them fairly.<sup>209</sup> Nevertheless, the court of appeal's decision had at best a modest influence on the ultimate shape of the settlement. On remand, the parties retained the settlement's two-trust structure, but ABB committed an additional \$204 million to the Asbestos Personal Injury Trust to pay future asbestos claimants.<sup>210</sup> The lower courts approved the new reorganization plan and issued a channeling injunction that directed all future claims to the Asbestos Personal Injury Trust. Apparently placated by ABB's largesse, no party appealed from the approval of the new reorganization plan. The parties thus succeeded in leveraging § 524(g) to create a new pre-packaged approach to resolving asbestos liabilities. That structure has become an industry default, appearing in many other asbestos reorganizations.<sup>211</sup>

The departures from the Manville model in *Combustion Engineering* and other § 524(g) bankruptcies show how an ad hoc procedural statute that sought to retroactively bless a pre-existing workout

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<sup>208</sup> *Id.* at 901.

<sup>209</sup> *Combustion Eng'g*, 391 F.3d at 202.

<sup>210</sup> Findings of Fact and Conclusions of Law Regarding Confirmation of Combustion Engineering, Inc.'s Plan of Reorganization, as Modified Through October 7, 2005 at 8, *In re Combustion Eng'g, Inc.*, No. 03-10495 (Bankr. D. Del. Dec. 19, 2005).

<sup>211</sup> See Plevin et al., *supra* note 200, at 893 (“[The] two-part structure . . . has now become commonplace in pre-packaged asbestos bankruptcies.”).

can evolve in future iterations of the originating procedural problem. The end result is an “extrajudicial trust system” for resolving asbestos liability whose fairness remains contested.<sup>212</sup> The retroactive application of § 524(g) to Manville’s pending bankruptcy made funds available to claimants, many in dire circumstances, that otherwise would have gone to attorneys or secured creditors, and allowed Manville to reorganize successfully. But it did so by singling out a favored class of plaintiffs and defendants (those with asbestos claims) for special treatment in response to sustained interest group lobbying, in a way that failed to anticipate the second-order effects of Congress’s intervention, highlighting the problems of legislative partiality, legislative myopia, and special treatment. Although the normative valence of this intervention is uncertain, its practical effect is not. With § 524(g), the course of asbestos litigation in U.S. courts changed—irreversibly.

### C. *Collective Settlement in Europe: The Dutch Act on Collective Settlement*

As U.S. lawyers were seeking a legal vehicle that would deliver peace in the asbestos crisis, a strikingly similar process was unfolding in the Netherlands. The legislation that resulted, the Dutch Class Action (Financial Settlement) Act (WCAM)<sup>213</sup> is similar to § 524(g) insofar as it allows claims from a mass harm to be directed to a privately-negotiated compensation scheme. But the WCAM differs from § 524(g) in ways that shed light on the normative objections to ad hoc procedural legislation introduced in Part I.<sup>214</sup>

#### 1. *The Dutch DES Crisis*

From 1947 to 1976, Dutch doctors prescribed a synthetic estrogen known as diethylstilbestrol (DES) to pregnant mothers to prevent miscarriage and premature birth.<sup>215</sup> In the 1980s, studies linked DES to heightened risks of breast and ovarian cancers.<sup>216</sup> Thousands of “DES mothers” and “DES daughters” filed lawsuits seeking compensation from manufacturers. In 1992, the Dutch Supreme Court removed the most significant legal obstacle to the plaintiffs’ claims

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<sup>212</sup> LLOYD DIXON ET AL., *RAND CORP., ASBESTOS BANKRUPTCY TRUSTS 2* (2010).

<sup>213</sup> Wet van 23 juni 2005 [WCAM] [Class Action (Financial Settlement) Act], Stb. 2005, 340 (Neth.).

<sup>214</sup> See *supra* Section I.D.

<sup>215</sup> See Lucas Bergkamp, *Compensating Personal Injuries Caused by DES: “No Causation Liability” in the Netherlands*, 1 EUR. J. HEALTH L. 35, 35 (1994).

<sup>216</sup> *Id.*

when it adopted a variant of the “market share liability” theory<sup>217</sup> and held that Dutch DES manufacturers were subject to joint and several liability where a plaintiff could not identify which specific manufacturer’s drug she took.<sup>218</sup>

Anticipating a flood of litigation, manufacturers and their insurers began negotiations with potential plaintiffs. To organize the negotiations, the Supreme Court appointed a foundation known as the DES Centre to coordinate DES claims and directed plaintiffs to “register” their claims with the foundation.<sup>219</sup> Within six weeks of the Supreme Court’s decision, “over 18,000 mothers, daughters and sons had registered” with the foundation.<sup>220</sup> Seven years of negotiation followed among the DES Centre, Dutch DES manufacturers, and their insurers.<sup>221</sup> The insurers ultimately agreed to a thirty-five million euro settlement, but insisted on a comprehensive release from liability.<sup>222</sup> Like U.S. asbestos manufacturers and their insurers, the Dutch companies wanted total peace.

Here, the negotiating parties faced a procedural problem. Although the Dutch Code of Civil Procedure provided a mechanism that allowed claims for injunctive and declaratory relief to be resolved on a collective basis,<sup>223</sup> the Code expressly barred collective actions for monetary damages.<sup>224</sup> Lacking a legal vehicle through which to bind the entire universe of DES plaintiffs, the DES Centre and drug manufacturers sought assistance from the Dutch Ministry of Justice, the branch of government “responsible for [proposing] the lion’s share of civil legislation in the Netherlands.”<sup>225</sup> The Ministry “was very much inclined to facilitate” the parties’ request.<sup>226</sup> The Ministry had previously been criticized for putting forward “ad hoc legislation” that

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<sup>217</sup> Market share liability allows plaintiffs to recover from defendants based on their market share of a product that caused injuries in certain products liability cases when specific causation cannot be established. *See Sindell v. Abbott Labs.*, 607 P.2d 924, 937–38 (Cal. 1980) (first adopting the theory in California), *cert. denied*, 449 U.S. 912 (1980).

<sup>218</sup> Bergkamp, *supra* note 215, at 35, 38.

<sup>219</sup> CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS* 71 (2008).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Willem H. van Boom, *Collective Settlement of Mass Claims in the Netherlands*, in *AUF DEM WEG ZU EINER EUROPÄISCHEN SAMMELKLAGE?* 171, 174 (Matthias Casper et al. eds., 2009) (discussing contemporary Dutch case law on aggregation).

<sup>224</sup> *See id.* at 175 (discussing changes to the 1992 Civil Code).

<sup>225</sup> Bart Krans, *The Dutch Act on Collective Settlement of Mass Damages*, 27 *PAC. McGEORGE GLOBAL BUS. & DEV. L.J.* 281, 284 (2014).

<sup>226</sup> Memorandum from I.N. Tzankova & D.F. Lunsingh Scheurleer, to Deborah Hensler & Christopher Hodges 5 (Sept. 24, 2007) (on file with the *New York University Law Review*) [hereinafter Memorandum from Tzankova & Scheurleer].

applied to specific parties, however, and therefore proposed a law that would provide a general framework for “the collective settlement of mass damages.”<sup>227</sup> Urgency to approve the DES settlement precluded detailed consideration of the legislation. Although the Ministry of Justice established “a commission of three distinguished Dutch civil procedural lawyers” to review the treatment of collective actions under Dutch law, the legislature passed the Ministry’s proposed legislation before the commission completed its study.<sup>228</sup>

Enacted to provide a legal vehicle for the DES settlement, the WCAM lacks any mechanism for resolving claims through adversarial litigation.<sup>229</sup> Instead, the statute, following the example of the DES litigation, proceeds on the assumption that a private foundation and defendant or group of defendants will negotiate a collective settlement out of court, and turn to the judiciary to make their settlement binding on a class of claimants after negotiations are complete.<sup>230</sup>

Like § 524(g), WCAM provided for its application in the procedure-generating case. After the statute took effect, the Amsterdam Court of Appeals approved the DES settlement and ordered an opt-out period.<sup>231</sup> Of the thousands of claimants who registered with the DES Centre, only one woman opted out.<sup>232</sup> The WCAM thus followed the familiar pattern of the Deutsche Telekom Act and § 524(g). In contrast to § 524(g), however, the WCAM is not

<sup>227</sup> Krans, *supra* note 225, at 284.

<sup>228</sup> Memorandum from Tzankova & Scheurleer, *supra* note 226, at 5.

<sup>229</sup> The absence of such a mechanism, a legislative summary wryly notes, “removes the coercion inherent in an American-style class action, so that a defendant will not feel forced into concluding this type of agreement.” THE DUTCH ‘CLASS ACTION (FINANCIAL SETTLEMENT) ACT’ (‘WCAM’) 5 (2008), <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/circulaires/2008/06/24/the-dutch-class-action-financial-settlement-act-wcam/wcamenglish.pdf> [hereinafter WCAM SUMMARY].

<sup>230</sup> Thus, the Act provides that a foundation may represent a group of claimants provided that it “represents the interests of these persons pursuant to its articles of association.” *Id.* at 1–2 (citing Art. 7:907 para. 1 BW). A settlement agreement may resolve claims for losses that arise out of “a single event or similar events.” *Id.* at 2. Once a foundation and defendant agree to a settlement, they jointly present the agreement to the Amsterdam Court of Appeals, which gives notice of the settlement to claimants who may be bound. The court reviews the settlement to ensure that the amount of compensation awarded is “reasonable,” an independent party will divide compensation equitably among claimants, and the foundation is “sufficiently representative” of claimants’ interests. *Id.* (citing Art. 7:907 para. 3 BW). If the court approves the settlement, a second notice is distributed to claimants, who may opt out within a court-specified deadline. *Id.* at 3 (citing Art. 7:908 para. 2 BW). Following the opt-out period, the court enters judgment on the settlement, which binds all claimants who do not opt out. *Id.*

<sup>231</sup> HÉLÈNE VAN LITH, THE DUTCH COLLECTIVE SETTLEMENTS ACT AND PRIVATE INTERNATIONAL LAW 18 & n.27 (2011); Daan Lunsingh Scheurleer et al., *Global Settlement Approved by Dutch Court*, LEXOLOGY (July 17, 2009), <http://www.lexology.com/library/detail.aspx?g=4ec6df79-30db-4e2f-b89d-6bed1cea946e>.

<sup>232</sup> WCAM SUMMARY, *supra* note 229, at 6.

restricted to a specific type of claim or litigant. The only limitation on the WCAM's scope is that a settlement resolve claims that arise out of "a single event or similar events."<sup>233</sup>

## 2. *The WCAM's Reach Expands*

In part because it was drafted in cross-cutting, trans-substantive terms, the WCAM evolved from a vehicle for resolving mass torts into one for resolving large-scale *securities* litigation. The case that laid the foundation for this development grew out of claims against Royal Dutch Shell.<sup>234</sup>

After Shell announced in January 2004 that it had overbooked its oil reserves, U.S. plaintiffs filed putative class actions on behalf of a worldwide class of investors in New Jersey federal court.<sup>235</sup> From the beginning of the litigation, a central point of contention was whether foreign investors could participate in the U.S. litigation.<sup>236</sup> While the parties awaited a ruling from the district court on that question, Shell's General Counsel Beat Hess pursued a divide-and-conquer strategy to the litigation. Hess negotiated a settlement with U.S. plaintiffs, while also devising a separate proposal to settle foreign investors' claims using the WCAM.<sup>237</sup> As Hess envisioned it, the parties would negotiate and the Amsterdam court would approve a settlement that bound investors worldwide, excluding only the claims of U.S. investors who were covered by the U.S. class action settlement.

