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# Mandatory Process

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# Mandatory Process

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# Mandatory Process

MATTHEW J.B. LAWRENCE\*

*This Article suggests that people tend to undervalue their procedural rights—their proverbial “day in court”—until they are actually involved in a dispute. The Article argues that the inherent, outcome-independent value of participating in a dispute resolution process comes largely from its power to soothe a person’s grievance—their perception of unfairness and accompanying negative emotional reaction—win or lose. But a tendency to assume unchanging emotional states, known in behavioral economics as projection bias, can prevent people from anticipating that they might become aggrieved and from appreciating the grievance-soothing power of process. When this happens, people will waive their procedural rights too freely.*

*This conclusion undermines the freedom-of-contract rationale for trusting parties to make their own pre-dispute choices about the availability of dispute resolution process. Contributing to the second, more paternalistic wave of “hard” behavioral economics (recommending mandates, not nudges), this Article identifies circumstances under which the threat of behavioral market failure justifies a law mandating the procedural protections that people must “buy” before a dispute arises, whether they want to or not.*

*This behavioral approach to understanding the value of process and when it should be mandatory has implications throughout the law. This Article shows how the behavioral approach leads to specific interventions for mandatory process in health insurance, the Federal Rules of Civil Procedure, the constitutional right to due process, and Medicare contractor agreements.*

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## INTRODUCTION

For decades, a patient whose health insurer refused to cover some treatment or service—say *in vitro* fertilization, gastric bypass, a CAT scan, or anything else—had little recourse to challenge that decision. The Employee Retirement Income Security Act (ERISA) had taken away but not replaced state courts' common law authority to second-guess such utilization review decisions, which left patients "unprotected."<sup>1</sup> Court after court lamented this problematic state of affairs and called on Congress to fix it.<sup>2</sup>

Eventually, though, states started to address this gap by mandating that insurers offer disappointed patients access to timely, external, independent review of decisions denying coverage, at the insurer's expense.<sup>3</sup> The Affordable Care Act (ACA) extended this patchwork throughout the land, mandating that every private insurance plan in every state offer such an external review process.<sup>4</sup> In health insurance, process is now mandatory.

By most accounts this is a happy ending,<sup>5</sup> but there is something missing from this story. If procedural rights were and are so valuable to patients, why did states (and eventually Congress) have to step in to get them those rights? Why didn't the health insurance contract simply provide for them? Why were courts so quick to assume (apparently correctly) that the common law process rights taken away by ERISA could be replaced only by state or federal mandate, and not by contract?

This puzzle invites a larger question: When should the law regulate process by mandate? The question arises again and again throughout the law: in civil procedure,<sup>6</sup>

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1. *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 62 (D. Mass. 1997).

2. *Id.*; e.g. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) ("I also join 'the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.'" (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 U.S. 442, 453 (3d Cir. 2003) (Becker, J., concurring))).

3. See generally Katherine T. Vukadin, *Hope or Hype: Why the Affordable Care Act's New External Review Rules for Denied ERISA Healthcare Claims Need More Reform*, 60 BUFF. L. REV. 1201 (2012).

4. *Id.* at 1203.

5. See *id.*; see also Dustin D. Berger, *The Management of Health Care Costs: Independent Medical Review After "ObamaCare"*, 42 U. MEM. L. REV. 255 (2011); Roy F. Harmon, *An Assessment of New Appeals and External Review Processes—ERISA Claimants Get "Some Kind of a Hearing."* 56 S.D. L. REV. 408 (2011); Eleanor D. Kinney, *Administrative Law Protections in Coverage Expansions for Consumers Under Health Reform*, 7 J. HEALTH & BIOMEDICAL L. 33, 60–64 (2011) (discussing procedures).

6. E.g., Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1342–52 (2012) (discussing current law on enforcement of agreements to alter rules of procedure in federal and state court); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 527 (2011) (discussing lack of information as a reason to doubt that choice about procedure reflects best interest of parties); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 734–38 (2011) (discussing enforcement of procedural contracts in federal court); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 613 (2005) (discussing amendments to the Federal Rules of Civil Procedure that expressly listed facilitating settlement as a goal of pretrial conferences).

in tort,<sup>7</sup> in constitutional law,<sup>8</sup> in arbitration law,<sup>9</sup> in contract law,<sup>10</sup> and elsewhere. Indeed, the Supreme Court confronts questions about whether to mandate process nearly every term.<sup>11</sup>

This Article offers a novel answer to this question, a behavioral approach to understanding the inherent value of the “product” that is dispute resolution process and whether its “purchase” should be mandatory. Based on research in behavioral economics and procedural justice, this approach offers an account of whether and when people should be trusted to contract over procedure. Advancing the second wave of “hard” behavioral economics that explores when biases justify not “nudges” but mandates, the Article identifies the conditions under which the law should “mandate process” by dictating the procedures that must be available to resolve a dispute, even if both parties agree otherwise before the dispute arises.

Here is a précis of the behavioral approach offered in this Article, in two steps: First, many people confronted with an adverse outcome, like the denial of their

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7. *E.g.*, Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1227 (2003) (discussing tort reforms allowing purchasers of automobile insurance to decide ex ante whether to contract for a full right to sue); Antonios P. Tsarouhas, *Bowen v. Kil-Kare, Inc.: The Derivative and Independent Approach to Spousal Consortium*, 19 OH. N. U. L. REV. 987, 994 (1993) (arguing that application of waiver of liability to spouse’s consortium claim would “deny the spouse her day in court”).

8. *E.g.*, *Antinore v. State*, 371 N.Y.S.2d 213 (N.Y. App. Div. 1975) (enforcing collective bargaining agreement that limited due process rights).

9. *Compare* *United States v. Raddatz*, 447 U.S. 667, 698 (1980) (Marshall, J., dissenting) (writing that due process would not allow parties to “flip a coin” to resolve dispute), *with* 10 Ill. Comp. Stat. Ann. 5/23-27 (West 2010) (mandating that in case of tie, election be resolved by lottery), *and* Norman L. Balmer, *An Innovator’s Prospective on Judicial Management in the United States*, 9 FED. CIR. B. J. 615, 618 (2000) (“[W]e have heard of patent disputes being resolved as a wager on a friendly game of golf or a flip of the coin. It is cost effective and it quickly eliminates uncertainty.”), *and* Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1444 (2009) (“[F]rom an economic perspective it is preferable to resolve an honest dispute over the amount of a debt by a flip of a coin, for this resolution minimizes litigation costs with no clear sacrifice on other dimensions of behavior.”), *and* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1 (2009) (discussing randomized outcomes in the judicial system).

10. *E.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); *see also* *Palomar Med. Ctr. v. Sebelius*, 693 F.3d 1151, 1165 (9th Cir. 2012) (allowing no judicial review of reopening determinations); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

11. The Supreme Court’s decisions enforcing the contractually-set limitations period in *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013), and requiring arbitration of the non-compete agreement in *Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500 (2012), are two recent examples. As seen in both those cases and many others, the Court tends to rule against mandatory process; that is, it has tended to approve pre-dispute agreements regarding parties’ procedural rights, usually by application of the Federal Arbitration Act, 9 U.S.C. § 2 (2012).

request for health insurance coverage, accept the outcome, deal with their disappointment, and move on. But sometimes a loss sticks, we perceive an outcome as unfair, and we “grieve” as a result. The inherent value of participating in a dispute resolution process comes in part from its power to soothe such a grievance when it does occur, win or lose. The ancient Egyptians knew that “[a] good hearing soothes the heart”<sup>12</sup>; or as Justice Frankfurter put it, due process “generat[es] the feeling, so important to a popular government, that justice has been done.”<sup>13</sup> More recently, Tom Tyler and others have offered experimental research into procedural justice consistent with the power of fair process to generate acceptance even without changing outcomes.<sup>14</sup> Thus, it may be correct to view process as a commodity, but it is a special kind. Its value to us depends on our suffering a grievance—an emotional response that can be difficult to predict—and comes not only from satisfying our preferences but from altering them.<sup>15</sup>

Second, people can fail to appreciate this grievance-soothing value of participating in a dispute resolution process until they actually suffer a grievance. Research in behavioral economics indicates that people tend to underestimate changes in their own emotional states; behavioral economists call this tendency “projection bias.”<sup>16</sup> Where present, projection bias “mean[s] that people wrongly project their current emotional state onto their future selves.”<sup>17</sup> (So, for example, a hungry shopper assumes she will be hungry when it comes time to eat, and buys too

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12. PTTAHOTEP, THE INSTRUCTION OF PTAHHOTEP, *quoted in* JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, at vii (1985).

13. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

14. *E.g.*, Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedural Reform*, 45 AM. J. COMP. L. 871 (1997).

15. As a result, dispute resolution process is better understood as belonging to a special category of preference-altering commodities, such as addictive drugs or gastric bypass surgery. Instead of generating addiction (as with drugs) or satiation (as with gastric bypass), dispute resolution generates acceptance.

16. George Loewenstein, Ted O’Donoghue & Matthew Rabin, *Projection Bias in Predicting Future Utility*, 118 Q. J. OF ECON. 1209, 1211–12 (2003) (“We believe that projection bias is important for many economic applications, and that it can provide an intuitive and parsimonious account for many phenomena that are otherwise difficult to explain.”) [hereinafter Loewenstein et al., *Projection Bias*]; *see also* George Loewenstein & Erik Angner, *Predicting and Indulging Changing Preferences*, in *TIME AND DECISION* 351, 353 (George Loewenstein et al., eds., 2003).

17. Cass R. Sunstein, *Willingness to Pay vs. Welfare*, 1 HARV. L. & POL’Y REV. 303, 323 (2007) [hereinafter Sunstein, *Willingness*]. The term “projection bias” has not always been used consistently since the label was offered by Loewenstein. On occasion, it has been used to imply simply that people do not correctly forecast how they will feel about things, regardless of whether the reason for such an error is their failure to anticipate an altered preference state or some other cause. This broader possibility is known as “affective forecasting,” a general term that includes several biases, of which projection bias is one. *Id.* at 305; *see also* Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1831 (2013). The term “projection bias” is used here in the more narrow sense in which Loewenstein (and Sunstein) employed it, that is, a failure to correctly forecast changes in one’s own emotional state. *See infra* notes 103–108 and accompanying text.

much food.) A person susceptible to projection bias, then, will underestimate the value of participating in a dispute resolution process *ex ante*, either by failing to appreciate that she may come to suffer a grievance (it is one thing to be subjected to a loss, quite another to suffer a grievance) or by failing to appreciate the grievance-soothing power of process. Either way, she will contract for too little process, potentially justifying a mandate.<sup>18</sup>

A stylized example of the behavioral approach at work: Imagine a tenant subject to projection bias negotiating over the terms of a lease. At this point, she will fail to appreciate that she could come to despise her landlord for, say, raising her rent. She will also fail to anticipate that, should she suffer such a grievance, pursuing a dispute resolution process like mediation or housing court could ease her bitterness, whether she gets her rent lowered or not. As a result, she will undervalue her procedural rights at the time she signs her lease and it may, under circumstances discussed in the Article, be appropriate for the law to mandate the dispute resolution process that governs her dispute rather than leave that question for the landlord and tenant to decide in the lease.

This Article is the first to apply behavioral economic tools to model the inherent value of dispute resolution process or to analyze the “market” therefor. The resulting behavioral approach to the value of the “day in court” and the desirability of mandatory process is the Article’s primary contribution.

The Article also makes three additional, secondary contributions. First, this Article is one of the first to explore the implications of projection bias for the design of legal rules. Unlike optimism, the availability heuristic, and other biases also revealed by research in behavioral economics, projection bias has with limited exception not found its way into behavioral law and economics; indeed Cass Sunstein has said that “it is not clear how or whether public officials should react to the possibility of projection bias.”<sup>19</sup> One reason that scholars in behavioral law and economics have so far been hesitant to explore the implications of projection bias may be that, unlike many other biases, it can be especially difficult to fix a behavioral market failure that is caused by projection bias with a choice-respecting “nudge”

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18. Just as behavioral economics might justify a prohibition on the purchase of addictive drugs because people fail to anticipate the adverse alteration to their preferences such drugs can cause, Loewenstein et al., *supra* note 16, at 1211 (“A stressed undergraduate who underappreciates the addictiveness of cigarettes . . . might start smoking with the plan of quitting upon graduation, only to continue smoking after graduation once she becomes addicted.”), the law should in many situations mandate the purchase of process because people fail to anticipate the benign alteration caused by the right to a “day in court.” The commodities and effects may be very different, but the behavioral bias that creates market failure—and justifies a restriction on choice—is not. *See infra* Part II.B.

19. Sunstein, *Willingness*, *supra* note 17, at 324. The primary exception is arguments about the usefulness of “cooling off” periods. *See generally* Camerer et al., *supra* note 7, at 1238–40. Such inquiries address projection bias only to the extent that it prevents a person in a “hot” state from predicting that they might cool down, not to the extent that it prevents a person in a “cool” state from predicting that they might enter a “hot” state. *See infra* note 109 and accompanying text.

such as a disclosure rule or default rule, making a liberty-respecting (and so unobjectionable) policy fix difficult.<sup>20</sup>

Second, and relatedly, Ryan Bubb and Richard Pildes note in their article, *How Behavioral Economics Trims Its Sails and Why*, that behavioral economic research is capable of supporting more forceful interventions than those recommended by the first wave of behavioral law and economics.<sup>21</sup> This Article advances the second, hard wave of behavioral law and economic scholarship called for by Bubb and Pildes, going “beyond nudges” to explore in a particular and especially important context the degree to which behavioral biases support a mandatory rule.<sup>22</sup> Process mandates are not as normatively problematic as ordinary mandates, the Article points out, because they are ultimately choice preserving. Process mandates deprive both parties of a choice *ex ante* (to forego process), but offer the aggrieved party a choice *ex post* she would not otherwise have had (to sue).