The lawyers working on the foreign settlement feared that the Amsterdam Court of Appeal would not be receptive to a settlement where individual investors had not been represented in settlement negotiations.<sup>238</sup> Thus, they recruited Verninging van Effectenbezitters (VEB), "a long-established Dutch association that is the public face of smaller investors in the Netherlands,"<sup>239</sup> to represent retail investors in the settlement negotiations. In April 2007, Shell, VEB, and a spe-

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<sup>233</sup> *Id.* at 2.

<sup>234</sup> Krans, *supra* note 225, at 285 (citing Hof Amsterdam 29 mei 2009, NJ 2009, 506 (Shell Petroleum N.V./Dexia Bank Nederland N.V.) (Neth.) [hereinafter *Royal Dutch Shell*]).

<sup>235</sup> Class Action Complaint for Violations of Federal Securities Laws ¶ 56, *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712 (D.N.J. 2007) (No. 04-374).

<sup>236</sup> See Deborah R. Hensler, *A Class Action "Mash-Up": In re Royal Dutch/Shell Transport Securities Litigation*, in *CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION* 170, 175–76 (Deborah R. Hensler et al. eds., 2016) (discussing the dispute over jurisdiction and noting the high stakes of foreign investors).

<sup>237</sup> *Id.* at 176–77. Hess was the former general counsel of ABB Group, the Zurich conglomerate that played a prominent role in *Combustion Engineering. Id.*

<sup>238</sup> *Id.* at 181.

<sup>239</sup> *Id.*

cially formed Dutch foundation petitioned the Amsterdam Court of Appeal for approval of a settlement that would resolve all non-U.S. investors' claims for securities fraud in the overbooking of Shell's oil reserves.<sup>240</sup>

In a watershed decision, the Amsterdam Court of Appeal concluded that it could exercise jurisdiction over foreign investors' claims because Shell was headquartered in the Netherlands and the investors' claims related to Shell's activities there.<sup>241</sup> Reviewing the settlement's substantive terms, the court concluded that it provided a reasonable amount of aggregate compensation and treated investors equitably.<sup>242</sup> The court approved the settlement, entered judgment on it, and directed that investors be given three months to opt out.<sup>243</sup> The result was a worldwide class action settlement that excluded only U.S. investors. In effect, the parties to the Royal Dutch Shell settlement created a vehicle for resolving private securities litigation that combined the preclusive effect of a U.S. class action settlement with universal jurisdiction.<sup>244</sup>

### 3. *The Perils of Trans-Substantivity*

Of the statutes considered in this Part, the WCAM does the most to address the rule-of-law concerns that attend ad hoc procedural legislation. Fearful that legislation limited to the DES case would be perceived as a handout to a narrow interest group—thus raising legislative partiality and special treatment problems—the Dutch Ministry of Justice devised a mechanism that applied to any aggregate settlement of claims that arose out of a single event or series of events. Although the Ministry's decision to propose a cross-cutting, trans-substantive statute headed off claims of legislative favoritism, it had serious unintended consequences, due in part to legislative myopia.

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<sup>240</sup> *Id.*

<sup>241</sup> For a sworn translation of the decision of the Amsterdam Court of Appeal in *Royal Dutch Shell*, see SWORN TRANSLATION FROM DUTCH TO ENGLISH OF: DECISION BY THE AMSTERDAM COURT OF APPEAL IN CASE NO. 106.010.887 RENDERED ON 29 MAY 2009 (2009), [http://globalclassactions.stanford.edu/sites/default/files/documents/Netherlands\\_Shell\\_Decision\\_29May2009\\_%20ENG\\_translation.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Netherlands_Shell_Decision_29May2009_%20ENG_translation.pdf).

<sup>242</sup> *Id.* at 43–45, 60–61.

<sup>243</sup> *Id.* at 60–61.

<sup>244</sup> In the *Converium* case, the court of appeals took an even more expansive view of the Dutch courts' jurisdiction, basing jurisdiction over a Europe-wide class of investors on the fact that Dutch investors were among those who purchased a Swiss corporation's securities. See Hof Amsterdam 12 november 2010, NJ 2011, 683 (SCOR Holding (Switzerland) AG); Bart Krans, *The Dutch Class Action (Financial Settlement) Act in an International Context: The Shell Case and the Converium Case*, 31 CIV. JUST. Q. 141, 141–42 (2012).



As many commentators have observed, the securities litigation regime that emerged from the *Royal Dutch Shell* litigation seems to undervalue plaintiffs' claims relative to a system that also allows claims to be resolved in an adversarial posture.<sup>245</sup> The concern is magnified by the Amsterdam Court of Appeal's expansive view of its jurisdiction. As interpreted by the court, a WCAM settlement may bind a worldwide class of plaintiffs, effecting a "global class action settlement."<sup>246</sup> Whether foreign courts will give preclusive effect to such a settlement has yet to be litigated. But, commentators argue, the Amsterdam court's view of its jurisdiction likely exceeds the limits of Dutch, E.U., and international law.<sup>247</sup>

It is improbable that a statute designed from the ground up to facilitate private enforcement of securities laws would be designed in this manner. Such a statute would more likely seek to create reasonable incentives for claims to be settled at a fair value, and ensure that judgments entered on a settlement were consistent with national and international law. Because the *Royal Dutch Shell* regime was pieced together from tools that were not designed to effect such settlements, it is blind to these issues.

In the face of these complaints, parties' continued willingness to make use of the *Royal Dutch Shell* regime is striking. As of 2014, seven applications for approval of a settlement had been brought to the Amsterdam Court of Appeals, six of which were granted.<sup>248</sup> The statute is often mentioned as a possible avenue for resolving securities claims that are filed elsewhere, such as those in the Volkswagen clean diesel securities litigation pending in Germany.<sup>249</sup> And, while there is reason to think that WCAM settlements undervalue plaintiffs' claims relative to a system where claims could be litigated, those settlements improve on the status quo ante, in which plaintiffs who could not participate in U.S. lawsuits lacked any mechanism for asserting claims on a collective basis. In light of the lack of alternatives, plaintiffs in *Royal*

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<sup>245</sup> See, e.g., Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 BROOK. J. INT'L L. 893, 926–27 (2012) (criticizing Dutch law for relying on other legal systems to create a "defendant-friendly" class action settlement environment).

<sup>246</sup> *Id.* at 952.

<sup>247</sup> See, e.g., Xandra E. Kramer, *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 235, 259–62 (2014) (summarizing critiques).

<sup>248</sup> Krans, *supra* note 225, at 282.

<sup>249</sup> See, e.g., Coffee, *supra* note 175, at 13–16.

*Dutch Shell* reportedly “were satisfied with the outcome” of the case.<sup>250</sup>

#### D. *Enforcement of Judgments: The Iran Threat Reduction and Syria Human Rights Act*

The statutes that we have discussed until this point addressed problems that occurred before the entry of judgment and that arose, at least to some extent, from the unique demands of aggregate litigation. But procedural problems and ad hoc statutory solutions arise in other contexts as well. To illustrate, we close with a statute adopted to address a problem in the post-judgment context, § 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (Iran Sanctions Act).<sup>251</sup>

##### 1. *The Challenge of Seizing “Blips on a Computer Screen”*

Section 502’s story begins with the October 1983 suicide bombing of the Twenty-Fourth Marine Amphibious Unit’s barracks in Beirut, Lebanon, which killed 241 servicemen and injured many others.<sup>252</sup> A federal district court later found that Iran had planned the attack and perpetrated it via Hezbollah, the Lebanese political party and militant group.<sup>253</sup>

Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state such as Iran is generally immune from U.S. courts’ jurisdiction, and the state’s U.S. assets are immune from execution unless they are used for “commercial” purposes.<sup>254</sup> Enacted in an effort to regularize sovereign-immunity determinations, the FSIA establishes standards for determining whether a foreign state enjoys sovereign immunity and assigns the courts primary responsibility for deciding that question.<sup>255</sup>

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>256</sup> and the Terrorism Risk Insurance Act of 2002 (TRIA)<sup>257</sup>

<sup>250</sup> Ianika N. Tzankova, *Everything You Wanted to Know About Dutch Foundations but Never Dared to Ask: A Check List for Investors* 10 (Tilburg Law Sch. Legal Studies Research Paper Series, No. 04, 2016).

<sup>251</sup> Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258–60 (2012) (codified at 22 U.S.C. § 8772).

<sup>252</sup> *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 56–58 (D.D.C. 2003).

<sup>253</sup> *See id.* at 51–53.

<sup>254</sup> 28 U.S.C. § 1604 (2012); *id.* § 1605(a)(2).

<sup>255</sup> *See Samantar v. Yousef*, 560 U.S. 305, 313 (2010).

<sup>256</sup> Pub. L. No. 104-132, § 221, 110 Stat. 1214, 2141–43 (1996) (codified at 28 U.S.C. § 1605 (2012)).

<sup>257</sup> Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337–40 (2002) (codified at 28 U.S.C. § 1610 (2012)).

eliminate this immunity for certain claims arising out of international terrorism and delegate much of the decisionmaking power to the President, who is responsible for designating a state a sponsor of terrorism.<sup>258</sup> The FSIA thus already included specialized procedures for cases involving foreign sovereigns that the President designated state sponsors of terrorism.

Proceeding under AEDPA and TRIA, victims of the Beirut attack and their heirs secured a \$2.7 billion judgment against Iran in a 2003 case entitled *Peterson v. Islamic Republic of Iran*.<sup>259</sup> Iran removed most of its assets from the United States following the 1979 revolution,<sup>260</sup> so the *Peterson* plaintiffs' prospects for enforcing their judgment were poor. In 2008, however, the plaintiffs learned from the Treasury Department that Iran's central bank, Bank Markazi, owned \$2.1 billion in bonds in New York.<sup>261</sup> The bonds were held at the Depository Trust & Clearing Corporation in New York and the New York Federal Reserve Bank, and were payable to a New York Citibank account maintained by Clearstream, a Luxembourg financial intermediary.<sup>262</sup> With the assistance of a New York-based judgment enforcement specialist, the *Peterson* plaintiffs attached Iran's interest in the bonds.<sup>263</sup> As soon as the attachments became public, other plaintiffs who held judgments against Iran filed additional restraints.<sup>264</sup> Citibank filed an interpleader action to determine which judgment holders, if any, were entitled to the bond proceeds.<sup>265</sup>

Although the bonds were merely "blips on computers," they were insulated from execution by Iran's sovereign immunity as well as by a "sandwiching" transaction that Iran executed in 2008.<sup>266</sup> In that trans-

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<sup>258</sup> See *id.* § 201(a) (providing that assets of a terrorist party "shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable"); *id.* § 201(d)(4) (specifying that the President may designate terrorist parties via the Export Administration Act of 1979 and Foreign Assistance Act of 1961).

<sup>259</sup> 264 F. Supp. 2d at 46 (D.D.C. 2003).

<sup>260</sup> See JAY SOLOMON, *THE IRAN WARS: SPY GAMES, BANK BATTLES, AND THE SECRET DEALS THAT RESHAPED THE MIDDLE EAST* 164 (2016).

<sup>261</sup> Julie Triedman, *An Uphill Battle*, AM. LAWYER, Oct. 2013, at 16, <http://www.americanlawyer-digital.com/americanlawyer-ipauth/201310ip?pg=15#pg15>.

<sup>262</sup> *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at \*2–3 (S.D.N.Y. Mar. 13, 2013), *aff'd*, 758 F.3d 185 (2d Cir. 2014), *aff'd sub nom.* *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

<sup>263</sup> Telephone Interview with Steven R. Perles, Senior Attorney & Founder, Perles Law Firm, P.C. (Oct. 14, 2016) [hereinafter Telephone Interview with Steven R. Perles].

<sup>264</sup> *Id.*

<sup>265</sup> *Peterson*, 2013 WL 1155576, at \*1.

<sup>266</sup> Triedman, *supra* note 261, at 16. To seize the bonds under FSIA's terrorism exception, plaintiffs had to show that the bond proceeds were located "in" the United States, belonged to Iran, and were not used for central-banking purposes. *Peterson*, 2013

action, Bank Markazi transferred its interest in the bonds to Banca UBAE SpA (UBAE), an Italian bank controlled by Libyan dictator Muammar Gaddafi,<sup>267</sup> which undertook to pay the bond proceeds to Markazi for a fee.<sup>268</sup> UBAE's presence in the payment stream threatened plaintiffs' ability to show that the bonds were owned by Iran, as required to overcome Iran's sovereign immunity. It also threatened the validity of the plaintiffs' claim to the bonds under Article 8 of the Uniform Commercial Code (UCC), which governs securities intermediaries such as Clearstream.<sup>269</sup> On June 23, 2009, District Judge Barbara Jones issued an order observing that Clearstream was not the proper garnishee for creditors seeking the bonds.<sup>270</sup> Although Judge Jones continued the restraints on Clearstream's Citibank account pending further proceedings, her order implied that the *Peterson* plaintiffs' only recourse was to go to Italy and attempt to seize the bond proceeds before UBAE removed them from the country.

## 2. *Plaintiffs Turn to Congress*

In light of the problem highlighted by Judge Jones's order, the *Peterson* plaintiffs decided, in the words of their attorney Steve Perles, that seeking legislation was the "prudent thing to do."<sup>271</sup> A legislative vehicle for a procedural fix appeared two-and-a-half years later, when on December 14, 2011, the House passed a bill sanctioning Iran for the continued development of its nuclear program.<sup>272</sup>

The bill moved to the Senate. On the day before the Senate Committee on Banking, Housing, and Urban Affairs' markup, Perles arranged for victims of the Beirut attack to visit members of the banking committee.<sup>273</sup> At the markup, Senator Robert Menendez (D-

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WL 1155576, at \*7. TRIA provided an independent pathway through which plaintiffs could seize the bonds, but required the plaintiffs to show the assets were owned by Iran. *Id.* at \*7-8.

<sup>267</sup> Guy Dinmore, *Rome Sits at Hub of Former Colony's Web*, FIN. TIMES (Mar. 4, 2011), <https://www.ft.com/content/03878dca-45c8-11e0-acd8-00144feab49a>.

<sup>268</sup> Triedman, *supra* note 261, at 17.

<sup>269</sup> Section 8-112(c) expressly addresses attachment of assets that are held by a "securities intermediary" such as Clearstream. U.C.C. § 8-112(c) (AM. LAW INST. & UNIF. LAW COMM'N 1977). To protect third-party interests, § 8-112(c) provides: "The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary *with whom the debtor's securities account is maintained.*" *Id.* (emphasis added).

<sup>270</sup> Order at 1, *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (S.D.N.Y. June 23, 2009), ECF No. 171.

<sup>271</sup> Telephone Interview with Steven R. Perles, *supra* note 263.

<sup>272</sup> H.R. 2105, 112th Cong. (as passed by House, Dec. 14, 2011).

<sup>273</sup> *Senate Banking Committee Unanimously Passes Amendments Critical to Beirut Bombing Victims*, PR NEWSWIRE (Feb. 2, 2012), <http://www.prnewswire.com/news->

NJ) offered an amendment<sup>274</sup> that addressed the “interests in financial assets of Iran”<sup>275</sup> and was accepted without dissent. As the sanctions bill was reported by the Banking Committee, the Menendez amendment authorized a broad array of U.S. plaintiffs, including victims of other terrorist attacks and hostages held at the U.S. embassy during the 1979 revolution, to seize assets that Iran held via securities intermediaries.<sup>276</sup>

The provision, however, encountered an obstacle in the Senate Financial Services Committee, whose members served as a conduit for the views of the securities industry,<sup>277</sup> with respect to this legislation.<sup>278</sup> The securities industry’s objections do not appear in the public legislative record, but their substance can be gleaned from an article on the Iran Sanctions Act that appeared in *Business Lawyer’s* annual survey of developments in the Uniform Commercial Code.<sup>279</sup> As that article explains, the Article 8 system is designed to allow an “upper-tier intermediary” such as Clearstream to operate without knowledge of lower-tier intermediaries’ dealings.<sup>280</sup> A provision that allowed assets to be restrained via upper-tier attachment orders that were

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releases/senate-banking-committee-unanimously-passes-amendments-critical-to-beirut-bombing-victims-138581524.html.

<sup>274</sup> See 158 CONG. REC. S3318 (daily ed. May 21, 2012) (statement of Sen. Johnson).

<sup>275</sup> S. 2101, 112th Cong. § 503 (as reported by S. Comm. on Banking, Hous., & Urban Affairs, Feb. 13, 2012).

<sup>276</sup> The Senate Banking Committee bill provided that—“[n]otwithstanding any other provision of law, and preempting any inconsistent provision of State law”—Iran’s “interest in securities or other financial assets” frozen in U.S. accounts “shall be deemed to exist at every tier of securities intermediary necessary to hold an interest in any such securities or other financial assets.” *Id.* § 503(a). Even when such an asset was held by a central bank, it would be “deemed to be commercial activity in the United States and . . . shall be deemed not to be held for the central bank’s or monetary authority’s own account.” *Id.* § 503(d). The bill thus addressed the major obstacles to the *Peterson* plaintiffs’ efforts to execute on the Iranian bonds frozen at Clearstream, in a manner that would have benefited *any* creditor of Iran that sought to seize assets held at a securities intermediary. See *id.* § 503(e) (specifying that the provision applied to any judgment against Iran for damages caused by “torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act”).

<sup>277</sup> Cf. CHRISTOPHER MITCHELL, SAVING THE MARKET FROM ITSELF: THE POLITICS OF FINANCIAL INTERVENTION 183 (2016) (noting the “substantial campaign donations from financial actors” to the House and Senate Financial Services Committee members).

<sup>278</sup> “[The] Financial Services Committee went nuts.” Telephone Interview with Jodi Herman, Vice President for Gov’t Relations & Pub. Affairs, Nat’l Endowment for Democracy (Oct. 7, 2016) [hereinafter Telephone Interview with Jodi Herman]. When the Senate received the bill passed by the House, it was referred to the Committee on Foreign Relations. See 157 CONG. REC. S8601 (daily ed. Dec. 14, 2011).

<sup>279</sup> Carl S. Bjerre, *Investment Securities*, 69 BUS. LAW. 1215 (2014).

<sup>280</sup> See *id.* at 1223 (explaining that “[t]he upper-tier intermediary does not know who its ‘customers’ customers’ are, let alone what individualized number or amount they hold of which securities of which issuer, or how these holdings fluctuate from time to time, or what control arrangements they are subject to”).

“simply lobbed into this delicately arrayed lattice of relationships” would “risk interfering with third parties’ property interests[] and create associated systemic concerns” insofar as it caused parties to doubt the Article 8 system’s integrity.<sup>281</sup>

Over the following months, the broader Iran bill was the subject of intense negotiations among Senate leaders, the State Department, and the White House.<sup>282</sup> Negotiations on the Menendez amendment proceeded among plaintiffs’ lawyer Perles, the securities industry, the White House, the State Department, and the Department of Justice, with Jodi Herman, Senator Menendez’s advisor, serving as go-between.<sup>283</sup> To address concerns about the amendment’s effect on the Article 8 system, the negotiating parties agreed to narrow the amendment’s scope.<sup>284</sup> The final obstacle involved the distribution of bond proceeds among Iran’s judgment creditors. If plaintiffs could not agree among themselves how to divide up the proceeds of the bond, Herman threatened, she would “pull the provision.”<sup>285</sup> In May 2013, plaintiffs reported that they had reached an agreement that provided for an equitable distribution of the bonds proceeds.<sup>286</sup> Under the agreement, bonds proceeds would be available to judgment creditors whose claims arose from the 1983 Beirut attack or the 1996 Khobar Towers bombing, but it excluded judgment holders whose claims arose from the 1979 hostage crisis.<sup>287</sup> On May 21, 2012, the Senate passed an amended version of the House’s Iran bill that was expressly limited to “property that is identified in and the subject of proceedings in the United States District Court for the Southern District of New York in

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<sup>281</sup> *Id.* at 1223–24.

<sup>282</sup> See, e.g., Roberta Rampton, *New U.S. Sanctions May Hinge on Iran Talks: Congress Aides*, REUTERS, Apr. 13, 2012, <http://www.reuters.com/article/us-usa-iran-sanctions-idUSBRE83C19E20120413> (summarizing bill negotiations); Paul Richter, *Obama Administration Takes Back Seat on Iran Sanctions*, L.A. TIMES (Feb. 17, 2012), <http://articles.latimes.com/2012/feb/17/world/la-fg-us-iran-20120218> (same).

<sup>283</sup> Telephone Interview with Jodi Herman, *supra* note 278.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Order Entering Partial Final Judgment Pursuant to Fed. R. Civ. P. 54(b), Directing Turnover of the Blocked Assets, Dismissal of Citibank with Prejudice and Discharging Citibank from Liability at 5–6, *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013) [hereinafter *Peterson Judgment*] (“[T]he Plaintiffs have agreed among themselves to settle their competing claims with respect to the Blocked Assets.”).

<sup>287</sup> See *id.* at 3; see also David M. Herszenhorn, *36 Years Later, Iranian Hostages Win Restitution*, N.Y. TIMES, Dec. 25, 2015, at A1 (noting that a 2015 bill provided the first compensation for victims of the 1979 hostage crisis); Press Release, U.S. Dep’t of Justice, Department of Justice Compensates Victims of State Sponsored Terrorism (Apr. 6, 2017), <https://www.justice.gov/opa/pr/departments-justice-compensates-victims-state-sponsored-terrorism> (observing that hostages held during the 1979 revolution were compensated from the U.S. Victims of State Sponsored Terrorism Fund pursuant to legislation enacted in 2015).

*Peterson*,” and required the court to find that the property in the intermediary account was “equal in value to a financial asset of Iran.”<sup>288</sup>

Negotiations on the Menendez amendment continued when the bill returned to the House. On August 1, 2012, the House passed the 2012 Iran Threat Reduction and Syria Human Rights Act. As further amended, the statute contained a “rule[ ] of construction,” which stated that the provision applied only to *Peterson* and discouraged courts from drawing any inference from it about the meaning of the Uniform Commercial Code.<sup>289</sup> The House bill required the court to find, before ordering turnover of the bond proceeds, that “no other person possesses a constitutionally protected interest in the assets . . . under the Fifth Amendment to the Constitution of the United States.”<sup>290</sup> The Senate passed the House bill without amendment, and President Obama signed it into law on August 10, 2012.<sup>291</sup>

### 3. Section 502 Applied

With the new statute in hand, plaintiffs returned to the Southern District of New York and renewed their motion for turnover of the bonds, which by then had matured. The district court found that “[t]he [n]ewest [a]ct”<sup>292</sup> “swept aside” the defendants’ objections to turning over the bond proceeds.<sup>293</sup> Bank Markazi appealed, arguing that Congress’s “overt” interference in the pending turnover litigation violated Article III.<sup>294</sup> The Supreme Court in *Bank Markazi v. Peterson* rejected the Article III argument, concluding that § 502 validly changed the law of sovereign immunity while the *Peterson* litigation was pending rather than directing that the turnover action be resolved

<sup>288</sup> H.R. 1905, 112th Cong. § 503 (as passed by Senate, May 21, 2012).

<sup>289</sup> H.R. 1905, 112th Cong. § 502(c) (as passed by House, Aug. 1, 2012).

<sup>290</sup> Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(a)(2), 126 Stat. 1214, 1259.

<sup>291</sup> *Actions Overview: H.R.1905—112th Congress (2011-2012)*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/1905/actions> (last visited Aug. 28, 2017).