Third, the behavioral approach has implications for whether to mandate process in specific areas throughout the law. A comprehensive analysis of every potential process mandate is beyond the scope of this Article. But the Article engages specific interventions in four areas in order to illustrate the usefulness of the behavioral approach: (1) the behavioral approach can be used to defend the Affordable Care Act’s “process mandate”—the requirement that health insurers offer beneficiaries external review of decisions denying coverage—and thereby solve the puzzle that opened the Article; (2) we should be especially reluctant to enforce contractual agreements altering the Federal Rules of Civil Procedure to the extent that they make it harder to bring a case simply because it is likely to lose (such as by raising the pleading standard or limiting discovery during the pendency of a motion to dismiss) or to appear in person (such as by forcing the plaintiff to litigate in a distant forum); (3) we should be loathe to permit claimants to waive their constitutional rights to due process prior to deprivations of “new” property; and (4) Medicare should consider requiring the insurers that it does business with to waive their procedural rights. This Article offers the first intervention in order to demonstrate how the behavioral approach can explain process mandates, the second to situate the behavioral approach in a lively literature addressed to mandatory process in civil procedure, the third for its constitutional significance, and the fourth to illustrate the capacity of the behavioral approach to counsel against mandatory process.

Part I discusses the features and functions of dispute resolution process, understood as a commodity. Part II begins by discussing limitations of the proceduralist and economic approaches to understanding the value of process and when the predispute “purchase” of this commodity should be mandatory. Part II then goes on to offer a conception of the inherent, outcome-independent value of process

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20. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009); see also Camerer et al., *supra* note 7, at 1239 (“Cooling-off periods appear more intrusive than our earlier policies, and should thus be implemented with much greater reticence and only after careful analysis.”).

21. Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1595 (2014) (“Put simply, it would be surprising if the main policy implication of the mounting evidence documenting the failure of individual choice was a turn toward regulatory instruments that preserve individual choice.”).

22. See *id.* at 1658.



as coming from its capacity to soothe grievances—especially negative emotional reactions to adverse events—and identifies projection bias as a behavioral market failure that may keep people from appreciating this value of the “day in court” ex ante, before suffering a grievance. In short, it shows that behavioral market failure could cause people to contract for too few procedural protections.

Part III explores the conditions under which the possibility that some people may fail to value their day in court ex ante actually supports a process mandate. This inquiry is necessary for any behavioral economic analysis because our susceptibility to behavioral biases is heterogeneous and because mandates come with unavoidable costs, so the mere possibility that a behavioral bias is present does not automatically counsel in favor of a mandate (or even a nudge). But, Part III shows, the knowledge problems that have stood in the way of “hard” behavioral economics are not as problematic for process mandates because process mandates are an example of what the Article labels choice-preserving mandates, that is, laws that force us to keep our options open. Such laws are not unambiguously liberty restricting; they restrict liberty ex ante, but increase liberty ex post. This distinction offers an answer to prominent functional and welfare-based libertarian objections to government intervention, and so puts mandatory process requirements (and other choice-preserving mandates) on a stronger normative footing than purely restrictive mandates.

Part IV discusses implications. Anytime the law might dictate that more (or different) process be available for resolving a potential dispute between two parties than the parties would set by agreement, the decision whether to do so would benefit from consideration of the behavioral approach put forward in this Article. Four particular implications for open questions of process policy—about where to mandate process, where not to, what process to mandate in federal court, and whether to treat the Due Process Clause as a mandate—illustrate the point. Finally, the Article ends with a brief Conclusion.

#### I. DISPUTE RESOLUTION PROCESS AS A COMMODITY

Commodities can be described by their functions and form, and dispute resolution process is no different (although, as this Article will show, dispute resolution is no ordinary commodity).<sup>23</sup> This Part briefly describes the essential and optional features of dispute resolution process, as well as its functions. This discussion sets the stage for the discussion in the next two Parts of how to understand the value of process and the behavioral case for forcing people to “buy” procedural protections that they do not want.

As used here, dispute resolution process (or just “process”) means any mechanism by which a party aggrieved by a decision may air his or her grievance after the fact and, perhaps, obtain reversal or some other relief. So, broadly understood, the irreducible features of dispute resolution process are (1) claimant participation and (2) some possibility of relief, often either reversal or compensation.<sup>24</sup> Remedial

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23. Cf. Tom Ginsburg, *2013 Coase Lecture, Constitutions as Products*, UNIVERSITY OF CHICAGO LAW SCHOOL (Feb. 12, 2013), <http://www.law.uchicago.edu/audio/ginsburg021213> (analyzing constitutions in light of their features and useful functions).

24. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (discussing participation and review by a decision maker as essential features of

processes fitting this description are everywhere, from the process your credit card company offers for you to dispute charges, to the NFL's instant replay system (before the final two minutes, when a different review mechanism is used), to the adjudication of a constitutional case in federal court.<sup>25</sup>

This definition contrasts dispute resolution process with other mechanisms by which parties might agree to enforce their rights or provide relief vis à vis one another. For example, cases might be identified or brought by third-party investigators, not individual parties (even if each party has a significant stake in the prosecution and outcome).<sup>26</sup> Similarly, in some cases, parties (including a third party) could use random sampling of cases, auditing, process controls, or other forms of oversight—other than individual, claimant-driven appeals—to prevent or identify incorrect decisions or inappropriate behavior.<sup>27</sup> Or a right to sue might be given to anyone, not just the aggrieved party, as is the case in *qui tam* lawsuits.<sup>28</sup>

Dispute resolution process may feature a variety of additional, optional features. These include: (1) an adversarial proceeding (involving not only the aggrieved but the party with whose decision the aggrieved takes issue)<sup>29</sup>; (2) taking of evidence or building of a record including, perhaps, the disclosure of information (to the parties or the public)<sup>30</sup>; (3) ritual (such as the judge's robes)<sup>31</sup>; (4) adjudicator independence (in some cases the adjudicator is the initial decider, while in others, such as federal

adjudication that distinguish it from other means of decision making); Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1806 (1997) (noting two effects of adjudication, a “sorting effect” flowing from the possibility of reversal and a “process effect[.]” flowing from participation by the aggrieved).

25. See generally Mitchell N. Berman, *Replay*, 99 CALIF. L. REV. 1683 (2011).

26. See, e.g., DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF THE INSPECTOR GEN., OEI-04-11-00680, MEDICARE RECOVERY AUDIT CONTRACTORS AND CMS'S ACTIONS TO ADDRESS IMPROPER PAYMENTS, REFERRALS OF POTENTIAL FRAUD, AND PERFORMANCE (2013) (describing program incentivizing third-party contractors to pursue Medicare appeals on behalf of government).

27. See, e.g., *Palomar Medical Center v. Sebelius*, 693 F.3d 1151, 1165 (9th Cir. 2012) (holding there was “nothing arbitrary or capricious” about agency's decision to enforce compliance with regulations “internally rather than through provider appeals”); cf. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) (discussing conditions under which error correction mechanisms other than *ex post* appeal are more cost effective); Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649 (2000) (presenting model in which optimal design of auditing procedures depends on whether errors of initial decision maker are intentional or accidental). See generally William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004) (discussing role of claimants in enforcing public goals).

28. See generally David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation under the False Claims Act*, 107 NW. U. L. REV. 1689, 1706–11 (2013) (discussing basics of *qui tam* lawsuits).

29. On inquisitorial versus adversarial systems generally, see, for example, Pauline Houlden, Stephen LaTour, Laurens Walker & John Thibaut, *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXP. SOC. PSYCH. 13 (1978).

30. Compare, e.g., 5 U.S.C. § 706 (2012) (describing on-the-record review of administrative agency action), with FED. R. CIV. P. 26–37 (governing discovery in federal civil proceedings).

31. OSCAR G. CHASE, LAW, CULTURE, AND RITUAL (2005).

court, extensive protections are employed to ensure independence)<sup>32</sup>; (5) reason giving by the adjudicator, either oral or in writing, including, perhaps, a system of precedent<sup>33</sup>; and (6) cost shifting.

As for the functions of dispute resolution process, the most obvious is the identification and correction of errors. Simply the threat of reversal can prevent errors, and each (correct) reversal corrects an error, thereby increasing compliance with the substantive law (whether the law's source is contract, statute, or constitution).<sup>34</sup>

Indeed, some who have modeled adjudicatory process have posited that encouraging compliance with the law through the prevention and correction of noncompliant behaviors is its only valuable function.<sup>35</sup> This assumption about the function of dispute resolution can be seen in general surveys of law and economics offered by prominent scholars in the field.<sup>36</sup> It bears noting that, if that is so, the first essential feature of adjudicatory process—participation by the aggrieved—is not actually necessary. Rather, so viewed, litigant selection and prosecution of cases are just one means to the end of enforcement.

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32. See, e.g., U.S. CONST. art. III (mandating independence of federal judges).

33. See, e.g., Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

34. As used here, an “error” is an outcome different than the legally “correct” one. In tort, an “error” occurs when a tort-feasor negligently injures a victim without compensation. In contract, an “error” occurs when a party breaches the terms of the contract without paying expectation damages to the other party to the contract.

35. See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (suggesting that reported preference for participation may reduce to preference for accuracy because accuracy is perceived to be a function of participation). But see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 291–97 (2004) (rejecting this view). See generally Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 323 (2008) (discussing this vision of procedure); Roscoe Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 388, 394 (1909) (“[T]he end of legal procedure is to bring about results in accord with substantive law.”).

36. See THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 235 (2d ed. 2009) (“[T]he social function of the legal system . . . is to provide incentives for individuals to act in certain socially desirable ways.”); see also *id.* at 250 (discussing benefits of ADR focused exclusively on information sharing and efficiency). The first example in LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2009) of a policy shift that welfare economics would support is a shift from the current system of tort liability for automobile accidents, in which victims may sue, to a comprehensive compensation system, in which victims could not sue but would, on net, be more likely to receive compensation. They say that such a proposal would be “deemed socially desirable” on a welfare-based approach simply if it had (1) lower administrative costs and (2) more accurate victim compensation. *Id.* at 1. Their welfare-based analysis assumes the only welfare-improving function of tort litigation is error reduction, in this case, preventing accidents and compensating victims (to be fair, the project of their book is a normative one; it is not intended to be a complete analysis of this or any policy, but their framing of the functions of process is nonetheless informative). To be sure, Kaplow and Shavell recognize that process may serve functions beyond error reduction, see *id.* at 275–89 (outlining functions of process that have been offered in the literature; not including grievance-reducing function), but their focus on accuracy is consistent with the focus of most economic analyses in the field.

Many believe that adjudicatory process serves valuable functions beyond just error identification and correction, however.<sup>37</sup> Paramount among these is the asserted inherent, outcome-independent value of participation—the value of the proverbial “day in court.”

For better or worse, there are nearly as many theories of the value of participation as there are proponents of such a value.<sup>38</sup> The three most prominent are: (1) satisfaction of a “preference for fairness”<sup>39</sup>; (2) a legitimizing effect, either for the court or its decision<sup>40</sup>; or (3) an autonomy-reaffirming influence that furthers the individual dignity of the participant.<sup>41</sup> The Parts that follow revisit and expand upon the precise nature of this inherent access value.

## II. BEHAVIORAL MARKET FAILURE AND THE DEMAND FOR PROCESS

Mandates are powerful medicine. Even where a mandate has a salutary effect, such benefit may well be outweighed by the myriad side effects that come along with any choice-restricting rule. Any mandate takes away people’s freedom of choice, and that is something we, as individuals or as a society, may value in itself, for a variety of reasons.<sup>42</sup> Furthermore, we generally assume that what people choose is more efficient than what we mandate, because people are better positioned than policymakers to know what they want.<sup>43</sup>

This Part for the first time explores the behavioral economics of mandatory process requirements—which prevent people from making their own pre-dispute

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37. Bone, *supra* note 35, at 337–39 (“For many proceduralists, outcome quality is not the only thing that matters in civil adjudication.”).

38. *Id.* (“There are several different approaches to defining the participation right, but each has serious difficulties.”); Solum, *supra* note 35, at 244–73 (discussing three theories of procedural justice: the accuracy model, the balancing model, and the participation model).

39. KAPLOW & SHAVELL, *supra* note 36; Bone, *supra* note 35, at 337 (stating the theory that the intrinsic value of participation is its “tendency to make a party feel that she has been treated fairly by the process and the outcome”); *see also* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996); Bruce Hay & David Rosenberg, *The Individual Justice of Rationing* 47–50 (Olin Discussion Paper No. 285) (writing that litigant may “derive moral satisfaction from the fact that the quality of his case is being recognized”).

40. Solum, *supra* note 35, at 189 (“If the system is seen as illegitimate or without authority, then the system may fail.”); *see also* Bone, *supra* note 35, at 338.

41. *See, e.g.*, MASHAW, *supra* note 12; Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1880 (2000) (theorizing the day-in-court value as reflecting “society’s democratic commitment to the precept of process-based autonomy,” with a value that is “extremely high but not absolute”); *see also* Bone, *supra* note 35, at 338.

42. Bone, *supra* note 35, at 1357–59 (discussing autonomy value as a reason to defer to party’s choices about process); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1068–74 (2012).

43. Bone, *supra* note 35, at 1355–57 (discussing presumed efficiency benefits of allowing parties to tailor process by agreement); Davis & Hershkoff, *supra* note 6, at 531; Dodge, *supra* note 6, at 725.

choices about their post-dispute procedural rights—in two senses. First, subpart A surveys normative arguments in favor of process mandates, relying on the framework that has been developed in normative behavioral economic scholarship for evaluating regulations that are based upon their capacity to respect choice (and so “treat” only those who are subject to bias).<sup>44</sup> This survey shows that few arguments have been advanced that actually support mandating process; most justifications fail actually to support either a mandate or a process requirement. Others are highly contingent, limited to, for example, process mandates for the adjudication of constitutional rights, and therefore are not helpful in evaluating the case for mandatory process beyond the limited (even if important) context in which they apply.

Subpart B then explores the behavioral economics of process mandates in a second, descriptive sense. Specifically, it offers a way of understanding the value of the “day in court” and identifies behavioral market failures that could theoretically prevent people from adequately considering this value *ex ante*. It does so by drawing on qualitative evidence, empirical research on perceptions of procedural justice, and behavioral economic research on boundedly-rational decision making.