<sup>292</sup> *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at \*9 (S.D.N.Y. Mar. 13, 2013), *aff’d*, 758 F.3d 185 (2d Cir. 2014), *aff’d sub nom.* *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

<sup>293</sup> *Id.* at \*34. “Clearstream argue[d] that there [were] triable issues as to whether Bank Markazi is the ‘owner of’ the Blocked Assets,” but § 502 made clear that the only question was whether a party “other than an agency or instrumentality of Iran” held “a constitutional, beneficial or equitable interest in the assets.” *Id.* at \*30. Markazi’s argument that the bond proceeds were immune from execution because they were not “in” the United States failed because the new provision “obviate[d] any need for this Court to rely on TRIA.” *Id.* at \*24. The new provision required the court to “also find no central bank immunity.” *Id.* at \*26.

<sup>294</sup> Brief of Defendant-Appellant at 50, *Peterson v. Islamic Republic of Iran*, 758 F.3d 185 (2d Cir. 2014) (No. 13-2952).

in a particular manner.<sup>295</sup> The Court stressed that its decision was informed by the political branches' longstanding authority to control "the disposition of foreign-state property in the United States."<sup>296</sup>

In July 2013, the District Court ordered that the bond proceeds be turned over to a trust for distribution to judgment creditors of Iran.<sup>297</sup> In October 2016—thirty-three years after the Beirut bombing—the trust began distributions to the victims. Aside from a small death benefit that the military provided, the disbursements represented the first financial compensation that victims of the bombing ever received.<sup>298</sup>

#### 4. *Resolving a Specific Legal Dispute Through a Bespoke Statute*

Section 502 unquestionably succeeded in its narrow goal of ensuring that the *Peterson* judgment creditors could seize the bonds that Bank Markazi inadvisably held in New York. As the district court observed, the statute "swept aside" barriers to executing on the bonds in the federal law of sovereign immunity. The statute's substantive standard—authorizing turnover if the district court found that "Iran holds equitable title to, or the beneficial interest in" the bonds and that "no other person possesses a constitutionally protected interest" in the bonds—preempted the New York U.C.C. for the purposes of the *Peterson* turnover litigation.<sup>299</sup>

As the *Bank Markazi* Court majority stressed, this intervention can be seen as a routine exercise of legislative line drawing.<sup>300</sup> Faced with a choice between blindly adhering to the laws of sovereign immunity and secured transactions, and these plaintiffs' demands for compensation, it is not difficult to understand why Congress provided the legislative relief that plaintiffs requested, even though doing so raised concerns that Congress was extending special treatment to victims of the Beirut bombing and interfering in the ongoing *Peterson* proceedings.

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<sup>295</sup> 136 S. Ct. 1310, 1329 (2016) ("By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets.").

<sup>296</sup> *Id.* at 1328.

<sup>297</sup> *Peterson* Judgment, *supra* note 286, at 6.

<sup>298</sup> Telephone Interview with Jodi Herman, *supra* note 278.

<sup>299</sup> *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518, 2013 WL 1155576, at \*10 (S.D.N.Y. Mar. 13, 2013), *aff'd*, 758 F.3d 185 (2d Cir. 2014), *aff'd sub nom.* *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

<sup>300</sup> *Bank Markazi*, 136 S. Ct. at 1326 ("[Section 502] provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets.").



As the Chief Justice observed, however, § 502 was also enacted in the midst of litigation that began in 2008. The statute “eliminate[d] each of the defenses” that threatened plaintiffs’ effort to seize the bonds.<sup>301</sup> It was enacted in response to the plaintiffs’ lobbying, with little opportunity for Iran or other judgment holders to make their case—a clear example of legislative partiality. “And lest there be any doubt that Congress’s sole concern was affecting the resolution of this particular case, rather than establishing any generally applicable rules,” the statute provided that nothing in it “shall be construed . . . to affect the availability, or lack thereof, of a right to satisfy a judgment in any other action against a terrorist party in any proceedings other than” *Peterson*.<sup>302</sup> Congress thus sought to foreclose any future problems arising out of legislative myopia.

Section 502, then, presents an especially sharp example of the possibilities and normative challenge of ad hoc procedural legislation highlighted in the preceding case studies. If the statute solved the problem of Iran successfully insulating its assets from execution, its specificity and the context in which it was enacted also show the extent to which ad hoc legislation can resemble the raw exercise of state power that procedure ordinarily seeks to discipline and constrain.<sup>303</sup> The legislation’s double aspect translated into the debate over its constitutionality at the Supreme Court. Where the majority concluded that the statute was a valid exercise of Congress’s legislative power, the Chief Justice argued that Congress had “assume[d] the role of judge and decide[d] a particular pending case.”<sup>304</sup> Nonetheless, the actual reasons for the statute’s specificity were never ventilated during the constitutional challenge to the statute. Herman related to us that that, during the Supreme Court argument in *Peterson*, she wanted to interject and explain that the statute’s specificity resulted from the securities industry’s objections to a bill that overrode the Article 8 holding system in more general terms.<sup>305</sup> This aspect of the statute’s history, however, is not apparent from the statute’s public legislative history, and it was never presented to the Court.

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<sup>301</sup> *Id.* at 1329 (Roberts, C.J., dissenting).

<sup>302</sup> *Id.* at 1333 (quoting 22 U.S.C. § 8772(c)).

<sup>303</sup> See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (“We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government’ . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.” (alteration in original) (citations omitted) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

<sup>304</sup> *Bank Markazi*, 136 S. Ct. at 1332 (Roberts, C.J., dissenting).

<sup>305</sup> Telephone Interview with Jodi Herman, *supra* note 278.

### III

#### AD HOC PROCEDURAL LEGISLATION IN A WORLD OF ORDINARY LAW

As the first Part demonstrated, ad hoc procedure presents a multifaceted challenge to the traditional image of procedure. Enacted in response to specific cases, ad hoc procedural legislation cannot claim to be fair because lawmakers are ignorant of how their work will affect specific litigants. Nor can fairness be assumed from ad hoc procedural legislation's generality, given the extreme specificity of statutes such as § 502 of the Iran Sanctions Act. When lawmakers seek to accomplish specific litigation outcomes through apparent legislative interference with pending litigation, the context in which that ad hoc procedural legislation is enacted raises separation of powers concerns.

Nevertheless, the preceding Part demonstrated that, in addition to inviting normative objections, ad hoc procedural legislation can serve important purposes—most notably, restoring the civil justice system's ability to function in procedure-generating cases. But the case studies do not provide a complete answer to whether ad hoc procedural legislation is legitimate. If statutes such as § 524(g) are beneficial when viewed from the perspective of tort claimants and asbestos manufacturers, they still pick winners and losers in a way that conflicts with process-based accounts of the rule of law. The question remains: When, if ever, are ad hoc procedural statutes a legitimate exercise of the state's power over civil procedure?

With the benefit of the initial examples Part I explored and the case studies Part II examined, this Part returns to the normative challenge of ad hoc procedural legislation and considers whether it can share the legitimacy of civil procedure that is established via the traditional *ex ante* model of procedural design. This Part argues that, because of the differences in the design of ad hoc procedural statutes and the reasons they were enacted, there is no across-the-board answer to the normative objections to ad hoc procedural legislation introduced in Part I. Instead, since the process that leads to ad hoc procedural legislation provides no guaranty that it will be fair or well considered, the legitimacy of any particular statute must be grounded in other factors. Chief among these are the substantive fairness of the outcomes that a statute seeks to bring about and the need for ad hoc legislation to ensure the proper functioning of the justice system.

Section III.A begins by showing that the double aspect of ad hoc procedural legislation that emerges from the case studies—its simultaneous tension with rule-of-law values and its necessary role in accomplishing important governmental objectives—is to some extent

unavoidable. Many of the procedural problems that the case-study statutes addressed could not be anticipated in generally applicable statutes, nor could they be addressed through other forms of ad hoc procedure-making. Lawmakers therefore faced a choice between intervening on-the-fly and allowing a procedural problem to frustrate the operation of the civil justice system. This dilemma suggests that the normative problems introduced in Part I are not, alone, a reason to reject ad hoc procedural legislation. Whether considering demands for ad hoc procedural legislation *ex ante* or evaluating such legislation *ex post*, courts and legislators cannot avoid balancing the need for ad hocery against its costs.

Even when ad hoc legislation is warranted, its serious costs are undeniable. As Section III.B shows, those costs result from two trade-offs that lawmakers face in addressing procedural problems through ad hoc procedural legislation. When determining the *substantive scope* of an ad hoc procedural statute, lawmakers face a tradeoff between limiting the statute to the motivating problem and extending the statute more broadly: A narrowly tailored statute lowers the risk that the statute will have unintended consequences but risks failing to treat like cases alike; a broadly framed statute avoids singling out a problem for special treatment but invites unintended consequences. When determining the *temporal reach* of an ad hoc statute, lawmakers face a tradeoff between operating prospectively and addressing problems linked to a specific case or set of cases: A perfectly prospective statute avoids the unfairness of changing procedure midstream but lacks the ability to respond to problems revealed by concrete cases; a perfectly retroactive statute resolves specific problems perfectly, but undermines the aspiration that cases be decided under rules that are established in advance of concrete disputes.

If the circumstances that ad hoc procedural statutes are enacted within do not guarantee their fairness and such legislation carries significant costs, can they be legitimate? In one sense, ad hoc procedural legislation is the *most* legitimate form of ad hoc procedure-making because it has the formal status of law under the relevant constitutional norms. But an ad hoc statute's *formal* status as law does not answer the rule-of-law-based objections to ad hoc procedure-making, which recognize that an enactment may formally be law while failing to comply with the *rule* of law because it is arbitrary, discriminatory, or established through a process that invites lawmakers to legislate for bad reasons.

Section III.C argues that an ad hoc procedural statute's legitimacy depends on the perception that that the statute is necessary to ensure the continued functioning of the civil justice system and that it

strives to do justice in response to that procedural problem. Ad hoc legislation thus depends upon a different kind of legitimacy than generally applicable procedural codes: A given statute's legitimacy or lack thereof lies in its justification and equity, not the fact that it results from a process that tends to produce evenhanded procedure. Because these aspects of a statute are so important to its legitimacy, the transparency of the legislative process that leads to the enactment of the statute is critical.

### A. *The Inevitability of Balancing*

We began in Part I with the challenge that ad hoc procedural legislation presents to the traditional model of procedural design and the rule-of-law values that model reflects. Enacted to overcome procedural problems revealed by a case or set of cases, ad hoc procedure departs from the traditional model of procedural design, which seeks to ensure the fairness of state action by resolving disputes through evenhanded processes established in advance of concrete disputes. The departures are particularly striking in the context of ad hoc procedural *legislation*, which not only changes the "rules of the road" for ongoing cases but also threatens traditional dividing lines between judicial and legislative functions. If avoiding the appearance of legislative partiality were the only metric for judging procedure-making, ad hoc procedural legislation's departures from the traditional model would be conclusive objections against it.

The case studies show, however, that procedure designed on the traditional model cannot address all of the problems that in practice can frustrate the operation of the civil justice system. Even the most clairvoyant procedural designer could not have anticipated the flood of claims precipitated by Deutsche Telekom's IPO,<sup>306</sup> the litigation dynamics that prevented the U.S. legal system from resolving the flood of asbestos litigation in the 1980s,<sup>307</sup> the need for global peace created by the Dutch Supreme Court's resolution of DES manufacturers' liability,<sup>308</sup> or Iran's maneuvering to make use of the U.S. financial system while protecting its assets from judgment creditors.<sup>309</sup> For the civil justice system to offer the goods that it ordinarily provides in these types of cases, some amount of ad hoc procedure-making was necessary.

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<sup>306</sup> See *supra* text accompanying notes 130–43.

<sup>307</sup> See *supra* text accompanying notes 5–14.

<sup>308</sup> See *supra* text accompanying notes 215–22.

<sup>309</sup> See *supra* text accompanying notes 266–70.