#### *A. Economic and Proceduralist Approaches to Mandatory Process*

Process mandates have not escaped scholarly attention. The literature associated with “contract and procedure” discusses the set of process mandates governing the procedures applicable to disputes adjudicated in federal court,<sup>45</sup> and the arbitration literature has discussed process mandates dictating minimum conditions for the enforcement of arbitration clauses.<sup>46</sup> These discussions have produced a number of potential reasons that the law should, in certain circumstances, disregard parties’ choices about process, that is, reasons that the law should mandate process.

Such justifications can roughly be grouped into two categories: (1) economic justifications, which accept the possibilities that dispute resolution process might not be worth its cost and that individuals are theoretically capable of making this cost-benefit tradeoff for themselves; and (2) proceduralist justifications, which tend to reject these possibilities and focus instead on arguably incommensurable values of process.

This subpart surveys these justifications, paying particular attention to their limitations—that is, whether they address mandatory process generally, whether they really support a mandate or just a nudge, and so on. For the economic approaches, the focus of doing so is not to demonstrate that these justifications are false or utterly unable to support a mandatory process requirement under any circumstances. Instead, the focus is to show that previously articulated economic justifications for mandatory process are of limited applicability and are often poorly positioned to justify a process “mandate” rather than a less coercive regulatory response. For the

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44. This strain of normative behavioral economics is most often associated with regulatory instruments viewed to be “asymmetrically paternalistic,” many of which are now commonly known as choice-respecting “nudges.” For convenience, this Article uses that term.

45. *E.g.*, Hershkoff & Davis, *supra* note 6.

46. *E.g.*, David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723 (2012).

proceduralist approaches, the focus is to explore their underlying bases and identify their limits as justifications for mandatory process.

### 1. The Economic Approach to Mandatory Process

The economic justifications for mandatory process can further be sorted into two categories: those that provide reason to doubt that a party's choice to go without a right to adjudicatory process actually reflects that person's best interests (faulty choice-based justifications), and those that provide reason to doubt that all the actual costs and benefits to third parties (or society) of going without process are reflected in a party's correct choice about her own best interests (externality-based justifications).

#### a. Faulty choice

Scholars have argued that a person's choice about dispute resolution process does not necessarily reflect her best interests because (1) the chooser may have inadequate information and (2) the chooser may have unequal bargaining power,<sup>47</sup> especially when faced with a take-it-or-leave-it standard form contract of the sort common in consumer contracts.<sup>48</sup> Neither justification necessarily supports a mandate.

Inadequate information and information asymmetry can theoretically be addressed with a disclosure rule—one type of nudge—rather than a choice-restricting mandate. This is the approach to addressing information asymmetry that has been offered to solve information problems in credit card contracts, motor vehicle purchasing contracts, mortgage contracts, cell phone contracts, and so on.<sup>49</sup> (To be sure, disclosure has its own limitations.<sup>50</sup>) Similarly, an imbalance in bargaining power created by a standard form contract can be addressed by forcing choice—prohibiting adhesion—rather than mandating the choice preferred by regulators.

Furthermore, the normative force of these justifications is questionable and highly context dependent. A regulation that protects people from their own inadequate information discourages learning and future investment in information that might

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47. Bone, *supra* note 6, at 1360–69 (discussing bargaining power objection to enforcing parties' agreements about process, collecting sources); Davis & Hershkoff, *supra* note 6, at 527 (discussing lack of information as a reason to doubt that choice about procedure reflects best interest of parties).

48. "Concerns about inadequate information are particularly salient when individuals enter into standard-form contracts with business enterprises without any reasonable opportunity to consult an attorney." Davis & Hershkoff, *supra* note 6, at 527.

49. See, e.g., Oren Bar-Gill & Rebecca Stone, *Pricing Misperceptions: Explaining Pricing Structure in the Cell Phone Service Market*, 9 J. EMP. LEGAL STUD. 430 (2012); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004).

50. See Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197 (2008) [hereinafter Willis, *Against Financial Literacy*]; Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707 (2006) [hereinafter Willis, *Decisionmaking*]; Lauren E. Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 429 (2011) (pointing to shortcomings of disclosure) [hereinafter Willis, *Financial Education*].

ultimately lead to a more choice-respecting fix.<sup>51</sup> Similarly, in a competitive market, at least, an adhesive contract may nonetheless adequately reflect consumers' interests even if only a small number of consumers are aware of the terms.<sup>52</sup> The threat of exit by even a small number of educated consumers can force a firm to remove an abusive or unwanted term from a standard form contract, and these consumers can be educated by competitors' advertising.<sup>53</sup>

#### b. Externalities

Scholars have pointed to several potential negative and positive externalities that may not be reflected in a person's pre-dispute choice about the availability of dispute resolution process.<sup>54</sup> When a person's choice fails to account for such an externality, the choice loses its presumptive efficiency.<sup>55</sup> The potential negative externalities of going without process (or going with less process) that scholars have identified include: diminished compliance with the law<sup>56</sup>; harms to direct third-party beneficiaries of the potential lawsuit<sup>57</sup>; a loss of uniformity in the procedures applicable to disputes<sup>58</sup>; the potential for violence or self-help by a person unable to air her grievance; a lost chance for the adjudicator to develop the law through its application in resolving a dispute<sup>59</sup>; and a lost chance for the public to learn about any potential dispute through the development, exchange, and public disclosure of

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51. Davis & Hershkoff, *supra* note 6, at 529 (“[C]oncerns about inadequate or asymmetrical information in contracting generally ought to diminish over time as reliance upon certain types of procedural boilerplate becomes more commonplace, resulting in changes in contracting parties’ knowledge and expectations.”). *But see* Dodge, *supra* note 6, at 761–63 (arguing that learning about procedural terms is unlikely to take place due to, among other reasons, the difficulty of anticipating procedure’s impact on enforcement of the substantive law and the requirement of legal knowledge to understand many such terms).

52. Bone, *supra* note 6, at 1364 & nn.146–48.

53. *Id.* (reviewing literature).

54. *E.g.*, Jennifer Arlen & W. Bentley MacLeod, *Malpractice Liability for Physicians and Managed Care Organizations*, 78 N.Y.U. L. REV. 1929 (2003) (discussing negative externalities as reason to refuse enforcement of medical malpractice exculpatory agreements); Davis & Hershkoff, *supra* note 6 (arguing for caution in permitting parties to contract *ex ante* to change rules of civil procedure because decisions made by private parties may have “spillovers” that implicate public values); Horton, *supra* note 46 (discussing negative externalities as a reason to prevent contracting over procedure); David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649 (2012) (pointing to externality of regulatory noncompliance, created by diminished incentive for plaintiffs’ attorneys to act as private attorneys general, as a reason courts should refuse to enforce anti-aggregation agreements in certain circumstances).

55. Davis & Hershkoff, *supra* note 6, at 513 (“[P]rivate transactions presumptively are efficient only if there are no negative externalities, that is to say, no adverse effects on third parties.”).

56. *See* Arlen & MacLeod, *supra* note 54; *see also* Bone, *supra* note 6, at 1375 n.198.

57. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 511–13 (2007).

58. Resnik, *supra* note 6.

59. Bone, *supra* note 6, at 1377 & n.203.

an evidentiary record.<sup>60</sup> On the other side of the ledger, one positive externality of the choice to forego process is the potential savings to any government-funded dispute resolution process of not having to process the potential dispute.<sup>61</sup>

These externality-based justifications for mandatory process have three limitations. First, as with the faulty-choice based justifications, none necessarily supports a mandate. If two parties' decision to contract around process creates externalities, then that decision should theoretically be taxed in order to force internalization of such externalities; the parties should not be prohibited from contracting around process altogether.<sup>62</sup> Hershkoff and Davis's argument against contractual alterations to the rules of civil procedure, for example, is that such agreements should not be enforced when the parties' procedural change implicates some public purpose of the procedure system.<sup>63</sup> But all else being equal, in such a case, the optimal rule would force the parties to internalize the cost of such an externality through a Pigouvian tax or other form of payment, not forbid them from contracting altogether.<sup>64</sup> Otherwise the tail could wag the dog; a small public externality might be used to justify prohibiting parties from obtaining potentially large private benefits through contract.

Second, a primary externality-based justification—diminished compliance with the law—does not actually support mandatory process. Rather, it supports only a mandatory mechanism for ensuring compliance with the law.<sup>65</sup> Ex post dispute resolution process is only one way to ensure compliance with the law; this end might also be sought by training and oversight requirements, periodic auditing, public enforcement of, for example, consumer-protection laws, or reputational sanctions.<sup>66</sup> Indeed, ex post process is in many contexts a particularly inefficient error-reduction

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60. See Davis & Hershkoff, *supra* note 6, at 514, 541–48 (“Among the most important” positive externalities created by process “are various kinds of information that help policymakers and members of the general public identify and respond to social problems.”); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1104 (2002); Elizabeth Thornburg, *Designer Trials*, J. DISP. RESOL. 181, 207 (2006).

61. Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1, 23–25 (2010). *But see* Bone, *supra* note 6, at 1374.

62. For example, parties to arbitration might be required to pay some fraction of any resulting judgment (or settlement, depending on the externality at issue) to the public court system, and parties waiving rules of civil procedure might be required to pay some fraction of any judgment to the court. Or the tax might be imposed as a (very small) flat fee on any contract waiving particular procedural rights. The former approach would be easier to implement, but the latter would avoid any distortion of litigation choices.

63. See Davis & Hershkoff, *supra* note 6.

64. This sort of tax is named for Arthur Cecil Pigou, its best-known proponent. See ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 192 (4th ed. 2002); see also Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 CORNELL L. REV. 523 (2013) (discussing Pigouvian taxes).

65. See *supra* notes 26–27 and accompanying text (discussing alternatives to regulatory process for ensuring compliance with the law).

66. See *supra* notes 26–27 and accompanying text; see also Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (discussing enforcement through reputational sanctions).



mechanism. The externality-based justification for mandatory process does not allow for a choice among these regulatory tools, all else being equal, or justify a mandate rather than a less-choice-restricting nudge, such as a forced choice among equally effective oversight mechanisms. Furthermore, this externality-based justification cannot explain common components of mandatory process—like the right to an in-person hearing or a written explanation from the decision-maker—except insofar as such components improve accuracy, a questionable proposition.<sup>67</sup>

Third, these externality-based justifications for certain processes are highly contingent and context specific. Several apply only in deciding whether to allow parties to opt out of the federal or state court system for resolving disputes (or make particular changes to that system), not in deciding whether to mandate process generally. For example, precedent is a feature of only a subset of dispute resolution processes (primarily courts)<sup>68</sup> and whether the lost opportunity to develop precedent is in fact a negative externality “depends on one’s theory of adjudication and, in particular, on what constitutes a good decision as well as a good decision-making process.”<sup>69</sup> That is why we usually allow parties to settle a dispute—whether in federal court or not—even though doing so deprives the court of the chance to make law. Indeed, courts following the “passive virtues” abhor the chance to make precedent, doing so only when parties with a genuine dispute insist that they do so.<sup>70</sup> That tendency is at least facially inconsistent with the view that the lost opportunity to make precedent is a negative externality that could justify a process mandate.

## 2. The Proceduralist Approach to Mandatory Process

Other scholars argue that adjudicatory process should not be subject to consequentialist concerns and that procedural rights should be determined by what is “fair” or “just,” not what is in the best interest of the parties (or third parties). Sometimes, proceduralist scholars leave the exact nature of this process value undefined.<sup>71</sup> This has caused some to argue that the underlying intuition simply reflects a preference for fairness.<sup>72</sup>

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67. Some studies have suggested that in-person credibility determinations are in fact not more accurate. See, e.g., Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837 (2011) (“[V]isually observing witnesses at best contributes nothing to a credibility determination and at worst increases the likelihood that a fact-finder will get it wrong.”).

68. See, e.g., 10 U.S.C. § 14502(b) (2012) (administrative procedures for resolving military service members’ disputes about promotion decisions featuring no system of precedent); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 § 10101(g) (2010) (procedures for external review of health insurer coverage determination featuring no system of precedent).

69. Bone, *supra* note 6, at 1377.

70. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

71. KAPLOW & SHAVELL, *supra* note 36, at 228 n.6 (stating that procedure scholars often “leave their ideas about fairness implicit”); Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 504–18 (2003) (“[D]iscussions of fairness in civil procedure are, with only a few exceptions, rather thinly developed.”) (internal citations omitted); Davis & Hershkoff, *supra* note 6, at 532 (“[T]he literature does not clearly state what the appropriate criteria of fairness might be.”).

72. See Solum, *supra* note 35, at 265 n.213. But see Bone, *supra* note 6, at 505–07

This lack of clarity does more than open the proceduralist approach up to criticism. It also makes it difficult to determine the extent to which this justification supports requiring that certain procedures be available even if both parties to the dispute agree otherwise *ex ante*. Yet even the most dogged of proceduralists would surely concede that there are some situations in which the law should not mandate process.

To remedy this lack of clarity, several scholars have set forth a more precise definition of the inherent, nonconsequential value of dispute resolution process, grounding it in dignity, fairness, or other values. As described in the paragraphs that follow, none of the four most prominent efforts offers a completely satisfactory account of when the law should mandate process.

#### a. Mashaw's Dignity and Due Process

In *Due Process and the Administrative State*, Jerry Mashaw offers "the best account of the dignitary value of participatory process,"<sup>73</sup> which itself is the primary deontological theory.<sup>74</sup> As Mashaw sees it, giving a person an opportunity to participate in a decision with which she disagrees is essential to preserving the autonomy and dignity of that individual. An unfair process creates an affront "somehow related to disrespect for our individuality, to our not being taken seriously as persons."<sup>75</sup>

Standing alone, Mashaw's individual-dignity-based theory is not actually an argument for mandatory process. For that we would need to add to Mashaw's theory an argument that individuals are not capable of valuing their own dignity and autonomy, or of assessing the potential impact of procedural rights thereupon, at the time they agree to relinquish those rights. The proposition does not speak for itself; if we assume people are better than policymakers at judging their desire for goods as impersonal as carrots or cars, then surely we should make the very same assumption when it comes to a person's desire for something as profoundly personal as individual dignity.