Of course, ad hocery does not have to take the form of legislation.<sup>310</sup> In recognition of the limits of human foresight, most procedural codes confer discretion on judges and authorize parties, by agreement, to tailor procedures to a case's specific needs.<sup>311</sup> When case-specific procedure-making fails to overcome a problem, legislatures may redirect claims to an administrative scheme, or a claims facility may be established to provide an alternative to public court litigation.<sup>312</sup> For certain problems, however, changes to existing procedures provide the most attractive—and sometimes the only—way to overcome procedural problems.<sup>313</sup>

Legislation is perhaps the most powerful form of ad hoc procedure, but the barriers to obtaining it are high. It is no coincidence that all of Part II's case studies involved procedural problems that arose in the course of high-stakes complex litigation, involving sophisticated lawyers and well-resourced parties with access to the key political players. Whether the actors who pursued the profiled statutes judged that existing law provided too little authority to frontline decision makers,<sup>314</sup> needed a statute to bind third parties,<sup>315</sup> or sought legislation for some other reason,<sup>316</sup> their repeated, successful attempts to persuade legislatures to adopt new procedural statutes suggest ad hoc procedural legislation will be a persistent feature of the procedural landscape.

If one accepts the legitimacy of the objectives that motivated Part II's case studies, as we generally do,<sup>317</sup> it is clear that ad hoc procedural legislation's departures from the traditional model of procedural design cannot be conclusive objections to it. An important point follows. Whether considering a proposal to enact an ad hoc procedural statute *ex ante* or evaluating the statute *ex post*, legislatures, courts, and observers of their work cannot avoid balancing the need for the legislation against the costs of ad hoc procedure-making. To treat ad hoc procedure statutes' departures from the traditional model of pro-

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<sup>310</sup> See *supra* text accompanying notes 67–111 (categorizing different forms of ad hoc procedure).

<sup>311</sup> See *supra* text accompanying notes 67–78.

<sup>312</sup> See *supra* text accompanying notes 79–111.

<sup>313</sup> See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (noting that “real reform” requires “federal legislation creating a national asbestos dispute-resolution scheme” (citing AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3, 27–35 (1991))).

<sup>314</sup> See *supra* text accompanying notes 154–75 (discussing the Bundestag's codification of the test case procedure developed by the DT trial court).

<sup>315</sup> See *supra* text accompanying notes 16–20 (discussing the channeling of asbestos claims to a freestanding trust via § 524(g)).

<sup>316</sup> See *Amchem*, 521 U.S. at 598.

<sup>317</sup> The PLRA raises a potential exception. See *supra* text accompanying notes 112–18.

cedural design as fatal defects, as the *Bank Markazi* dissent does,<sup>318</sup> is to deny the seriousness of the problems that inspire the legislation. To accept ad hoc procedural legislation simply because it is law—the tenor, if not holding, of the *Markazi* majority opinion<sup>319</sup>—is to deny the serious rule-of-law concerns that such legislation raises. Balancing is inevitable.

Interestingly, the Supreme Court reached an analogous conclusion in the 1960s and 1970s when addressing due process challenges to agency adjudication schemes that departed from the procedures followed by public courts. After suggesting in *Goldberg v. Kelly* that due process requires agency adjudication schemes to follow the basic features of public court procedure,<sup>320</sup> the Court quickly reversed course and concluded that novel agency procedures are consistent with due process if they are supported by a sufficiently compelling justification<sup>321</sup> and ensure “fundamental fairness.”<sup>322</sup> As famously articulated in *Mathews v. Eldridge*, a due process challenge to New York City’s procedures for terminating Social Security disability benefits, this calculus depends upon “the private interest that will be affected by the official action,” “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and “finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>323</sup> The Court’s adoption of this “cost-benefit formula”<sup>324</sup> was premised on its recognition that whether a chal-

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<sup>318</sup> See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1333 (2016) (Roberts, C.J., dissenting) (“There has never been anything like § [502] before. Neither the majority nor respondents have identified another statute that changed the law for a pending case in an outcome-determinative way and explicitly limited its effect to particular judicial proceedings.”).

<sup>319</sup> See *id.* at 1327 (denying that “there is something wrong with particularized legislative action” and reasoning that “[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action” (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995))).

<sup>320</sup> See 397 U.S. 254, 267–68 (1970) (“[Due process] principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”).

<sup>321</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334–49 (1976).

<sup>322</sup> *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

<sup>323</sup> *Mathews*, 424 U.S. at 335. For a skeptical analysis of whether the *Mathews* factors capture the relevant costs and benefits, see generally Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

<sup>324</sup> *Van Harken v. City of Chicago*, 103 F.3d 1346, 1353 (7th Cir. 1997), *cert. denied*, 520 U.S. 1241 (1997).

lenged procedure is “constitutionally sufficient” depends on the “governmental *and* private interests that are affected.”<sup>325</sup> Condemning a novel procedure simply because it departed from the procedures followed in public court would ignore one side of that balance.

### B. *The Dynamics of Ad Hoc Procedural Legislation*

To say, as the preceding section suggests, that ad hoc procedural legislation is inevitable is not to say that it is costless. Rather, the necessity of balancing the costs and benefits of ad hoc legislation suggests that such legislation is virtually certain to carry costs. Part I.C introduced costs that result from ad hoc procedural legislation’s departures from the traditional model of procedure-making. Other costs highlighted by Part II’s case studies result from the tradeoffs that legislatures face when considering demands to enact ad hoc procedural legislation.

#### 1. *The Generality Tradeoff*

The first of these tradeoffs arises from the distinctive interest-group dynamics of ad hoc procedural legislation.<sup>326</sup> The groups that a procedural problem affects—securities fraud plaintiffs and judges responsible for hearing their claims, asbestos plaintiffs and defendants, DES manufacturers and individuals harmed by their products—are prototypically adverse to one another in litigation. A procedural problem, however, may deny litigation adversaries a good or package of goods that they seek from litigation, such as a mecha-

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<sup>325</sup> *Mathews*, 424 U.S. at 334 (emphasis added).

<sup>326</sup> For the standard account of interest-group politics in the United States, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). For refinements of Olson’s account that demonstrate how the enactment of legislation gives rise to interest groups that influence the demand for new legislation and constrain Congress’s ability to modify existing law, see, for example, JEB BARNES & THOMAS F. BURKE, *HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION* (2015) (describing injury compensation cases as examples of interest-group advocacy through litigation), ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* (2003) (analyzing the reciprocal relationship between political participation and policy with respect to the civic engagement of senior citizens), and Paul Pierson, *The Study of Policy Development*, 17 J. POL’Y HIST. 34 (2005) (advocating for greater analysis of how policy develops in order to understand how new legislation may become either a durable policy regime or a fleeting initiative). *But see* Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004) (questioning the thesis that legislative entitlements universally “stick” and explaining strategies through which opponents of the welfare state may exploit the stickiness of legislation to lower the level of state-provided risk protection).

nism for binding an entire universe of claimants through an aggregate settlement.<sup>327</sup> A procedural problem can therefore provide the occasion for a shotgun wedding, as litigation adversaries temporarily unite in a group to seek out legislation that advances their several interests.<sup>328</sup> Compared to usual players in the litigation process, these litigation “interest groups” are small. Prototypically, they consist of the parties to an ongoing case that a procedural problem affects.

That small interest groups enjoy a comparative advantage in pursuing legislation has been a staple of political economy since Mancur Olson’s *Logic of Collective Action*.<sup>329</sup> A small group’s size, and the fact that its members are directly affected by legislation, help to overcome the collective action problems that are thought to prevent individuals with shared policy preferences from mobilizing legislative action.<sup>330</sup> The billions of dollars at stake in cases that spawn ad hoc procedural legislation justify the investment in the lobbying needed to secure it.

These interest-group dynamics, however, shape the record for lawmakers considering ad hoc procedural fixes in ways that impact legislative design. On the bright side, a group seeking an ad hoc procedural statute has strong incentives to present lawmakers with a detailed picture of the procedural problem that the group seeks to overcome. The group’s members also have a strong incentive to develop legislation that treats members of the group fairly, in order to prevent defections from the temporary coalition. In the Manville bankruptcy, for example, parties on all sides of the proceeding—*asbestos claimants, the future claims representative appointed by the district court, Manville’s managers, and the trustees of the Manville personal injury trust*—came together to support § 524(g) when it was presented to Congress.<sup>331</sup> The legislation they proposed reflected the bargain that had been negotiated among the asbestos plaintiffs’ lawyers, the court-appointed future claims representative, and Manville during earlier stages of Manville’s reorganization. It is only where par-

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<sup>327</sup> See *supra* text accompanying notes 5–14 (discussing the inability of ordinary procedural tools to bind claimants in asbestos-related litigation).

<sup>328</sup> See McKenzie, *supra* note 182, at 1014–15.

<sup>329</sup> See, e.g., sources cited *supra* note 326.

<sup>330</sup> Olson theorized that small groups are “twice blessed in that they have not only economic incentives, but also perhaps social incentives, that lead their members to work toward the achievement of the collective goods.” The social incentives involved pressure to contribute and be seen as contributing to the group’s common work. “The large, ‘latent’ group, on the other hand, always contains more people than could possibly know each other, and is not likely (except when composed of federated small groups) to develop social pressures that would help it satisfy its interest in [obtaining] a collective good.” OLSON, *supra* note 326, at 63.

<sup>331</sup> See *supra* text accompanying notes 187–92 (discussing 1992 hearings on § 524(g)).



ties to the procedure-generating case have differential access to the legislative process that ad hoc legislation will tend not to represent a compromise among their interests. In the case of the PLRA, state and local prison and law-enforcement authorities overpowered the voices of those representing the unpopular prison inmate population, resulting in legislation that critics see as one-sided and that, all agree, establishes restrictive litigation rules applicable only to prisoner litigants.<sup>332</sup>

If ad hoc procedural legislation is likely to reflect a compromise among the litigants who seek it, it is unlikely to take third parties' interests into account. A litigation group that puts forward a procedural fix for a legislature's consideration has little incentive to draft legislation that does more than solve the immediate problem it faces, to develop information about the proposal's effects on strangers to the procedure-generating case, or to present that information to the legislature.<sup>333</sup> To the contrary, drafting a statute that is broader than needed to overcome the procedural problem, or articulating its effects on third parties, decreases the likelihood that the statute will be enacted by inviting objections from third parties. Accordingly, ad hoc legislation will tend to be narrowly drawn, and to be indifferent to its effects on third parties—inviting legislative myopia with respect to the statute's long-run consequences.

Even if other kinds of litigation present a comparable procedural problem, drafters of the ad hoc legislation are unlikely to address it.<sup>334</sup> And while a proposed statute might be drafted to address obvious constitutional objections,<sup>335</sup> this hardly ensures that all of the constituencies the statute affects will be treated fairly. As noted above, asbestos manufacturers objected to § 524(g) on the ground that it

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<sup>332</sup> See Fan, *supra* note 101, at 610 (explaining that the PLRA “imposed high hurdles for prison population reduction orders in part because of a controversial prisoner reduction consent decree in Philadelphia”).

<sup>333</sup> In this sense, the groups who seek ad hoc legislation are similar to coalitions that devise settlements that resolve an immediate controversy at the expense of non-parties. *Cf.* Martin v. Wilks, 490 U.S. 755, 763–65 (1989) (holding that non-parties to a settlement cannot be precluded from challenging it in later proceedings).

<sup>334</sup> Interestingly, practitioners have told us anecdotally that now that § 524(g) has legitimized use of the channeling injunction in bankruptcies involving asbestos liability, debtors with other kinds of liability have been able to take advantage of similarly structured channeling injunctions issued under the authority of Section 105 of the Bankruptcy Code. N.Y. Univ. Sch. of Law Ctr. on Civil Justice & N.Y. Univ. Law Review, *Center on Civil Justice Fall 2016 Conference: The Effectiveness of Rule 23*, YouTube 39:00 (Jan. 27, 2017), <https://youtu.be/CmSTFtvKGw4> (comments of Sheila Birnbaum, Esq.).