As discussed in Part II.B, below, the behavioral approach offered in this Article can be understood as providing an economic basis for such an argument. In this sense, the behavioral approach integrates the economic approach with Mashaw's version of the proceduralist approach.

#### b. Solum's Participatory Legitimacy Thesis

Lawrence Solum articulated an oft-cited and carefully-reasoned theory of procedural justice specifically in order to counter claims that such a value was,

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(arguing against this theory of fairness because (1) "[d]efining fairness in terms of feelings collapses fairness into utility" and (2) doing so means that fairness is no more important than (and thus, could potentially be outweighed by), people's preferences for more pedestrian commodities like roads and schools).

73. Solum, *supra* note 35, at 262 n.208 (discussing MASHAW, *supra* note 12).

74. For other expressions of this theory, see, for example, Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

75. MASHAW, *supra* note 12, at 163.

because undefined, illusory.<sup>76</sup> His theory is nuanced, but fundamentally based on the claim that to obligate a person to comply with a decision with which she disagrees—to give the decision normative legitimacy—we must give the person a right of participation in the process that brings the outcome about.<sup>77</sup> In short, participating in process makes a losing outcome normatively legitimate even to the loser.

As Solum notes (in not so many words), there is no essential reason that contracting parties could not appreciate this legitimacy-conferring value of participation *ex ante*, and price that value into their decision whether to forego process.<sup>78</sup> Thus, his theory of the value of process does not necessarily counsel in favor of mandatory process.<sup>79</sup> In order to determine the extent to which Solum's theory counsels in favor of mandatory process, as with Mashaw's theory, we need to explore how (and whether) people account for the power of process to generate legitimacy *ex ante*. The behavioral approach offered below offers insight into that question, but only insofar as bringing a person to be "legitimately bound by erroneous decisions," the conclusion with which Solum is concerned,<sup>80</sup> is consistent with the "acceptance" value modeled therein.

### c. Bone's Adjudicatory Legitimacy

Robert Bone articulates his theory of adjudicatory legitimacy in a self-conscious effort to give content to the intuitive concerns that motivate proceduralists to object to contracts altering the Federal Rules of Civil Procedure—one form of process mandate—which he calls "party rulemaking."<sup>81</sup> As he puts it, "if party rulemaking is to be limited or barred in a wider range of cases, it must be because giving parties control over procedure risks jeopardizing the normative legitimacy of adjudication."<sup>82</sup> On Bone's theory, participation by the aggrieved is an essential prerequisite to the legitimacy of the adjudicatory process, and therefore essential to the functioning of the courts.<sup>83</sup>

His view is only a roadblock, however, for agreements that alter, in an impermissible fashion, the rules that govern judicial resolution of disputes in state or federal court. As Bone recognizes, the adjudicatory legitimacy he sees as essential to these institutions is not a prerequisite to the proper functioning of alternative mechanisms for resolving disputes (or overseeing compliance). It therefore does not counsel against enforcement of a wide range of agreements about process, including

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76. Solum, *supra* note 35, at 191 (arguing that "a right of participation can be justified for reasons that are not reducible to either participation's effect on accuracy or its effect on the cost of adjudication").

77. *See id.* at 274.

78. *See id.* at 303 ("[I]f rational persons are conceived as having an overriding interest in having reasons to consider themselves as legitimately bound by erroneous decisions, then they will choose participation over accuracy and cost.")

79. *Cf. id.* at 266 (rejecting preference-satisfaction theory of value of participation because it does not make participation an essential, irreducible aspect of adjudicatory process).

80. *Id.* at 303.

81. *See* Bone, *supra* note 6, at 1331.

82. *Id.* at 1336.

83. *Id.*

agreements to arbitrate disputes rather than hear them in federal court, agreements about the process that governs administrative procedures, and agreements to go without process altogether.<sup>84</sup> As a result, Bone's theory applies (to the extent one finds it persuasive) when it comes to deciding whether to allow parties to tailor the process available to a dispute they agree to resolve in federal court, but is inapplicable outside of that limited context. But participation surely has value outside of federal court.

#### d. Dodge's Symmetrical Theory

Owen Fiss, in his article *Against Settlement*, did not specifically address the value of process, but he did argue against allowing parties to resolve disputes on their own terms to the extent that doing so could undermine the enforcement of substantive laws written with full judicial enforcement in mind.<sup>85</sup> Jaime Dodge's "symmetrical theory" can be understood as an intellectual heir of that view. Dodge argues that the law should refuse to enforce agreements to alter procedures in state or federal court—in other words, it should mandate process (within these domains)—where doing so could undermine the enforcement goals of the substantive law at issue in the dispute.<sup>86</sup> David Noll has also offered a similar argument specific to agreements to waive the option of bringing a dispute by class action.<sup>87</sup>

Like Bone's "adjudicatory legitimacy," Dodge's symmetrical theory is not a general theory of the value of participation. Instead, it is a theory of the value of adjudication in federal or state court as sometimes viewed by legislators. Dodge's theory counsels in favor of mandatory process only where legislators actually intend to use litigant-driven lawsuits as the means to enforce the legal right at issue, and actually expect such litigation to proceed following the default rules set by the Federal Rules of Civil Procedure. The proportion of suits that fall into this subset is not clear.<sup>88</sup>

More importantly for present purposes, Dodge's is not essentially an argument about deference to parties' choices about participatory process, it is an argument about parties' choices regarding whether (and how) to enforce their legal rights. Therefore, participation is not an essential component of Dodge's view. Dodge's

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84. *Id.* at 1354 ("[T]he distinctive feature of adjudication is its commitment to a particular form of principled reasoning . . . this commitment is essential to its institutional legitimacy.").

85. Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984) (arguing that the legal system in the United States is intended to further public values, not private interests of disputants; disputants are means to an end).

86. *See* Dodge, *supra* note 6, at 730–31 (arguing that parties should be prohibited from setting procedure by ex ante agreement that would limit or prevent enforcement of nonwaivable constitutional, statutory, or procedural requirements). This view is closely related to the compliance externality consequentialist justification for mandatory process, but takes as its legitimizing force the goals of the substantive law rather than harms to third parties. It therefore is included among the nonconsequentialist/deontological justifications for mandatory process.

87. Noll, *supra* note 54.

88. *See* Matthew J.B. Lawrence, *Courts Should Apply a Relatively More Stringent Pleading Threshold to Class Actions*, 81 *U. CIN. L. REV.* 1225, 1247 (2013) (explaining that some statutes are not written with any expectation regarding lawsuit rate).

view is that parties should not be allowed to agree by contract to enforcement mechanisms that would produce less compliance than the default put into the law by the legislature. As with the compliance externalities discussed above, this argument supports mandating that parties' choices about enforcement maintain at least as much compliance as would the default (or, perhaps, prohibition of agreements that would increase enforcement above that baseline)<sup>89</sup> but do not support laws mandating that parties employ adjudicatory process to obtain that end rather than other nonprocess means, such as auditing.<sup>90</sup>

### *B. A Behavioral Approach to Mandatory Process*

This subpart puts forward a behavioral conception of the value of participation and points to research in behavioral economics indicating that people tend to under-appreciate this value *ex ante*. The story of this subpart, shorn of details, is not complicated. The story has three parts presented, in full, in sections 1, 2, and 3. Here is the simple version:

First, bad things happen to us all the time. Almost always, we simply move on with our lives. Either we do not even lament that things might have been better—think of the last time you had the flu—or we momentarily grieve our loss but quickly accept it, like a college-bound student forced to settle for his safety school.

Sometimes, though, our misfortunes possess us. We see a fault, we perceive an unfairness, one that hurts us or our family, and we cannot look away. Our grievance can drive us to sue, to gnash our teeth, to divorce, to depression, and to bitterness, among other things. Grievances really hurt. That is the first part of the story, subsection 1 (The Costs of Grievances).

Second, having a process available to resolve disputes can reduce grievances. It can prevent us from experiencing a grievance, when we assume a bad outcome—although bad—must be fair because we have the option to appeal it. And it can soothe a grievance when just being heard heals, or at least softens, the hurt. That's section 2: The Benefits of Process.

Third, we often do not realize that we could come to suffer a grievance and that process could come to play an important role if we do, so we do not value procedural protections enough *ex ante*. As a result, we might happily contract away our right to sue, or sue in court, or sue quickly, when the possibility of a loss, let alone a grievance, seems far off and farfetched. That's section 3: Behavioral Economics and the Market for Process.

And so the conclusion, and a new take on when to mandate process: when people fail to predict how process might prevent or cure grievances, the law might help by

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89. See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77–80 (2003) (arguing that Congress creates private rights of action under the assumption that lawsuits will be brought at the rate that autonomous individuals tend to sue).

90. See *supra* notes 26–27 and accompanying text (discussing alternative means of enforcement that could be better able to encourage compliance, under certain circumstances, than claimant-driven adjudication); *infra* Part IV.C. (discussing possibility of ensuring accuracy in administrative decision making without giving claimants any process rights).

forcing them to buy process even though they think it is not worth it or by setting the terms of such process to optimize its grievance-reducing power.

My goal here is not to demonstrate that behavioral market failure is the only possible justification for mandatory process requirements. The contribution here is to reconceive, and thereby improve upon, the classical economic approach that scholars have applied when analyzing particular process mandates. This effort can be understood as partially translating the concerns of proceduralists, like Mashaw, into a more nuanced version of the model of the economists. Doing so brings the economic and proceduralist approaches into greater alignment. It thereby shows that mandatory process requirements can be justified under a broader range of conditions than the economic approach would predict, but need not be as universal as the proceduralist approach might indicate.

### 1. The Costs of Grievances

In order to assess the demand for dispute resolution process as opposed to other means of enforcement, I focus on the feature of such process that distinguishes it from other enforcement mechanisms—participation by the aggrieved.<sup>91</sup> What sort of cost—beyond fixing an error—does participation prevent or what sort of benefit does it create? The sorts of losses that are ordinarily prevented by an enforcement mechanism—monetary cost or physical injury—are poor candidates; participation is not a necessary feature of an enforcement mechanism that addresses such losses.<sup>92</sup>

But harm is not always as straightforward as lost wages, or a broken car, or a ruined lung. People can be remarkably resilient; research into happiness shows that we are in some circumstances capable of rebounding from a debilitating loss of wealth or function to be as happy as we were before.<sup>93</sup> And research into dispute formation shows that we sometimes barely notice that something bad has happened to us, even when the law would, if we asked, provide us with hefty compensation.<sup>94</sup>

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91. *See supra* Part I.

92. *See supra* notes 26–27 and accompanying text.

93. *See generally* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603 (2013) (discussing research into hedonic adaptation). *But cf.* Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use?*, 62 DUKE L. J. 1509 (2013) (surveying normative hedonic literature and questioning conclusions of Bronsteen et al.).

94. *See* PAUL C. WEILER, HOWARD H. HIATT, JOSEPH P. NEWHOUSE, WILLIAM G. JOHNSON, TROYEN A. BRENNAN & LUCIAN L. LEAPE, A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 70 *tbl.4.1* (1993) (showing that about one in eight negligent injuries led to a legal claim); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 448 (1987) (citing studies showing low lawsuit rate); M.P. Baumgartner, *Social Control in Suburbia*, in 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 79, 82, 93 (Donald Black ed., 1984); Frederick C. Dunbar & Faten Sabry, *The Propensity to Sue: Why Do People Seek Legal Actions?*, 42 BUS. ECON. 31 (2007); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 681–82 (1986); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984); Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. SOC'Y 400 (1991); David M. Studdert, Eric J.

Sometimes, however, losses stick. People perceive a loss as an injury, see it as someone's fault, feel wronged, and suffer. Often, they seek to right the wrong by filing a lawsuit or appeal, if that route is available. Or they stew. This behavior, here called grieving, has long been the focus of scholarly inquiry associated with the "name, blame, claim" framework for analyzing the determinants of dispute formation: first, someone identifies a harm, next, they blame someone else for it, and last, they file suit.<sup>95</sup>

Grievances pose significant welfare costs to those who suffer them. Qualitatively, one might look to anecdotes of people whose lives were disrupted, often permanently, by a grievance.<sup>96</sup> Similarly, quantitative studies lend support to the heavy cost of grievances.<sup>97</sup> And research on the power of therapy focuses on the importance of acceptance.<sup>98</sup>

Grievances can impose costs on others too. In the workplace, research shows that employees who feel they have been mistreated are less likely to follow rules.<sup>99</sup> And in the private contractual context, research shows that parties that feel unfairly treated will "shade," that is, take unverifiable steps to reduce the value of performance to the one they think wronged them.<sup>100</sup>

## 2. The Benefits of Process

Dispute resolution process differs from other mechanisms of enforcement by reducing grievances in two ways. First, simply having the option of pursuing a dispute

Thomas, Helen R. Burstin, Brett I.W. Zbar, E. John Orav & Troyen A. Brennan., *Negligent Care and Malpractice Claiming Behavior in Utah and Colorado*, 38 MED. CARE 250 (2000).

95. See Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y. REV. 655, 656 (1980), William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergency and Transformation of Disputes: Naming, Blaming, and Claiming. . .*, 15 LAW & SOC'Y. REV. 631 (1980-81); see also Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, in BEHAVIORAL LAW AND ECONOMICS 302 (Cass Sunstein, ed. 2000) (qualitative study of parties to nuisance lawsuits showed acrimony, perceived unfairness at play in decision to press claim through appeal, declined to bargain after judgment).

96. E.g.; M. GREGGORY BLOCHE, *THE HIPPOCRATIC MYTH* (2011) (describing in detail one woman's fight to obtain insurance coverage); Joan Savitsky, *A Patient Dies, and Then the Anguish of Litigation*, N.Y. TIMES, Dec. 29, 2009, at D5 (outlining anecdote of children of a deceased patient, "whom I barely knew, were coping with their own complex emotions, which I imagined to be grief, very likely anger and frustration, and perhaps misunderstanding. Filing a malpractice suit somehow addressed this").