<sup>335</sup> See *supra* note 185 and accompanying text (discussing how § 524(g) was drafted to avoid violating the Bankruptcy Clause).

would force them into bankruptcy. When § 524(g) became law, it had precisely this effect.

These dynamics create a tradeoff between legislating narrowly, as Congress did in the Iran Sanctions Act, and extending an ad hoc intervention beyond the motivating case, as the Dutch legislature did in the WCAM.<sup>336</sup> Narrow legislation reduces the risk of unintended consequences at the cost of failing to treat like cases alike and appearing to dole out a legislative favor to the group that sought the legislation. Thus, the Iran Sanctions Act's extreme specificity led the Chief Justice to complain that Congress had "assume[d] the role of judge and decide[d] a particular pending case in the first instance."<sup>337</sup> Legislation cast at a higher level of generality avoids the appearance of legislative favoritism at the cost of inviting unintended consequences. The WCAM's trans-substantivity, for instance, enabled it to form the foundation of the securities regime created in *Shell*. Likewise, the MDL statute's trans-substantivity enabled it to form the foundation for the controversial current system of resolving mass torts through massive non-class aggregations and aggregate settlements.<sup>338</sup>

## 2. *The Retroactivity Tradeoff*

The second tradeoff presented by proposals for ad hoc procedural legislation involves the costs of changing procedural rules mid-stream. As Part I explained, ad hoc legislation is enacted by lawmakers who are aware of—and generally intend—specific litigation outcomes. Lawmakers' awareness of how legislation will affect pending cases, and the fact that they do not act based on recommendations of nominally impartial experts, strips ad hoc procedural legislation of the presumptive fairness of procedure that is established through the traditional model of procedure-making. For example, Congress's awareness of the likely effects of the Iran Sanctions Act raises separation-of-powers concerns.

That ad hoc procedural legislation changes the *procedure* used to resolve legal claims distinguishes it from other types of legislation and underscores the normative challenge of legislating on the fly. Virtually all legislation has distributional implications.<sup>339</sup> But procedural rules

<sup>336</sup> See also *supra* notes 93–99 and accompanying text (discussing the MDL statute).

<sup>337</sup> *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1332 (2016) (Roberts, C.J., dissenting).

<sup>338</sup> See generally Bradt, *supra* note 95 (summarizing debates over this use of the MDL statute).

<sup>339</sup> Madison observed:

[A] body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different

aim to treat all sides fairly, and the perceived fairness of dispute resolution procedure is central to the legitimacy of legal judgments, as Part I noted.<sup>340</sup> Thus, there is a difference between lawmakers' awareness of how ad hoc procedural statutes affect litigants and, say, lawmakers' awareness of how amendments to the Clean Air Act will affect power companies.

Lawmakers presented with a proposal for ad hoc legislation might seek to allay these concerns by specifying that legislation applies prospectively, or even delaying its effective date.<sup>341</sup> Doing so eliminates the objection that the legislature is meddling in ongoing litigation, but compromises legislation's ability to address procedural problems in ongoing cases. The DT Act would be of little use if it could not be used in the DT litigation. Nor would § 524(g) have been attractive to Manville if it could not have been used in Manville's restructuring.

Lawmakers thus face a tradeoff between changing procedural rules midstream, inviting charges of legislative favoritism, and solving problems that arise in specific cases. To the extent that legislation operates prospectively, its capacity to address problems revealed in specific cases is diminished. When legislation operates retrospectively—or just in time to address the problem—it is in tension with the aspiration that cases be decided according to procedures established *ex ante*, and with separation-of-powers norms that attempt to distinguish between legislative and judicial functions. But a legislature cannot solve problems in pending litigation and operate exclusively on a prospective basis.

### 3. *Balancing, Quickly and for Keeps*

The tradeoffs that we have just highlighted—between specificity and generality, prospectivity and retroactivity—are endemic to legislation.<sup>342</sup> But the circumstances under which ad hoc procedural statutes are enacted make them particularly unlikely to resolve those tradeoffs optimally.

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classes of legislators but advocates and parties to the causes which they determine?

THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

<sup>340</sup> See *supra* notes 44–47 and accompanying text (discussing social psychologists' findings on the factors that contribute to acceptance of legal decisions).

<sup>341</sup> See generally Frank Fagan & Saul Levmore, *Legislative Sunrises: Transitions, Veiled Commitments, and Carbon Taxes*, in *THE TIMING OF LAWMAKING* 130 (Frank Fagan & Saul Levmore eds., 2017) (surveying advantages and drawbacks of sunrise legislation in the context of pollution policy).

<sup>342</sup> See SAMUEL ESTREICHER & DAVID L. NOLL, *LEGISLATION AND THE REGULATORY STATE* §§ 1[C][1]–[2] (2015) (discussing tradeoffs between regulation and common law, and rules and standards).

Posit that lawmakers considering ad hoc legislation work in good faith. Even so, the short time frame in which ad hoc legislation is developed means that they will have little time to consider—and negotiate—the shape that the legislation takes. For example, pressure to enact the WCAM was so great that the Dutch legislature could not wait for a report on the legislation from a commissioned panel of civil justice experts.<sup>343</sup> Section 502 of the Iran Sanctions Act was part of a broader sanctions bill that navigated the legislative process in eight months, an impressive accomplishment in an era of partisan gridlock.<sup>344</sup> Such pressure decreases the likelihood that lawmakers strike the optimal balance between generality and specificity and between prospectivity and retroactivity.

Even though ad hoc procedural legislation tends to be enacted in a hurry, the balance lawmakers strike is likely to endure because it is formalized in law.<sup>345</sup> And the very formality of ad hoc procedural legislation invites sophisticated legal actors to put ad hoc statutes to uses that the drafters and proponents of the legislation did not anticipate, as lawyers did with § 524(g).<sup>346</sup> As explained above, Congress sought to retroactively bless the procedures used in the Manville bankruptcy in § 524(g), and to make those procedures available to other asbestos manufacturers that faced the prospect of a stream of asbestos claims extending indefinitely into the future. The statute, however, provided the legal basis for a new legal structure for stripping a company of asbestos liability—the pre-packaged § 524(g) bankruptcy.<sup>347</sup> A review of the committee hearings on § 524(g) shows that lawmakers did not consider or affirmatively approve that structure.<sup>348</sup> As *Combustion Engineering* suggests, sophisticated actors' use of ad hoc procedural legislation in unexpected ways magnifies the risk of responding to procedural problems revealed by particular cases with ad hoc legislation.

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<sup>343</sup> See Ianika Tzankova & Daan Lunsingh Scheurleer, *The Netherlands*, in 622 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 155 (Deborah Hensler et al. eds., 2009).

<sup>344</sup> On February 1, 2012, Senator Robert Menendez introduced the original version of what would become § 502. The section became law, as amended, on August 10, 2012. See *supra* notes 275–91.

<sup>345</sup> See generally JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30850, MINORITY RIGHTS AND SENATE PROCEDURES (2005) (describing rules that empower minorities in the Senate to delay or prevent new legislation); William N. Eskridge, Jr., *Vetogates*, CHEVRON, PREEMPTION, 83 NOTRE DAME L. REV. 1441, 1444–49 (2008) (describing how vetogates in the federal legislative process increase the difficulty of enacting new legislation and decrease the likelihood that legislation, once enacted, will be amended or repealed).

<sup>346</sup> Cf. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2540 (2011) (concluding that the enactment of the Federal Clean Air Act completely displaced common law regulation of greenhouse gas emissions).

<sup>347</sup> See *supra* text accompanying notes 199–211.

<sup>348</sup> See *House Manville Hearings*, *supra* note 23; *Senate Manville Hearings*, *supra* note 8.

Seen from this perspective, the Bundestag's inclusion of a sunset clause in the DT Act was prescient. Recognizing that it was acting under intense time pressure and with imperfect information, the Bundestag effectively forced reconsideration of the DT Act at a later time, when more information would be available and the legislature was not under the gun to resolve the Frankfurt court's "mutiny." The changes that resulted from the forced reconsideration of the statute, in turn, were a major factor in making the statute an attractive vehicle for the Volkswagen securities litigation.

Sunsetting, however, reflects a bet that a future legislature will be able to identify problems with the ad hoc statute and address them effectively—a questionable assumption when it comes to, say, the current U.S. Congress. The possibility of a failure to act at the time of the sunset can create uncertainty and result in losing the benefits of the ad hoc procedure as a fix for future iterations of similar issues. Where a legislature's membership changes, moreover, sunseting implicates risks of legislative drift: Tomorrow's legislature may reject the original legislature's judgment that a procedural problem warrants an ad hoc fix.<sup>349</sup> Thus, while the sunset device accomplished its goals in the DT Act, it is no cure-all.

### C. *Can Ad Hoc Procedural Legislation Be Legitimate?*

We are left with ad hoc procedural legislation's abiding ambivalence. Ad hoc procedural legislation is formally law. For this reason, there is no question that it can direct courts to apply new forms of procedure and modify third parties' rights subject to constitutional constraints. But as we have shown, the circumstances in which ad hoc procedural legislation is enacted do little to guarantee that it is fair. It inevitably involves balancing rule-of-law values against the apparent need to fix procedural problems to enable the justice system to function. Moreover, it entails serious costs that result from the timeframe in which it is enacted and the tradeoffs that legislatures face in attempting to fix problems revealed by specific cases. All this raises questions of legitimacy. Ad hoc legislation can work rough justice. Can it also share the legitimacy of codes, such as the Federal Rules of Civil Procedure, established through the traditional model?

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<sup>349</sup> See Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503–04 (1989) (sketching the phenomenon of legislative drift). For a discussion of how legislative drift can influence other forms of procedure-making, see David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1011–17, 1036 (2017).

For reasons we have already suggested, that legitimacy cannot rest entirely on ad hoc legislation's formal status as enacted law. To be sure, ad hoc legislation is subject to debate in Congress, and both parties to the procedure-generating litigation and outsiders to it have a formal opportunity to participate in the debates over the bill. Such legislation thus contrasts with ad hoc procedures created through judicial fiat or party agreement. But ad hoc procedural legislation is unlikely to reflect a robust debate among diverse interest groups. It is *special interest* legislation insofar as it results from a narrow interest group's demand for legislation that advances the group's interest.<sup>350</sup> It results from *unorthodox* lawmaking, because it tends not to proceed through the legislature in the manner assumed by textbook accounts of the legislative process.<sup>351</sup> This process stands in contrast to the process that led to framework procedural statutes such as the Enabling Act.<sup>352</sup>

Nor is the legitimacy of ad hoc procedural legislation guaranteed by the fact that it survives judicial challenges alleging violations of constitutional separation-of-powers and due process norms. In the United States, the separation-of-powers doctrine prohibits Congress from requiring that judgments be reviewed by an executive department, reopening final judgments, or directing the resolution of a pending case.<sup>353</sup> But as *Bank Markazi* illustrates, those norms leave Congress room to intervene in litigation in ways that “dictate judicial results.”<sup>354</sup>

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<sup>350</sup> See *supra* note 326 (listing theoretical treatments of interest-group politics).

<sup>351</sup> See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2016) (discussing lawmaking that does not follow the textbook legislative process); Abbe R. Gluck, *Unorthodox Civil Procedure*, 165 U. PA. L. REV. (forthcoming 2017) (analogizing unorthodox legislation to the development of precedent in multidistrict litigation).

<sup>352</sup> See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035–95 (1982) (chronicling the decades-long lobbying effort that culminated in passage of the Enabling Act); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1675–77 (1995) (summarizing the lobbying effort that culminated in the Administrative Procedure Act); see also Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950) (describing the Administrative Procedure Act as the product of “a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest”). But cf. Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343, 1346–49 (2014) (arguing that the legal structure of the modern administrative state reflects compromises and developments inextricably linked to the effort to mobilize the nation for World War II).