97. E.g. Audrey Freshman, *Financial Disaster as a Risk Factor for Posttraumatic Stress Disorder: Internet Survey of Trauma in Victims of the Madoff Ponzi Scheme*, 73 HEALTH & SOC. WORK 39 (2012) (reporting elevated levels of PTSD and other adverse behavioral effects among victims of Bernie Madoff).

98. See generally ACCEPTANCE AND MINDFULNESS IN COGNITIVE BEHAVIOR THERAPY (James D. Herbert & Evan M. Forman, eds., 2011).

99. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 187-91 (1988).

100. Yuval Feldman & T.R. Tyler, *Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace*, 6 REGULATION AND GOVERNANCE 46, 53-63 (2012).

resolution process could prevent a grievance from forming in the first place by making the underlying decision appear fair—in behavioral terms, a framing effect.<sup>101</sup> A person might assume that a decision she has the right to challenge is fair where she would have assumed the decision was unfair if the law left her no recourse.<sup>102</sup>

Second, and more directly, pursuing a process that is perceived to be fair can itself soothe a person's grievance, even if she does not prevail. When someone does grieve, navigating a dispute resolution process that she perceives to be fair can ease the dissatisfaction she feels with an outcome she initially viewed to be unfair, win or lose.<sup>103</sup> In other words, navigating a fair process can cure (or at least ease) a grievance, regardless of outcome.<sup>104</sup>

This grievance-soothing benefit of participation is connected to empirical research into procedural justice.<sup>105</sup> This body of scholarship has investigated the

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101. Research on medical malpractice claiming rates indicates that the likelihood of a grievance there is a function of presentation and whether the doctor apologizes. See Kevin Sack, *Doctors Start to Say 'I'm Sorry' Before 'I'll See You in Court'*, N.Y. TIMES, May 18, 2008, at A1. Furthermore, even alternative systems that allow a patient to feel heard reduce claims. The literature on Therapeutic Jurisprudence, similarly, has shown myriad ways that legal process can facilitate or hinder recovery from mental illness or have other therapeutic effects. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 129 (2000). Cf. TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES 33–65 (2011); Mark A. Hall, *Can You Trust a Doctor You Can't Sue?*, 54 DEPAUL L. REV. 303 (2005).

102. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 12 (2007) (“Although many people never actually go to court, believing that they could go to court if they needed to—and that, if they did, they would receive consideration—is a key antecedent of trust and confidence in the legal system.” (citing TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH, YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997).)).

103. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988) (“What is striking about procedural justice judgments is that they also shape the reactions of those who are on the losing side.”); Burke & Leben, *supra* note 102, at 6 (“People are in fact more willing to accept a negative outcome in their case if they feel that the decision was arrived at through a fair method.”); Tom R. Tyler, *New Approaches to Justice in the Light of Virtues and Problems of the Penal System*, in SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 19, 32 (Margit E. Oswald, Steffen Bieneck, Jorg Hupfeld-Heinemann, eds., 2009); cf. Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2007); Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008).

104. Cf. Arthur Pearlstein, *Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR*, 12 PEPP. DISP. RESOL. L.J. 215 (2012).

105. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 (1994) (“Although we consciously chose the individual legal changes, we have not entirely comprehended their combined effect. As a consequence, we sometimes debate particular features—for example, styles of judging, the virtues and vices of discovery, abuses of the legal system, alternatives to litigation, and various docket-speeding local experiments—without acknowledging their links to the system as a whole. We need a better sense of these connections and a more comprehensive sense of how process functions



components of process that affect whether participants come to view it as fair, including voice and the behavior of the decision maker.<sup>106</sup> These components may be optional features of process that affect the degree to which it prevents and soothes grievances.

Understanding the value of dispute resolution process as its capacity to soothe a grievance reflects a core intuition about the usefulness of process that may be as old as courts themselves. As Justice Frankfurter put it in 1951: “[n]o[] . . . better way [has] been found for generating the feeling, so important to popular government, that justice has been done.”<sup>107</sup>

And Justice Frankfurter himself was not a pioneer in recognizing the power of participation to generate acceptance. In his seminal work *Due Process in the Administrative State*, Jerry Mashaw offered support dating back to 2300 BC:

If you are a man who leads  
Listen calmly to the speech of one who pleads;  
Don't stop him from purging his body  
Of that which he planned to tell.  
A man in distress wants to pour out his heart  
More than that his case be won.  
About him who stops a plea  
One asks “Why does he reject it?”  
Not all one pleads can be granted,  
But a good hearing soothes the heart.<sup>108</sup>

The final line—“a good hearing soothes the heart”—bears emphasis, because it highlights one additional consideration about the value of process. While a “good hearing” has the power to generate acceptance and to soothe a hurt, a bad hearing—a poorly designed process—can do the opposite. It can create bitterness rather than take it away.<sup>109</sup> That possibility increases the importance of questioning whether

as a system.”).

106. Burke & Leben, *supra* note 102, at 4 (“[1] voice, [2] neutrality, [3] respectful treatment, and [4] engendering trust in authorities.”); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodic., *Influence of Voice on Satisfaction With Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 72 (1985); *see also* E. Allan Lind, Ruth Kanfer & Christopher P. Early, *Voice, Control and Procedural Justice*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990) (presenting study in which participants labeled outcome as more fair when they had opportunity to speak, even after being told their opinion would have no impact on outcome).

107. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

108. MASHAW, *supra* note 12, at vii (quoting PTAHOTEP, *supra* note 12).

109. *See* David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 120 (1983). Some studies in therapeutic jurisprudence have looked at the negative implications for the well-being of participants of certain dispute resolution systems. *See* DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990) (various procedures for determining fitness to stand trial may prevent recovery from mental illness); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1999) (making case that adversary process heightens rather than soothes

parties who have agreed to resolve disputes by a particular process (or no process) have adequately taken into account the grievance-soothing power of process.

### 3. Behavioral Economics and the Market for Process

Louis Kaplow and Steven Shavell have argued that the inherent value of participating in a dispute resolution process, if any, can be modeled in economic terms as the satisfaction of a “preference for fairness.”<sup>110</sup> Formulating the value of participation in this way leaves out three salient aspects of the costs of grievances and benefits of process just set out.

First, the value of process comes not (or not only) from satisfaction of a preference but from soothing of a hurt and elimination of a negative response.<sup>111</sup> This aspect of value should perhaps be modeled as the alteration, to the point of elimination, of a preference. Such preference-shaping effects are entirely consistent with economic analysis, although they do complicate matters by forcing relaxation of the static preferences assumption.<sup>112</sup>

Second, the preference for fairness itself should not be viewed as constant but instead as a (perhaps unpredictable) function of a loss that depends on whether the loss is perceived to be unfair or not. The experience of a grievance (and accompanying formation of a strong “preference for fairness”) is stochastic, so it is not certain one way or the other at the time a person enters an agreement that she will suffer a grievance should she come to suffer a loss. As a result, the grievance-reducing value of participation is probabilistic; it depends on the possibility that a person will come to suffer a grievance and so develop a strong taste for fairness as to a loss or that dispute resolution process will be a soothing route for such a person.

Third, and relatedly, the decision about how much process should be available in the event of a dispute necessarily takes place well before a loss (and, possibly, an accompanying grievance) occurs. As a result, the experienced benefit of participation

dissatisfaction of child custody disputes).

110. KAPLOW & SHAVELL, *supra* note 36. *But cf.* Michael B. Dorff & Kimberly Kessler Ferzan, *Is There a Method to the Madness? Why Creative and Counterintuitive Proposals Are Counterproductive*, in *THEORETICAL FOUNDATIONS OF LAW & ECONOMICS* 21, 28 (Mark White ed. 2009) (reviewing studies) (“[T]he mere lip service that is given to the taste for fairness within the legal economist’s typical empirical conclusions is utterly unacceptable. The taste for fairness is pervasive, and the preference for fairness is strong.”); Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 *J. BUS.* 285 (1986).

111. *See supra* Parts II.B.1–2.

112. *Cf.* KAPLOW AND SHAVELL, *supra* note 36, at 415–18 (generally approving of incorporating possibility of altered preferences into welfare economics, so long as change in preferences does make people better off). *See* Kenneth G. Dau-Schmidt, *Legal Prohibitions as More than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in *LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES* 153, 153 (Robin Paul Malloy & Christopher K. Braun, eds. 1995) (“Law and economics scholars have identified various areas in the law . . . in which legal prohibitions and penalties are not merely intended to act as a price on the proscribed behavior, but are also intended to influence the underlying preferences of the sanctioned parties and other members of society.”).

in process is usually long delayed from the time that a decision is made about how to value participation.

Each of these three salient features of the behavioral understanding of the value of process—its potentially preference-altering effect, its probabilistic value, and its delayed benefit—is a boundary condition for the presence of behavioral market failure, depending on the decision-making of the buyer.

#### a. Projection Bias

As discussed above, the inherent value of process depends in various ways on changed emotional states. Process is a framing device that may affect whether a person suffers a grievance, and it is a preference-altering commodity insofar as it can soothe grievances that do happen, even for those who do not ultimately prevail. Furthermore, the latter benefit depends on the formation of a grievance, itself a shift in a person's emotional state.<sup>113</sup>

Preference endogeneity—the tendency of some legal regimes to change peoples' preferences, rather than merely satisfy them—has been identified and studied in other areas of the law. The most well-studied example of preference endogeneity in behavioral economics may be the endowment effect: the finding that in certain contexts the law's assignment of an entitlement changes the way that entitlement is valued by its recipient.<sup>114</sup> Another, also well-developed area of research on dynamic preferences is the study of the effect of law and legal institutions on the formation and internalization of norms.<sup>115</sup> The acceptance-generating function of process is an additional way that the law may influence our preferences.

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113. *See supra*, Part II.B.1.

114. For recent studies discussing the endowment effect, also known as reference-dependent preferences, *see, e.g.*, Andrea Isoni, Graham Loomes & Robert Sugden, *The Willingness to Pay—Willingness to Accept Gap, the 'Endowment Effect,' Subject Misconceptions, and Experimental Procedures for Eliciting Valuations: Comment*, 101 AM. ECON. REV. 991 (2011); Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935 (2008) (providing evolutionary explanation for endowment effect); Jack L. Knetsch & Wei-Kang Wong, *The Endowment Effect and the Reference State: Evidence and Manipulations*, 71 J. OF ECON. BEHAV. & ORG. 407 (2009); Keith M. Marzilli Ericson & Andreas Fuster, *Expectations as Endowments: Evidence on Reference-Dependent Preferences from Exchange and Valuation Experiments*, 126 Q. J. ECON. 1879 (2011). *But see* Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449 (2007) (questioning endowment effect).

115. *See, e.g.*, Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 490 (2006); Steffen Huck, *Trust, Treason, and Trials: An Example of How the Evolution of Preferences Can Be Driven by Legal Institutions*, 14 J.L. ECON. & ORG. 44 (1998). *Cf.* Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998) (discussing wisdom of using law to influence norms). For an in-depth study focused on the challenges of preference endogeneity to cost-benefit analysis, *see* Gregory Scott Crespi, *The Endogeneity Problem in Cost-Benefit Analysis*, 8 GEO. J.L. & PUB. POL'Y 91, 96 (2010) (conventional cost-benefit analyses “do not confront the difficulties involved in valuing policies under those circumstances when one of their consequences is a significant alteration of the preferences of a substantial number of people”).

Research in behavioral economics provides reason to doubt that people adequately account for future alterations in their emotional states when they make a decision, suffering from a decision-making quirk Loewenstein dubbed “projection bias.”<sup>116</sup> Where present, projection bias “mean[s] that people wrongly project their current emotional state onto their future selves.”<sup>117</sup>

A classic example of projection bias is the hungry shopper: a person who shops while very hungry may over-estimate her desire for food when the time comes to eat it because her hunger changes her preference for food and she fails to take that alteration into account when making a purchase decision. Another example of projection bias offered by Cass Sunstein is the decision to purchase a gym membership; people mistakenly assume at the time they enter into a gym agreement, usually just after the new year, that their current desire to work out will persist throughout the year.<sup>118</sup> As a result, people buy expensive long-term memberships that they do not wind up using.

Projection bias has not received as much focus in the legal literature as other behavioral phenomena like status quo bias or the endowment effect, but it has in limited instances been the subject of scholarly attention in behavioral law and economics.<sup>119</sup> One reason for this may be that unlike other biases, it is not apparent how projection bias can be “nudged” away.<sup>120</sup> None of the nudges addresses

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116. Loewenstein et al., *supra* note 16, at 1209 (“People exaggerate the degree to which their future tastes will resemble their current tastes. We present evidence from a variety of domains which demonstrates the prevalence of such projection bias.”); George Loewenstein & Erik Angner, *Predicting and Indulging Changing Preferences*, in *TIME AND DECISION* 351 (Loewenstein et al., eds., 2003); cf. Daniel T. Gilbert, Elizabeth C. Pinel, Timothy D. Wilson, Stephen J. Blumberg & Thalia P. Wheatley, *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 *J. PERSONALITY & SOC. PSYCHOL.* 617 (1998).

117. Sunstein, *Willingness*, *supra* note 17, at 323.

118. *Id.*

119. *See id.* at 324 (pointing to projection bias as one reason for a gap between willingness to pay and actual welfare). The primary exception is arguments about “cooling off” periods to prevent people from making decisions while in temporary “hot” states. *See id.* These “cooling off” periods function in much the same way as a process mandate: they prohibit decision making until the shift in preferences has occurred. *E.g.* Jungmin Lee, *The Impact of a Mandatory Cooling-Off Period on Divorce*, 56 *J.L. & ECON.* 227 (2013). Those arguments apply only insofar as projection bias prevents a person in a temporary “hot” state from projecting a future “cold” state; they do not address failures that result from more enduring changes in preferences. An example of a projection-bias caused market failure resulting from failure to appreciate a persistent alteration in preferences that might justify a mandate is addiction. Laux has argued that addiction is a market failure resulting from failure of affective forecasting. Fritz L. Laux, *Addiction as a Market Failure: Using Rational Addiction Results to Justify Tobacco Regulation*, 19 *J. HEALTH ECON.* 421 (2000). In this vein, John Strnad has argued in favor of food tax based on the view that people do not anticipate the addictive effect of many foods. John Strnad, *Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies*, 78 *S. CAL. L. REV.* 1221 (2005). Furthermore, Manuel Utset has argued that failure to anticipate future hot states can lead to incomplete contracting. Manuel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 *UTAH L. REV.* 1329 (2003).