<sup>353</sup> See *supra* note 116 (describing doctrinal developments since *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)).

<sup>354</sup> 136 S. Ct. 1310, 1334 n.2 (2016) (Roberts, C.J., dissenting).

Due process might seem to exert a stronger influence on the design of ad hoc procedural legislation. In *Amchem* and other cases, courts have elaborated a set of principles grounded in the Due Process Clause that check against self-dealing by class counsel and seek to ensure the fairness of distributional choices made by designers of class settlements and judgments.<sup>355</sup> As summarized by Judge Anthony Scirica in *Sullivan v. DB Investments*, these principles of “structural, procedural, and substantive fairness” aim to achieve “redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality.”<sup>356</sup> They require that individuals bound by an aggregate resolution receive competent and conflict-free representation, that settlement proceeds be allocated fairly among beneficiaries, and that proceedings be free of collusion among adversaries.<sup>357</sup>

These principles have never been held applicable to legislation, however. Quite the contrary, the Court in *Amchem* opined that a successful resolution to the asbestos litigation crisis “required federal legislation creating a national asbestos dispute-resolution scheme” and pointed to the Federal Black Lung Program as a model for such legislation.<sup>358</sup> The Court’s preference for a legislative solution to the asbestos crisis reflects the unstated belief that a resolution required essentially political judgments about how to allocate asbestos manufacturers’ scarce assets among a sprawling class of claimants. The federal courts, “lacking authority to replace state tort systems with a national toxic tort compensation regime,” could not make those judgments, but Congress could.<sup>359</sup>

As *Amchem* teaches, the factors that contribute to ad hoc procedural legislation’s legitimacy differ from the factors that legitimate ordinary procedural law and court-created workouts. A legislative

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<sup>355</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997) (holding that class certification under Rule 23(b)(3) requires that class members’ interests be aligned with their putative representative); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832–37 (1999) (same; Rule 23(b)(1)); *Hansberry v. Lee*, 311 U.S. 32, 40–42 (1940) (holding that binding inadequately represented non-parties to a judgment violates the Fourteenth Amendment’s Due Process Clause). For a survey of the Supreme Court’s jurisprudence and the difficulties lower courts have encountered implementing it, see Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 788 (2017).

<sup>356</sup> 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring).

<sup>357</sup> See *id.*

<sup>358</sup> *Amchem*, 521 U.S. at 598.

<sup>359</sup> *Id.* at 599; see Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1640 (2017) (observing that “[f]or years, the Supreme Court and scholars have said that legislative bodies are better than judges at responding to problems of mass harm”); see also Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 173–74 (2003) (developing analogy between mass settlement grids and legislative compensation schemes).

solution to the asbestos litigation crisis was preferable in large measure because other strategies for addressing the crisis had failed.<sup>360</sup> While an ad hoc legislative fix would necessarily depart from the procedures followed by public courts and the processes of procedure-making that generated them, there was no realistic alternative. During the asbestos crisis, the Court correctly recognized, the choice was between procedural improvisation and the continued failure of the civil justice system.<sup>361</sup>

We do not mean to suggest that ad hoc procedural legislation is permissible only as a last resort. It must however be necessary in the sense of being supported by a sufficiently compelling justification for legislative action. Though no single type or category justification is strictly required, the statutes with the strongest claim to legitimacy—the DT Act and § 524(g), for example—address the civil justice system’s failure to provide a good that it provides in run-of-the-mill litigation. On the other hand, the statutes that appear the most intuitively problematic—such as the PLRA and § 502 of the Iran Sanctions Act—went beyond *restoring* the civil justice system’s ability to function and set up *new*, specialized procedures for covered claims. Much of the criticism directed at the PLRA is directed at the perceived artificiality of the procedural problem with prisoner litigation that led to the statute, and the overzealous “fix” that singles out prisoner litigation for particularly harsh treatment.<sup>362</sup>

If necessity is an important determinant of an ad hoc statute’s legitimacy, it is not sufficient. An ad hoc statute that, say, erected an untenably high burden of proof for asbestos-based personal injury claims might have ended the asbestos litigation crisis, but only at the cost of disrupting expectations of compensation that followed from pre-existing law. This example points to a second condition for ad hoc procedural legislation’s legitimacy: that the statute seek to produce substantively just results. An ad hoc statute cannot claim to treat litigants even-handedly because it is enacted behind a veil of ignorance. Thus, one cannot escape evaluating the fairness of the litigation outcomes that it tends to produce. Statutes that seek to produce substantively just results will be perceived as more legitimate than those that do not. This observation explains some of the unease that § 502 of the Iran Sanctions Act generates. Few would argue that allowing terrorism victims to recover for their injuries is substantively unjust, even

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<sup>360</sup> See *supra* text accompanying notes 9–21; Section II.B.1.

<sup>361</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (describing “the elephantine mass of asbestos cases” and remarking that “this litigation defies customary judicial administration and calls for national legislation”).

<sup>362</sup> See *supra* text accompanying notes 112–18 (discussing criticisms of the PLRA).



if providing compensation is in tension with traditional notions of sovereign immunity. But § 502 did more. It ensured that a specific class of assets—the Clearstream bonds—went to a specific class of litigants—the *Peterson* plaintiffs—to the detriment of other judgment creditors of Iran.<sup>363</sup> The only check against unjust distributions in the statute was the requirement that no other party have a constitutionally protected interest in the funds that went to the *Peterson* plaintiffs.

Because ad hoc legislation's legitimacy turns on whether it seeks to produce substantively just results, the process through which it is made matters. Ad hoc legislation is applied and reviewed by courts, affects litigants, is observed by the public, and may form a precedent for future legislative interventions. All of these actors scrutinize the legislation's fairness. All else being equal, they are more likely to view a statute favorably if they can discern the legislature's reasons for acting and the reasons for the design choices reflected in the statute. Accordingly, a developed legislative record can bolster the specific type of legitimacy implicated by ad hoc procedural legislation. In contrast, statutes that are enacted *without* a developed legislative record are intuitively more troubling, even if they serve valid ends. Departures from the traditional model of procedure-making in ad hoc legislation will appear less problematic—to both judicial and lay audiences—if legislatures explain the necessity for ad hoc legislation, and their choices in designing the particular legislation.

If lawmakers would do well to explain their reasons for how and why they adopt ad hoc legislation, however, courts should be sensitive to tradeoffs between the necessity for legislation and legislative transparency in ad hoc legislation. The example of § 502 shows that legislative decisions that appear to reflect extreme favoritism toward a particular group of litigants may in fact be explained by innocuous reasons—in the case of § 502, the desire to avoid interfering with the UCC indirect holding system. We do not suggest that ad hoc procedural legislation is immune from constitutional scrutiny. But courts should hesitate before concluding that choices reflected in such legislation lack an articulable basis.

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We conclude 180 degrees from where we began. From the perspective of traditional procedural theory, ad hoc legislation appears likely to be motivated by politics rather than by a genuine desire to resolve claims fairly and efficiently. But in statutes such as § 524(g) and the WCAM, legislative intervention was needed to secure merits

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<sup>363</sup> See sources cited *supra* note 287.

resolutions that the legal system could not provide using ordinary tools of procedure.

Ad hoc legislation that is limited to the motivating litigation also creates special-purpose rules, raising concerns about singling out a specific group for special treatment and creating transaction costs for litigants and courts. The limited scope of an ad hoc procedural statute may reflect the informational and cognitive limitations of legislatures that are asked to approve an ad hoc fix on the fly, and a reasonable reluctance to tinker with generally applicable law. The legislature's active involvement in shaping rules of dispute resolution procedure threatens the traditional separation of functions between legislatures and courts. But in statutes including the WCAM, DT Act, and § 524(g), courts and highly motivated lawyers were incapable of overcoming procedural problems that created a need for ad hoc legislation. Ad hoc legislation changes rules of dispute resolution procedure midstream and is unlikely to reflect a systematic analysis of how the civil justice system should operate. But broader, cross-cutting legislation—which *is* subject to systematic analysis—gives rise to procedural problems that call for ad hoc solutions.

Although ad hoc procedure may appear suspect from the perspective of traditional procedure, it is now an important part of how states respond to complex legal problems that overwhelm the capacities of pre-existing rules of dispute resolution procedure. The fact that procedural legislation is “ad hoc” signals that it is a different kind of procedure, not that it necessarily is illegitimate.

#### POSTSCRIPT: THE PERSISTENCE OF AD HOC PROCEDURE

On March 24, 1989, the Exxon Valdez crashed into the Bligh Reef off the southern coast of Alaska, setting off a spill that released some eleven million gallons of oil into Prince William Sound.<sup>364</sup> After the Valdez crash, three other major spills occurred within the year.<sup>365</sup> The spills focused public attention on the shortcomings of the federal regulation of oil tankers, as well as the legal framework that governed the consequences of a spill.<sup>366</sup> Successfully containing the environmental

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<sup>364</sup> ALASKA OIL SPILL COMM'N, *SPILL: THE WRECK OF THE EXXON VALDEZ: IMPLICATIONS FOR SAFE TRANSPORTATION OF OIL 1* (1990).

<sup>365</sup> Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 482 (2000).

<sup>366</sup> See Anne C. Mulkern, *How Long to Pass an Oil Spill? Try 18 Months*, N.Y. TIMES (Aug. 13, 2010), <http://www.nytimes.com/gwire/2010/08/12/12greenwire-how-long-to-pass-an-oil-spill-bill-try-18-mont-13939.html> (“Prior to 1989, there were [sic] a series of different regulations covering different kinds of spills. The effort to create one regulation that covered all spills had stalled in Congress because of disagreement over federal pre-emption.”).

and economic damage caused by an oil spill requires quick cash transfers to the affected communities.<sup>367</sup> But Exxon stonewalled; it ultimately spent decades fighting lawsuits seeking damages for economic loss.<sup>368</sup>

Within months of the crash, the immediately apparent legal and regulatory failures pushed oil spill legislation to the top of the 101st Congress's agenda. Seventeen months after the crash, President George H.W. Bush signed the Oil Pollution Act of 1990 (OPA).<sup>369</sup>

The 1990 Act imposed new design standards for oil tankers operating in federal waters and raised the liability limits for damages caused by oil spills, which had previously been limited to double the value of the vessel *after* a crash. Animated by Exxon's lethargic response to the Valdez disaster, the Act established a new system of private financing for oil spill recovery efforts based on the principle, "You make the mess; you clean it up."<sup>370</sup> When a spill occurred, the President, acting through the Coast Guard, would designate a "responsible party" that was obligated to finance the cleanup effort and pay interim claims for damages.<sup>371</sup> In an effort to avoid the expense and delay of public-court litigation, the Act required litigants to present claims to the responsible party before filing suit.<sup>372</sup> To backstop private financing, the Act authorized new excise taxes to fund the Federal Oil Spill Liability Trust Fund, which would fund cleanup efforts and pay damages claims when the responsible private party was insolvent or the damages from a spill exceeded the OPA's liability limits.<sup>373</sup>

The Act's effort to ensure that the responsible party paid cleanup costs and claims without drawn-out litigation was frustrated by Congress's failure to address the legal consequences of accepting payment from the responsible party in the original OPA. In January 1996, the North Cape barge crashed off the coast of South Kingstown, Rhode Island. Senator Lincoln Chafee (R-RI) took to the Senate floor to explain that fishermen and lobstermen who had lost their live-

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<sup>367</sup> See ALASKA OIL SPILL COMM'N, *supra* note 364, at 155 ("What is required in a successful oil spill response is to blend the resources of state, federal and industry response teams into an effective organization, and to provide sufficient manpower and resources to make a significant attack on the spill within 24 hours.").

<sup>368</sup> See generally Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. SAINT THOMAS L.J. 25 (2009) (describing the two-decade-long Exxon Valdez litigation).

<sup>369</sup> Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701-19).

<sup>370</sup> 145 CONG. REC. 4691 (1999) (statement of Rep. Oberstar) (discussing 1999 amendments to the OPA).

<sup>371</sup> 33 U.S.C. § 2714(a).

<sup>372</sup> *Id.* §§ 2705(a), 2713.

<sup>373</sup> See *id.* § 2712.

lihoods as a result of the crash were reluctant to present claims to the claims facility created by the barge's owner, because they feared that accepting a claim for interim damages would waive their right to pursue future compensation.<sup>374</sup> To address the waiver problem, Senator Chafee proposed amendments to the OPA that formalized a responsible party's obligation to establish a procedure for the "[p]ayment or settlement of a claim for interim, short-term damages."<sup>375</sup> Accepting such a payment would not prejudice the claimant's right to pursue "damages not reflected in the paid or settled partial claim."<sup>376</sup> In October 1996, Congress passed Chafee's amendments in the Coast Guard Authorization Act of 1996.<sup>377</sup>

Between 1990 and 2006, responsible parties and the Oil Spill Liability Trust paid between \$860 million and \$1.1 billion in fifty-one "major" spills to finance cleanup efforts and compensate injured parties.<sup>378</sup> Of that amount, responsible parties "paid between about 72 to 78 percent of these costs."<sup>379</sup> Yet, even as revised by the Chafee amendments, the OPA still failed to provide a framework that could successfully manage claims from a Valdez-scale spill successfully.

On April 20, 2010, the Deepwater Horizon rig exploded, killing eleven crew members and setting off a three-month-long spill that released an estimated 200 million gallons of crude into the Gulf of Mexico.<sup>380</sup> In the face of intense political pressure from the President and the public, BP agreed on June 16, 2010, to waive the OPA's seventy-five million dollar liability cap for oil spills from an "offshore facility,"<sup>381</sup> and to set aside twenty billion dollars, payable in part from future drilling off the Gulf Coast, to pay for damages caused by the Deepwater Horizon explosion.<sup>382</sup> Memorializing its informal agreement with the President, the company ran a series of newspaper advertisements that pledged BP was "determined to do everything we

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<sup>374</sup> 142 CONG. REC. 26,523–25 (1996) (statement of Sen. Chafee).

<sup>375</sup> S. 1730, 104th Cong. § 201(a) (as reported by Sen. Chafee, June 26, 1996).

<sup>376</sup> *Id.*

<sup>377</sup> Pub. L. No. 104-324, § 1142(a)(2), 110 Stat. 3901, 3991 (1996) (codified at 33 U.S.C. § 2705(a)).

<sup>378</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-795T, OIL SPILLS: COST OF MAJOR SPILLS MAY IMPACT VIABILITY OF OIL SPILL LIABILITY TRUST FUND 3 (2010).

<sup>379</sup> *Id.*

<sup>380</sup> John M. Broder, *BP Shortcuts Led to Gulf Oil Spill, Report Says*, N.Y. TIMES (Sept. 14, 2011), <http://www.nytimes.com/2011/09/15/science/earth/15spill.html>.

<sup>381</sup> 33 U.S.C. § 2704(a)(3).

<sup>382</sup> See Jackie Calmes & Helene Cooper, *BP to Set Aside \$20 Billion to Help Oil Spill Victims*, N.Y. TIMES, June 17, 2010, at A1; Jonathan Weisman, *BP Blunted U.S. Demand*, WALL ST. J., June 21, 2010, at A1.

can to minimize any impact” from the Deepwater Horizon spill.<sup>383</sup> Said the company: “We will honor all legitimate claims.”<sup>384</sup>

Making good on this commitment presented a formidable procedural challenge. BP initially sought to process claims through a “Gulf Coast Claims Facility” (GCCF) managed by Kenneth Feinberg, the special master who successfully oversaw the September 11 Victim Compensation Fund.<sup>385</sup> Just as in the North Cape crash, however, the availability of a claims facility failed to head off public-court litigation.

As Feinberg “paid out an eye-opening \$6.2 billion to more than 220,000 claimants” during the first eighteen months of the GCCF’s operation, plaintiffs’ lawyers organized a campaign to sign up clients and persuade them to file claims in court.<sup>386</sup> The Judicial Panel on Multidistrict Litigation consolidated tort claims before Judge Carl Barbier of the U.S. District Court for the Eastern District of Louisiana.<sup>387</sup> While Feinberg promised Gulf Coast residents that the GCCF would provide the same compensation as courts without the need for a lawyer and in a shorter timeframe, plaintiffs’ lawyers charged that Feinberg was working hand in glove with BP to minimize the costs of the Deepwater Horizon disaster.<sup>388</sup> Competition between Feinberg and the trial bar spilled into Judge Barbier’s court, as plaintiffs’ counsel complained that Feinberg was violating ethics rules by interfering in their relationship with potential clients.<sup>389</sup> On February 2, 2011, Judge Barbier ordered Feinberg to “[f]ully disclose to claimants their options under OPA if they do not accept a final payment.”<sup>390</sup> Thanks in part to Judge Barbier’s order, thousands of

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<sup>383</sup> PATRICIA SWANN, *CASES IN PUBLIC RELATIONS MANAGEMENT: THE RISE OF SOCIAL MEDIA AND ACTIVISM* 218 (2d ed. 2014).

<sup>384</sup> *Id.*

<sup>385</sup> See Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—a Fund Too Far*, 71 LA. L. REV. 819, 820–21 (2011). On Feinberg, see Ashby Jones, *Spotlight on Ken Feinberg: The Special Master of America*, WALL ST. J. (Jan. 14, 2010), <https://blogs.wsj.com/law/2010/01/14/spotlight-on-ken-feinberg-the-special-master-of-america>.

<sup>386</sup> Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 400 (2014).

<sup>387</sup> *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on April 20, 2010, 731 F. Supp. 2d 1352, 1355 (J.P.M.L. 2010). Securities cases were consolidated before Judge Keith P. Ellison in the U.S. District Court for the Southern District of Texas, Houston Division. See *In re BP P.L.C. Sec. Litig.*, 843 F. Supp. 2d 712, 721 (S.D. Tex. 2012).

<sup>388</sup> Mullenix, *supra* note 385, at 872–78.

<sup>389</sup> See Memorandum in Support of Motion to Supervise *Ex Parte* Communications Between Defendant and Putative Class Members at 9, MDL No. 2179, 2011 WL 323866 (E.D. La. Feb. 2, 2011) (complaining that “[t]he GCCF has repeatedly endangered the rights of the putative class members to be properly informed of the facts surrounding the oil spill and the manner in which their rights will be affected”).

<sup>390</sup> Order and Reasons at \*8, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on April 20, 2010, MDL No. 2179, 2011 WL 323866 (E.D. La. Feb. 2, 2011).

plaintiffs elected not to make use of the GCCF and filed claims via counsel that were transferred to Judge Barbier for pre-trial management.<sup>391</sup>

The “amorphous collection of claims” consolidated in Judge Barbier’s court presented fresh procedural problems.<sup>392</sup> Confronting a public relations disaster and claims filed by the Federal EPA and state attorneys general, BP faced intense pressure to pay legitimate claims. Plaintiffs and their counsel sought to maximize the damages they extracted from BP. The court sought to avoid the zombie dockets and institutional dysfunction that defined the U.S. courts’ response to the asbestos litigation crisis.<sup>393</sup>

To streamline litigation, Judge Barbier made use of an ad hoc procedure first devised in earlier multidistrict litigation: He appointed a plaintiffs’ steering committee (PSC) to coordinate litigation of Deepwater Horizon claims.<sup>394</sup> The PSC, joined by BP, proposed to “organize[] the relevant claims into ‘pleading bundles’” that would establish the litigation’s general structure.<sup>395</sup> Instead of filing a complaint that repeated the allegations of earlier complaints, a plaintiff would join one of three “master complaints” that governed claims for personal injury, economic loss, and property damage.<sup>396</sup> Barbier “had never before heard of” pleading bundles and noted the term did not appear in the *Manual for Complex Litigation*.<sup>397</sup> He explained, however, that “[w]e are creating something here,” and approved the joint proposal, invoking his authority to manage the multidistrict litigation.<sup>398</sup> With the litigation structured along the lines established by the pleading bundles, BP agreed to a series of class action settlements that resolved much of its liability from the Deepwater Horizon spill.<sup>399</sup>

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<sup>391</sup> Richard Blackden, *Is BP Still America’s Most Hated?*, TELEGRAPH (Apr. 20, 2011), <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8461870/Is-BP-still-Americas-most-hated.html> (describing the “frenzy of filing” before the statute of limitations ran).

<sup>392</sup> Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237, 237 (2011).

<sup>393</sup> See *supra* notes 7–14 and accompanying text.

<sup>394</sup> See Order and Reasons at \*1, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.* on April 20, 2010, MDL No. 2179, 2011 WL 1464908 (E.D. La. Apr. 15, 2011). On PSCs, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004).

<sup>395</sup> Order and Reasons at \*1, *In re Oil Spill*, 2011 WL 1464908; see also Alejandro de los Rios, *Barbier Approves Pleading BP Claims into ‘Bundles,’* LA. REC. (Sept. 20, 2010), <http://louisianarecord.com/stories/510580438-barbier-approves-pleading-bp-claims-into-bundles>.

<sup>396</sup> Order and Reasons at \*3, *In re Oil Spill*, 2011 WL 1464908; see also de los Rios, *supra* note 395.

<sup>397</sup> De los Rios, *supra* note 395.

<sup>398</sup> *Id.*

<sup>399</sup> See Ratner, *supra* note 355, at 809–21 (discussing the settlement classes).

Among them was an uncapped settlement for economic loss claims that cost BP billions of dollars.<sup>400</sup>

The Oil Pollution Act's history powerfully illustrates the forces that necessitate ad hoc procedure-making and the difficulty—if not the impossibility—of avoiding it. With each change to the procedures that apply in the aftermath of a spill, from the 1990 Oil Pollution Act to Judge Barbier's innovations in the *Deepwater Horizon* litigation, policymakers sought to ensure that claims from oil spills would be processed in a manner that minimized environmental and economic harm, paid legitimate claims, and contained spills' financial impacts. These actors' efforts were not based on systematic analysis of civil litigation in U.S. courts, or even oil spill litigation, but on defects in the architecture of the law that specific crises revealed: the lack of a mechanism to ensure quick cash transfers to communities affected by the Valdez spill, the need to clarify the effect of accepting an interim award, and the need to coordinate prosecution—and resolution—of the thousands of claims that arose out of the Deepwater Horizon disaster. If policymakers' efforts have a seat-of-the-pants quality that sits uncomfortably with traditional images of judicial impartiality and procedural regularity, they also reflect an effort to ensure that the civil justice system does not repeat the failures of the asbestos litigation crisis. Unable to address the procedural problems of oil spill litigation using the preexisting processes of law, litigants, lawyers, judges, and lawmakers move back and forth among different forms of procedural ad hocery: legislation such as the Chafee amendments, special-purpose entities such as the GCCF, judicial orders, and agreements negotiated by lawyers. The thread that connects these efforts is the felt necessity of changing procedural rules of the road just in time to solve procedural problems.

As this Article has shown, ad hoc procedure presents a deep challenge to the traditional model of civil procedure that has long underpinned the legitimacy of state action in civil litigation. At the same time, ad hoc procedure-making *bolsters* the civil justice system's legitimacy by ensuring that procedural problems do not prevent it from functioning. In highlighting the tension between these two sources of legitimacy, we have aimed to show the pervasiveness and persistence of ad hoc procedure, and the importance of understanding ad hoc procedure's role in the civil justice system.

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<sup>400</sup> See Paul M. Barrett, *Spillapalooza: How BP Got Screwed in the Gulf*, BLOOMBERG BUSINESSWEEK, July 1–July 7, 2013, at 52, 54.