120. “[I]t is not clear how or whether public officials should react to the possibility of projection bias.” Sunstein, *Willingness*, *supra* note 17, at 324. This is so, Sunstein says,

projection bias as to a persistent change in emotional state that affects the value of a contracted-for commodity. A default rule will not stick so long as one of the parties to the contract has an incentive to “shift” the default, in which case that party will be well positioned to do so.<sup>121</sup> Forced choice is no solution, because those subject to projection bias will make the wrong choice (for the reasons discussed above). Finally, the research that we have indicates that disclosure does not effectively counteract projection bias, perhaps because projection bias distorts a person’s understanding of their own preferences, not their belief about a question of fact (like optimism).<sup>122</sup>

Furthermore, because projection bias specifically interferes with the way people value participation, it theoretically can justify a mandate that requires not only a certain degree of oversight but also participation by the aggrieved in the oversight mechanism. In short, the presence of projection bias can support not only a compliance mandate, but mandatory process.

Theoretically, then, projection bias is a reason that parties contracting for dispute resolution process before a dispute has arisen could tend to underestimate the possibility that they might suffer a grievance and also underestimate the benefits of access should they do so. In such conditions, it may be “efficient,” all else being equal, to mandate such parties have process available should a dispute arise even if, left to their own devices, they would not contract for it. (Of course, any such benefit must be balanced against the “cost” of the mandate to parties who would not contract for process even if they did not suffer from projection bias, including the liberty “cost” of any mandate. That latter cost is reduced in the case of process mandates, as explained in Part III.)

#### b. Optimism

The value of process depends not only on the formation of a grievance but also the occurrence of a disappointing outcome. Those who are optimistic could tend to underestimate the likelihood that things will not go as they hope, and so underestimate the value of process (or any means of identifying and correcting errors).<sup>123</sup>

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because “[t]he problem with projection bias is that it suggests that people will make choices that do not promote their welfare, as when they end up with products that they do not enjoy when they are using or consuming them.” *Id.* at 323–24. This is indeed a problem for soft behavioral economics and for the freedom-of-contract rationale when applied to preference-altering products or products whose value assumes static preferences. It is not a problem for hard behavioral economics, but rather a policy challenge that a carefully considered mandate can overcome. *See infra* Part III.

121. *See* Lauren E. Willis, *Why Not Privacy by Default?*, 21 BERK. TECH. L.J. 62 (2014) (discussing situations under which profit-interested parties with power to do so reverse default rules).

122. *See* Loewenstein et al., *Projection Bias*, *supra* note 16, at 1238–39 (stating that it is unlikely that learning could correct projection bias).

123. Sternlight and Jensen include a brief discussion of the possibility of optimism, as well as risk-loving behavior, in the context of their analysis of the enforceability of class action waivers. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 96–99 (2004). Dodge includes a lengthy footnote that also makes these two

Where optimism leads to failure in the market for process, the least choice-restrictive option for remedying it is a disclosure rule, not a mandate. That is the approach that has been taken to address failure resulting from optimism in other markets, like the credit card market.<sup>124</sup> To be sure, disclosure will not always work as a solution to optimism, in which case a more intrusive regulatory response, such as a mandate, may be warranted. Indeed, recent research into the actual effectiveness of disclosure provides new reason to doubt its effectiveness in particular applications.<sup>125</sup>

### c. Hyperbolic Discounting

A final potential behavioral market failure that may also prevent some parties from adequately accounting for the value of process at the time that they enter into a contract is hyperbolic discounting. Hyperbolic discounting, also referred to as “present bias,” is the occasional tendency demonstrated in various experimental studies to prioritize short-term costs and benefits over costs and benefits that will not accrue until later.<sup>126</sup>

To the extent that this tendency is indeed a bias, rather than a genuine preference, it could prevent people from adequately assessing either the costs of grievances or the benefits of dispute resolution process at the time they enter a contract, just as it prevents efficient contracting in other contexts.<sup>127</sup> However, the possibility that hyperbolic discounting reflects true (if short-sighted) preferences rather than a bias<sup>128</sup> makes it a problematic basis for a regulatory intervention.

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suggestions. Dodge, *supra* note 6, at 759–60 n.139. Similarly, Baker and Lytton argue that optimism could lead patients to under-estimate the likelihood of doctor error, and so under-value their right to sue for malpractice. See Tom Baker & Timothy D. Lytton, *Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein*, 104 NW. U. L. REV. 233 (2010). For an argument noting that other-regarding behavior could lead patients to waive their right to sue for malpractice even when they otherwise would like to retain the right, and proposing a solution to that problem, see Matthew J.B. Lawrence, Note, *In Search of an Enforceable Medical Malpractice Exculpatory Agreement: Introducing Confidential Contracts as a Solution to the Doctor-Patient Relationship Problem*, 84 N.Y.U. L. REV. 850 (2009).

124. See *supra* note 49 and accompanying text.

125. See *supra* note 50 and accompanying text.

126. See Richard H. McAdams, *Present Bias and Criminal Law*, 2011 U. ILL. L. REV. 1607 (2011); Maribeth Coller, Glenn W. Harrison & E. Elisabet Rutström, *Are Discount Rates Constant? Reconciling Theory and Observation* (Dec. 2003) (unpublished manuscript), available at <http://darkwing.uoregon.edu/~harbaugh/Readings/Time/Are%20Discount%20Rates%20Constant%20%20Reconciling%20Theory%20andObservation.pdf> (showing that discount rate is constant but there is a “present payment” premium).

127. See Oren Bar-Gill & Omri Ben-Shahar, *No Contract?* (N.Y.U. Ctr. for Law, Econ. & Org., Working Paper No. 13-06, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220271](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220271).

128. See Wright & Ginsburg, *supra* note 42, at 1059 (“There is neither a theoretical nor an empirical basis for the behaviorists’ implicit privileging of a future self.”).

## III. PROCESS REQUIREMENTS AS CHOICE-PRESERVING MANDATES

As discussed above, mandates are powerful medicine. The mere possibility of behavioral market failure does not in itself warrant a nudge, let alone a mandate. That is because the actual costs and benefits of a mandate can be difficult (some would say impossible) to quantify, especially for policymakers (or academics!) that are, of course, not themselves immune to behavioral bias.

This “knowledge problem,” as Mario Rizzo and Douglas Glen Whitman call it, is not a mere roadblock for behavioral law and economics.<sup>129</sup> Indeed it is no doubt a large part of the reason behavioral law and economics has, thus far, focused on recommending nudges, not mandates. Classical law and economics avoided the difficulty of not fully understanding human decision making by using simplified models to make recommendations with a certainty—at least within the assumptions of the models. Most information problems are external to these models and so did not directly undermine the recommendations, or at least did not until experimental research began to show that some of the assumptions of classical economics can deviate from actual human behavior in predictable ways.

The first wave of behavioral law and economics relaxed the classical economic assumptions, allowing uncertainty into more realistic analyses, but made do notwithstanding that uncertainty by limiting its policy recommendations to “nudges,” such as policies (1) that feature negligible costs, as with a disclosure regime or (2) that are directed to areas where a policy choice is inevitable, as with the choice of a legal default.<sup>130</sup> As such, this first wave was often able to make policy recommendations comfortably based only on evidence about the decision making of college students in stylized laboratory experiments, even in the face of substantial uncertainty about just how beneficial or effective the recommended “nudge” would be in the real world. And while some scholars were skeptical, policymakers were not; agencies at the local, state, and federal level have implemented a number of reforms advocated by the first wave of behavioral law and economics, sometimes with demonstrable success.<sup>131</sup>

While the first wave of scholarship in behavioral economics largely circumvented the knowledge problem by pushing for interventions that ultimately preserve freedom of choice, such as disclosure requirements and default rules, not all behavioral market failures can be solved with nudges. As Bubb and Pildes rightly point out in their forthcoming article, by focusing on nudges scholars have ignored behavioral market failures that may be correctible only by a mandatory intervention.<sup>132</sup>

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129. Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905 (2009). Jennifer Arlen may have been the first to note this problem for behavioral economics in an early comment. Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAN. L. REV. 1765, 1768 (1998) (“It is difficult to predict how, when, or whether many of these biases will manifest themselves in the real world.”).

130. See *supra* notes 120–122 and accompanying text (discussing these and other nudges).

131. See generally CASS SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013).

132. Bubb & Pildes, *supra* note 21, at 1595 (“Put simply, it would be surprising if the main policy implications of substantial evidence documenting the failure of individual choice were

Hard behavioral economics of the variety Bubb and Pildes advocate does not have the luxury of either the internal certainty of classical law and economics or the de minimis costs of the regulations advocated by the first wave of behavioral law and economics. But process mandates have their own distinctive features that make them easier to justify.

Process mandates are not purely liberty-restricting, in fact they ensure freedom of choice (ex post) at the same time that they take away freedom of choice (ex ante). This fact lowers the justificatory threshold necessary to support a process mandate and may help to explain their pervasive presence. (It is also a reason that other choice-preserving mandates—including no-fault divorce rules and prohibitions on liquidated damages that make it easier for a contracting party to breach—are not as normatively problematic as ordinary mandates.)

To be sure, because the choice that a process mandate preserves is downstream from the choice that it forbids, process mandates (and other choice-preserving mandates) still run contrary to the assumption that parties are best positioned to know what will satisfy their own preferences, and so the presumption that any mandate will prevent efficiency-creating bargains. But that is the very rationality presumption that much of behavioral economic research occasionally undermines.<sup>133</sup> As such, an analysis supporting (or attacking) a process mandate in a particular case, like any good behavioral analysis, must (1) be precise about the behavioral phenomenon at issue because not all departures from classical rationality actually cause market failure, (2) be attentive to contextual boundary conditions, (3) consider the baseline in deciding whether to recommend regulation, and (4) consider the possibility that learning might cure any behavioral market failure without intervention.<sup>134</sup> These

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a turn toward regulatory instruments that preserve individual choice.”); *id.* at 1601 (“We come not to bury [behavioral law and economics], but to push it even further.”).

133. *See generally id.*

134. *See* Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237 (2008); Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573 (2014). On the possibility of learning that cures biases, *see* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (discussing learning and use of law to change biases). If people’s preferences vary predictably, then in theory people should have as much ability to learn that fact as policymakers. Indeed, individuals should have particularized insight into their own susceptibility to this effect, something policymakers can never achieve. Thus, it is only the possibility of projection bias that makes preference endogeneity a basis for regulation. For example, the thriving market for negative preference-altering products (addictive drugs) suggests they are something we should think carefully about regulating. *Cf.* Jonathan Gruber & Botond Köszegi, *Is Addiction “Rational”?* *Theory and Evidence*, 116 Q.J. ECON. 1261, 1285–86 (2001) (self-control model); Jonathan Gruber and Botond Koszegi, *A Theory of Government Regulation of Addictive Bads: Optimal Tax Levels and Tax Incidence for Cigarette Excise Taxation* (Nat’l Bureau of Econ. Research, Working Paper No. 8777, Feb. 2002) (presenting time-inconsistent preferences as justification for regulation of addictive drugs). On the other hand, there is no consensus that addiction indicates a departure from rationality, rather debate about the consistency of Becker’s rational addiction model with actual behavior still persists. *See* Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675, 694–95 (1988); Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex-Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1181–1223 (1998); *see also* W. KIP VISCUSI, SMOKING: MAKING THE RISKY DECISION



contextual considerations are a reason that this Article does not purport to say that mandatory process requirements are always justified (or never are). The behavioral approach provides an explanation for the prevalence of process mandates in our law as well as a framework for deciding when process should be mandatory, but assessment of the desirability of a particular process mandate requires consideration of context, as shown in the examples provided in the next Part.

But choice-respecting mandates do largely avoid a second objection to mandates often offered in support of a presumption against regulation, that is, the liberty cost of any mandate. To lovers of liberty, any mandatory rule comes with an inherent liberty cost because it deprives people of the right to make a choice, even a bad choice. Critics of behavioral law and economics have attacked behavioral studies for failing to consider this liberty cost, which they urge should create a presumption against regulatory intervention.<sup>135</sup>

The liberty cost of mandates is a critical component in the debate about the normative desirability of whether and how to interfere in individual decision making (by nudge, by mandate, or not at all). The idea that nudges preserve choice (by, for example, leaving a regulated party the opportunity to opt out of a default rule) was the key move that broke open the first wave of soft normative behavioral economic analysis, associated with “libertarian paternalism” and “asymmetric paternalism.”<sup>136</sup>

Additionally, the liberty cost of mandates and nudges is a load-bearing aspect of the argument of those who say that because of the knowledge problem, policymakers should not employ behavioral market failure as a justification for regulation.<sup>137</sup> That is because the knowledge problem does not actually counsel for or against regulation, it says only that it is difficult for policymakers to know the true effect of regulation. In order to use this insight as an argument against regulation, proponents rely on a presumption against restricting choice on the ground that come what may, laws that interfere with choice pose liberty costs.<sup>138</sup> This approach makes sense; if we are uncertain about most costs and benefits of an intervention, but certain of one cost, it follows naturally that we should err against the intervention.

This is why it is important that process mandates and other choice-respecting mandates do not pose as great a liberty cost as ordinary mandates. While a process mandate deprives both parties of a choice *ex ante*, namely, the choice to waive (or otherwise specify) process, it does so while giving one of the affected parties a choice she would not otherwise have had *ex post*, namely, the right to air her grievance. As such, a process mandate is not as purely liberty restricting as, for example, a ban on cigarette smoking or mandate that people save for retirement. Indeed, a process mandate may seem more liberty enhancing than the alternative to a customer or patient or employee who is reminded at the time of suit, after suffering a grievance, that she has agreed in advance with the seller or insurer or employer that she has grown to loathe that she would not sue, or could sue only in the forum and through the process designed by her opponent. (The seller or insurer or employer, of course, will take the opposite view).

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(1992); ROBERT D. TOLLISON & RICHARD E. WAGNER, *THE ECONOMICS OF SMOKING* (1992).

135. See Wright & Ginsburg, *supra* note 42.

136. See Bubb & Pildes, *supra* note 21, at 1604.

137. E.g. Rizzo & Whitman, *supra* note 129.

138. See Wright & Ginsburg, *supra* note 42, at 1062–67.

Furthermore, the normative case for already-extant process mandates is even stronger. Process mandates already pervade the law and often become the subject of controversy only when scholars employing the classical economic approach advocate they be rescinded.<sup>139</sup> Against a baseline of mandatory process, which may itself be adaptive, the mere possibility of behavioral market failure cuts against the certainty of arguments that employ the rationality assumptions of classical economic analysis.<sup>140</sup>

#### IV. IMPLICATIONS

The behavioral approach to mandatory process should be taken into account anytime policymakers decide whether to mandate process, eliminate an existing mandate, or decide how much process to mandate. This Part demonstrates the operation of the behavioral approach as to four specific process policy questions. Subpart A discusses how the behavioral approach can be used to defend the ACA's process mandate. Subpart B discusses implications for agreements to alter the Federal Rules of Civil Procedure, currently the subject of active scholarly debate. Subpart C offers implications for an open question of constitutional law, specifically, the question whether claimants to government benefits may waive their right to process "due" under the Fifth or Fourteenth Amendments to the Constitution of the United States. Subpart D shows how the explanation offered here can point out not just where a process mandate is justified, but where one is not.

##### *A. Explaining the Affordable Care Act's Process Mandate*

The Obama Administration has famously embraced the "asymmetrically paternalistic" approach to regulation advocated by Cass Sunstein, Christine Jolls, and others, enacting numerous regulations that only "nudge" people to behave in a particular way while leaving the ultimate choice to them. But the Administration's signature legislative enactment, The Patient Protection and Affordable Care Act, famously takes a different approach. The ACA does not nudge, it shoves.

The ACA's most famous mandates, so far, are the requirement that uninsured individuals obtain health insurance, the "individual mandate"; the requirement that all insurance plans include coverage for contraceptive services, the "contraception

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139. Consider, for example, the controversy surrounding Richard Epstein's suggestion that parties be allowed to contract out of the malpractice system. See Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1 AM. B. FOUND. RES. J. 87 (1976); see also Lawrence, *supra* note 123, at 851 ("Scholars of law and economics have long contemplated versions of [Epstein's] proposal, although currently there is no uniform endorsement of the idea." (internal citations omitted)).

140. This insight is a specific application of the more general point that it is easier to use behavioral economics to support "anti-antipaternalism"—here, to doubt the freedom-of-contract rationale as a basis for restricting extant process mandates—than it is to use behavioral economics to support outright paternalism. See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541 (1998) ("[B]ounded rationality pushes toward a sort of anti-antipaternalism—a skepticism about antipaternalism, but not an affirmative defense of paternalism.").

mandate”); and the requirement that employers provide subsidized health insurance to their full-time employees, the “employer mandate.” The bases for and wisdom of these mandates has been the subject of extensive popular and scholarly attention.

The health reform law contains a fourth mandate that has not received the same level of attention, yet. The law mandates the procedural rights that must be made available as part of health insurance coverage decision making.

“One of the most important consumer protections” in a law that doubles down on insurer-administered healthcare, this process mandate says that even purely private health insurers must offer their beneficiaries the opportunity to challenge decisions denying healthcare coverage claims all the way to an “independent” external reviewer.<sup>141</sup> The reform is a significant one. In 2013 alone, the Centers for Medicare and Medicaid Services expected more people to air their grievances through this dispute resolution process than to file civil lawsuits of any kind in federal court.<sup>142</sup> And this process mandate is likely to grow in importance as the need to curb growing healthcare costs presses insurers to ration coverage more explicitly.<sup>143</sup>

Why mandate a process to govern review of health plan coverage decisions rather than leave such choices to freedom of contract? The forgoing analysis presents an explanation. At the time a beneficiary shops for insurance, the possibility of needing coverage for a particular treatment of service is far off; the possibility of such needed coverage being denied will seem more remote still. Furthermore, if projection bias causes the beneficiary to assume static emotional states, then she will not anticipate that a denial of coverage could cause her particular emotional harm (separate from the financial loss), and so will not anticipate that participating in a dispute resolution process could soothe such a grievance. And beyond projection bias, a beneficiary

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141. Timothy Jost, *Implementing Health Reform: The Appeals Process Amended Rule*, HEALTH AFFAIRS (June 23, 2011), <http://healthaffairs.org/blog/2011/06/23/implementing-health-reform-the-appeals-process-amended-rule/>; see also Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

142. Compare Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 43328, 43343 tbl.2 (July 23, 2010) (to be codified at 45 C.F.R. pt. 147) (projecting 377,500 appeals will be sought in 2013), with *Filings in the Federal Judiciary Continued to Grow in Fiscal Year 2010*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Mar. 15, 2011, at 3 available at [http://www.uscourts.gov/News/TheThirdBranch/11-0301/Filings\\_in\\_the\\_Federal\\_Judiciary-Continued\\_to\\_Grow\\_in\\_Fiscal\\_Year\\_2010.aspx](http://www.uscourts.gov/News/TheThirdBranch/11-0301/Filings_in_the_Federal_Judiciary-Continued_to_Grow_in_Fiscal_Year_2010.aspx) (noting two percent annual growth rate in civil filing numbers, with a total of 282,895 filed in 2010).

143. See M. GREGG BLOCHE, THE HIPPOCRATIC MYTH 10 (2011) (“Medicine’s therapeutic potential is surpassing our ability to pay for it. . . . We will ration care.”); see also ROBERT P. RHODES, HEALTH CARE POLITICS, POLICY, AND DISTRIBUTIVE JUSTICE: THE IRONIC TRIUMPH 14 (1992) (“No more can we explain death and suffering as a consequence of fate. It is our medicine, or lack of it, that denies death and suffering. We know we must choose who receives scarce resources and who does not. No longer can we attribute to fate or to God the responsibility for making life-and-death decisions. . . . These new choices challenge our basic values and frequently produce conflict.”); Randall R. Bovbjerg, Charles C. Griffin, & Caitlin E. Carroll, *U.S. Health Care Coverage and Costs: Historical Development and Choices for the 1990s*, 21 J. L. MED. & ETHICS 141, 150 (1993) (“Medical ‘need’ was once thought to set a natural limit on services; in fact, ‘need’ is an expansive, not a limiting concept.”).

might be optimistic about the likelihood of being denied coverage, which would also cause her to underappreciate the value of an appeal right.

To be sure, this is all supposition; we do not have data on either the benefit a claimant gets from challenging an insurance coverage denial or of beneficiaries' actual susceptibility to projection bias. Here is where the "knowledge problem" usually proves fatal for mandates<sup>144</sup>; where we are unsure about the presence of a behavioral market failure, the fact that mandates limit choice counsels against their adoption. But as discussed in Part III, that argument does not have the same force in this context.

The prevalence of process mandates throughout the law and the fact that a process mandate actually promotes choice for the beneficiary *ex post* (by giving her the option to appeal) even while limiting her options *ex ante* (by taking away her option to forego a right to appeal) undercuts the force of the freedom-of-contract presumption. If one views the former choice (the option to appeal) to be as meaningful as the latter (the option to waive the right to appeal), it is not clear which way the intrinsic value of liberty cuts, making the ACA's choice to mandate process for plan beneficiaries defensible in light of the mere possibility of projection bias. Indeed, the anguished reaction of patients and courts to the former (no process) state of affairs indicates that the option to appeal is indeed an especially significant choice.<sup>145</sup>

### *B. Contracting Around the Federal Rules of Civil Procedure*

In the past several years, a vibrant literature has explored whether and when federal courts should permit parties to alter, by agreement, the Federal Rules of Civil Procedure.<sup>146</sup> The ultimate approach that courts take to answer this question could have substantial implications for the administration of civil justice in the United States. Excellent surveys of the growing importance of this practice and the scholarly debate surrounding it are put forward by Davis and Hershkoff, Bone, and Dodge.<sup>147</sup> The behavioral approach to mandatory process offered above has significant implications for this issue.

First, the possibility that projection bias could lead parties to undervalue their day in court provides an independent reason to be concerned about agreements to alter procedural rules that affect the perceived fairness of civil process. At the same time, it provides reason to be sanguine about rules that force participation in programs intended to do nothing more than air (and thereby soothe) grievances, such as

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144. *See supra* Part III.

145. *See supra* notes 1–3 and accompanying text.

146. *E.g.*, Robert G. Bone, *supra* note 6, at 1333 n.21, 1334 nn.22–23 (collecting sources pro and con contracts to alter the Federal Rules of Civil Procedure); *id.* at 1342–52 (discussing current law on enforcement of agreements to alter rules of procedure in federal and state court); Davis & Hershkoff, *supra* note 6, at 527; Dodge, *supra* note 6, at 734–38 (discussing enforcement of procedural contracts in federal court); Resnik, *supra* note 6, at 613; Taylor & Cliffe, *supra* note 60, at 1098–1105 (arguing that Rules Enabling Act prohibits judicial enforcement of contractual alterations to the Federal Rules of Civil Procedure).

147. *See* Bone, *supra* note 6; Davis & Hershkoff, *supra* note 6; Dodge, *supra* note 6.

requirements that parties participate in mediation before hearing their dispute in court, even if the parties do not think in advance that mediation will be worth the effort.<sup>148</sup>

Contracts altering rules of civil procedure that affect the grievance-soothing functions of process—the “day in court”—are especially suspect due to the possibility of behavioral market failure preventing one or both parties from adequately assessing this value *ex ante*. This concern augments the classical economic concerns discussed in Part II.A.1, as well as the federal court-specific concerns discussed in Parts II.A.2(c) and (d), providing a reason to refuse enforcement even when those concerns are absent and bolstering the case against enforcement when they are present.

Research into procedural justice indicates particular rules that should be especially resistant to contractual alteration. The first are those rules that affect access to an in-person hearing, because of the importance of that right to the acceptance-generating power of process.<sup>149</sup> This obviously implicates procedural changes that take away this right directly, like an agreement waiving the right to trial by jury, or an agreement to appear by telephone. It also implicates agreements that make an in-person hearing practically more difficult, such as forum selection clauses that force a plaintiff to litigate in a distant forum.

Another category of rules of civil procedure that the behavioral approach indicates should be especially resistant to contractual alteration are those that affect the quality of cases a plaintiff may bring. Rule 8 of the Federal Rules of Civil Procedure, which governs pleading, is the most apparent example of such a rule.<sup>150</sup> Agreements altering the filing fee schedule are also suspect under the behavioral approach, as are agreements limiting the availability of discovery during the pendency of a motion to dismiss (perhaps by providing for an automatic stay).<sup>151</sup> (Such an agreement limits access insofar as discovery during the pendency of the motion could, due to the possibility of amendment, make the pleading threshold easier to meet.) While efficiency may dictate that losing cases be weeded out, the behavioral approach indicates that there is value even to giving a losing plaintiff his day in court and that plaintiffs will tend to underestimate that value before a dispute arises.

Second, as a general matter, the behavioral approach counsels in favor of an across-the-board prohibition on all agreements to alter rules that implicate the grievance-soothing functions of process.<sup>152</sup> By adding an additional context-dependent reason to doubt, in a particular case, that parties’ contracts to alter such Federal Rules are in fact in the parties’ interest, the behavioral approach ultimately counsels in favor of a uniform rule against enforcement. Coupled with other context-dependent inquiries, such as the inquiry into whether enforcement of

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148. See Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN’S L. REV. 77, 78–79 (2007).

149. See *supra* note 101 and accompanying text.

150. FED. R. CIV. P. 8; see also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 557 (2007) (interpreting pleading standard of Rule 8 to weed out implausible suits).

151. See generally Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss is Pending*, 47 WAKE FOREST L. REV. 71 (2012) (in many districts discovery automatically proceeds during pendency of motion to dismiss).

152. To the extent possible, such a blanket prohibition might include a carveout for suits between two corporate entities. See *infra* Part IV.D.1.

the contract would undermine the underlying substantive law envisioned by Dodge, and the inquiry into whether enforcement would undermine other purposes of the federal courts envisioned by Davis and Hershkoff, the “cost” of adjudicating whether to enforce particular procedural contracts could easily outweigh any benefit that a case-by-case approach would have over a uniform prohibition.<sup>153</sup> That is, the more that must be considered in order to apply a standard, the more attractive a rule begins to look. This concern is heightened in designing a set of adjudicatory procedures whose very purpose is uniformity.<sup>154</sup>

In sum, the behavioral approach has important implications for civil procedure. It counsels against enforcement of predispute agreements altering rules that limit a claimant’s right to an actual hearing, such as forum selection clauses, as well as agreements that limit a claimant’s right to come to court in the first place, provided in the pleading standard of Federal Rule 8 and elsewhere.

### C. Due Process: Nudge or Mandate?

The most famous process mandate in American law is surely the Fifth Amendment’s instruction that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>155</sup> But even due process is not always mandatory process. In some circumstances, the Supreme Court has treated the Due Process Clause as a mere nudge, a default rule subject to opt out. In others, the Court has not yet decided whether the clause mandates or nudges due process. In such cases the behavioral approach is illuminating.

To crystallize the discussion, a hypothetical: Mashaw’s prominent study of the administration of social security disability suggests that much of the energy spent on administrative appeals could be better spent on getting initial decisions right.<sup>156</sup> Assuming policymakers agreed in a particular case, could they offer participants the choice of opting out of the default, due-process-required administrative appeal system *ex ante*, and into a system in which the resources that would have been spent on due process are poured into getting decisions right in the first instance? Or even a system in which the resources saved by not operating the administrative appeals mechanism are poured into extra benefits for those who opt out? Given the massive transaction costs of operating entitlement appeals systems in social security, Medicare, veterans’ benefits, and elsewhere, this hypothetical is not so farfetched.

The constitutionality of a predispute opt-out administrative process regime governing such a “new property” entitlement<sup>157</sup> subject to due process protections would implicate two potentially conflicting lines of Supreme Court precedent. In a series of cases beginning with *M/S Bremen v. Zapata Off-Shore Co.*, the Supreme

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153. See generally Lawrence, *supra* note 88 (discussing choice between rule and standard in designing Federal Rules of Civil Procedure); cf. Bone, *supra* note 6 (expressing doubt that costs and benefits of procedural contracts can be measured and weighed).

154. Taylor & Cliffe, *supra* note 60, at 1100–04. But see Bone, *supra* note 6, at 1371 (rejecting uniformity argument against contractual deviations from the Federal Rules).

155. U.S. CONST. amend. V.

156. JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1985); see also ELEANOR D. KINNEY, PROTECTING AMERICAN HEALTH CARE CONSUMERS (2002) (building on Mashaw’s analysis).

157. See Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

Court held that the due process protections offered to litigants prior to entry of a civil judgment may be waived *ex ante*, before a dispute has arisen.<sup>158</sup> Indeed, in *Overmyer Co. Inc. v. Frick Co.*, the Court found due process was not violated by a cognovits note, by which a debtor agreed in advance that her creditors' attorney could agree to a civil judgment on her behalf.<sup>159</sup> This is why an arbitration need not follow all the procedures that due process requires be available in federal court in order to produce an enforceable judgment against the defendant.

On the other hand, in addressing specifically the procedural protections that must be available when the government alters or withdraws an entitlement, the Supreme Court has rejected the theory that claimants can be asked to accept the "bitter with the sweet," that is, that subconstitutional procedures are permissible when they are provided for in the law that creates the initial entitlement. As the Court put it in *Cleveland Bd. of Educ. v. Loudermill*: "The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."<sup>160</sup>

An opt-out regime conditioning access to a better administrative process or to enhanced benefits would not conflict with this precise holding, because the alteration to the constitutionally created safeguards would come by contractual agreement, not legislative mandate. But it would conflict with the spirit of *Loudermill* insofar as the reasoning that the content of "due process" is to be determined by the Court in interpreting the Constitution precludes contractual as well as legislative alteration.

How should this question of law be resolved? Lower courts that have addressed predispute agreements to go without the protections of due process have held them to be enforceable on freedom-of-contract grounds.<sup>161</sup> Furthermore, scholars have suggested that an opt-out administrative regime should be constitutionally permissible, again seeing "no obvious injustice or arbitrariness in holding the individual bound by the *procedural* strings that were voluntarily accepted."<sup>162</sup> The

158. 407 U.S. 1 (1972).

159. 405 U.S. 174, 187–88 (1972) (holding the cognovits note was enforceable). The Court did reserve the question whether cognovits notes would be enforceable in other situations. *Id.* at 188 ("Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."); *see also* *Fuentes v. Shevin*, 407 U.S. 67, 94–96 (1972) (holding that the waiver was facially invalid in adhesive consumer contract).

160. 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (Powell, J., concurring)).

161. *See Gorham v. City of Kansas City*, 590 P.2d 1051, 1058 (Kan. 1979) (holding that union could waive due process rights through collective bargaining agreement so long as replacement procedures were "fair, reasonable, and efficacious"); *Antinore v. State*, 371 N.Y.S.2d 213 (N.Y. App. Div. 1975), *aff'd*, 40 N.Y.2d 921 (1976) (enforcing collective bargaining agreement that limited due process rights). *Cf. Murphy v. Wack*, No. 89 Civ. 3300, 1991 WL 64193, at \*5 n.3 (S.D.N.Y. Apr. 18, 1991) (wondering whether *Antinore* is still good law after *Loudermill*).

162. Rodney M. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 111 (1982)

behavioral approach shows that the case for allowing opt-out of due process prior to the formation of a dispute is not so straightforward.

Whether an agreement to opt-out of procedural due process protections before a dispute has arisen should be constitutional is a different question than the one the behavioral approach addresses, that is, whether the law should approve of such an agreement simply as a matter of policy on the basis of the freedom-of-contract assumption that doing so would be welfare enhancing. In particular, the constitutional question might implicate questions about original intent (if you are an originalist); about the interpretation of precedent (we are all precedentialists); and about the design of constitutional rules (which are difficult to tailor case by case).

However, the scholars and courts that have approved of the constitutionality of such agreements have focused only on the freedom-of-contract rationale as a reason to do so. Here, the behavioral approach offers a rebuttal. Even an agreement made knowingly, without any imbalance in bargaining power, may reflect the behavioral biases discussed in Part II.B—projection bias and also optimism or hyperbolic discounting—that could lead the would-be claimant to undervalue her right to process. While Laurence Tribe asked “why should a would-be government employee . . . not be permitted to waive procedural protections” *ex ante*,<sup>163</sup> these behavioral considerations provide an answer: because she may undervalue her right to a “day in court” when entering into such an agreement. In light of the constitutional gravity of the issue, such *ex ante* waivers should not be enforced absent assurance that the claimant was not subject to projection bias. (In the case of a corporate claimant this may not be difficult to acquire, see *infra* Part IV.D, but in the case of an ordinary, mortal applicant for benefits it may be far more difficult.)

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(“[W]hen the contractual relationship between the state and the individual is free of such coercive taint, there is no obvious injustice or arbitrariness in holding the individual bound by the *procedural* strings that were voluntarily accepted. Some rights may be inalienable in some situations, just as some bargains are illegal despite mutual and uncoerced assent; but as long as courts retain their normal power to police bargains and carefully scrutinize the contractual process, the lack of meaningful procedural recourse for an individual can surely be the legitimate object of an enforceable bargain.”) (emphasis in original); see also *id.* at 114 (“If the validity of the condition turns on balancing the government interest against the individual right involved, there is nothing wrong with ‘devaluing’ the individual interest when it is voluntarily bartered for a benefit.”); *id.* (“[T]o the extent that concerns for individual dignity create a need for due process norms as ends in themselves, those dignity interests are legitimately devalued when abrupt procedure is voluntarily accepted.”); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 280 n.37 (1975) (“Absent some notion of great bargaining inequality, why should a would-be government employee, or a would-be debtor, *not* be permitted to waive procedural protections in return for benefits each would rather enjoy in hybrid form than not at all?”) (emphasis in original); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L. Q. 305, 374 (2001) (“[T]he recipient of a government benefit may be deemed to have waived due process rights as part of the bargaining process by which the benefit was obtained.”).

163. Tribe, *supra* note 162, at 280 n.37 (emphasis omitted).



*D. Mandate Unjustified: Insurers' Contracts with Medicare*

The behavioral approach is especially essential to informed analysis of process policy in areas where policymakers are tasked with deciding whether the law should mandate process where it previously did not do so. That is, because unlike reliance on a single deontological view or potential externality, the behavioral approach is capable of doing more than just defending existing process mandates; when neither projection bias nor any of the justifications discussed in Part II.A are present, the behavioral approach counsels against a process mandate. Such questions are especially common and important in the increasingly regulated tenth of the economy related to healthcare, as illustrated in Part IV.A, and this Section points to another such application: private insurers' contracts with the federal government to administer Medicare or operate on the Affordable Care Act's exchanges.

The United States government is very much in the business of healthcare coverage. The ACA amplified that role.<sup>164</sup> Rather than displace the market for healthcare with a single-payer system, the ACA expanded that market—mandating demand—while simultaneously increasing the surveillance role of government in the marketplace.<sup>165</sup> In an effort to tame healthcare, an industry that is perceived to be unique, the invisible hand of the market has been partnered with the red, white, and blue one of Uncle Sam.

This public-private partnership is evident even in the design of original Medicare, the first-enacted federally subsidized insurance program for the elderly and disabled.<sup>166</sup> Medicare Parts A and B—original Medicare—are nominally “single payer,” in the sense that the government directly pays for medical services provided to beneficiaries.<sup>167</sup> They are actually operated, however, by third-party contractors, often working for a profit, who are hired by the Centers for Medicare and Medicaid Services to run Medicare on its behalf.<sup>168</sup> And, of course, providers and device manufacturers do not work for the government; they remain in the private sector and agree to serve Medicare beneficiaries only because they are paid to do so.<sup>169</sup>

The private role in public healthcare is even more pronounced in the more recent additions to government-subsidized healthcare, Medicare Parts C and D.<sup>170</sup> There,

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164. See Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1611 (2011) (discussing minimum coverage requirements and other ACA initiatives to regulate private insurance).

165. *Id.*

166. See Nicholas Bagley, *Bedside Bureaucrats: Why Medicare Reform Hasn't Worked*, 101 GEO. L.J. 519 (2013).

167. *Id.* at 530.

168. *Id.* at 527.

169. *See id.*

170. In Medicare Part C, Medicare beneficiaries opt to put their Medicare premium dollars toward privately-administered health insurance, rather than participate in the federally run Medicare program. Insurers who accept Medicare Part C beneficiaries enter into agreements with the Centers for Medicare and Medicaid Services that govern the terms of their plans, but benefit not only by having access to a wider customer base, but also by receiving risk sharing and other subsidies from the taxpayers.

In Medicare Part D—the Medicare prescription drug program—Medicare formally contracts with insurers, known as “Part D sponsors,” to provide coverage to Medicare

the government is not actually the payer, from the perspective of either the beneficiary or the provider. Instead, private nonprofit and for-profit insurers provide coverage to beneficiaries in these components, with the government subsidizing and regulating that coverage on the back end through contractual and quasi-contractual agreements with the participating insurers.<sup>171</sup>

The public-private partnership continues in the ACA. Under the Act, the government increased demand for coverage in the individual market by mandating individuals buy health insurance that covers certain benefits. At the same time, the Act tasks state and federal governments with creating and administering an exchange marketplace in which such plans are bought and sold, and entitles participating insurers to government-subsidized (i.e., taxpayer-subsidized) and administered risk protection through the risk corridors and cost sharing.<sup>172</sup> As in Medicare, the insurers that choose to participate in the government-run marketplace created by the ACA get the benefit of increased revenues resulting from government subsidies, but must be willing to subject themselves to heightened government control.<sup>173</sup> So far, some insurers have thought that tradeoff worth it, while others have not.<sup>174</sup>

Disputes between the government and such insurers that choose to do business with it in the medical marketplace are inevitable. One common sort of dispute arises out of the myriad payment determinations that the government must make—in Medicare Parts A, B, C, and D—as well as in operating on the ACA's exchanges. In each area, the Centers for Medicare and Medicaid Services (CMS), the responsible division of the Department of Health and Human Services, must calculate the payments owed to particular providers, insurers, and hospitals.<sup>175</sup> (The CMS will first do this as to participants in the ACA's exchanges in early 2015, after the 2014 plan year is concluded.) This amounts to millions of individualized calculations each year, forming the fodder for as many disputes as there are contracting insurers and providers.

In many of these areas, the legal right to ex post dispute resolution process afforded to entities that do business with the government remains undetermined. In the areas where this question has been resolved, however, the law has generally mandated that the private nonprofit and for-profit entities that do business with the government have available the same process for resolving disputes with the government—including case by case adjudication in federal court—that is made available to Medicare beneficiaries, or to citizens aggrieved by agency action

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beneficiaries at great reduced cost. The Part D contracts these sponsors enter into with the HHS set the premiums they will charge, the reimbursement they will receive from the government, the distribution of risk between the insurer and the government, and so on.

171. See Bagley, *supra* note 166, at 527.

172. See 42 U.S.C. § 18061 (2012) (Transitional reinsurance); 42 U.S.C. § 18062 (2012) (Risk corridors calendar years 2014, 2015, 2016); 42 U.S.C. § 18063 (2012) (Risk adjustment).

173. See Baker, *supra* note 164, at 1611–12 (discussing exchange participation).

174. See Leemore Dafny, Jonathan Gruber & Christopher Ody, *More Insurers Lower Premiums: Evidences from Initial Pricing in the Health Insurance Marketplaces* (Nat'l Bureau of Econ Research, Working Paper No. 20140, 2014), available at <http://www.nber.org/papers/w20140>.

175. Patient Protection and Affordable Care Act; Amendments to the HHS Notice of Benefit and Payment Parameters 2014, 78 Fed. Reg. 15,541, 15,543 (Mar. 11, 2014) (to be codified at 45 C.F.R. pt. 153, 156) (describing method for calculating subsidies).

generally.<sup>176</sup> This is so notwithstanding the possibility that these entities might freely enter business with the government even if no such process were available. This can be because of either statutory or regulatory requirements, and sometimes is the product of the strong presumption in favor of judicial review of agency action applied by courts.<sup>177</sup> Indeed, in some cases insurers are entitled to more dispute resolution process than is offered to individual beneficiaries.<sup>178</sup>

The law mandates dispute resolution in this domain reflexively, assuming that entities that voluntarily do business with the government to administer healthcare should have access to the same dispute resolution process that statutes and regulations currently make mandatory for Medicare beneficiaries or other individuals aggrieved by nonconsensual agency action. But the behavioral approach shows that this assumption is unfounded.

Unlike beneficiaries, insurance companies are rational actors with one static preference, namely, wealth maximization. As such, dispute resolution process serves a diminished grievance-reducing function vis-a-vis insurers that contract with the government to administer Medicare benefits, as explained in Part I. As to such firms, mandatory dispute resolution process can be justified only by either its error-reducing functions or a deontological preference for a system in which process is available in such situations. Both justifications are unpersuasive in this context, as explained in Parts II and III.

### 1. Corporate Grievances?

Insurance companies are rational wealth maximizers. There is no reason to believe that insurers suffer the costs of grievances discussed above, and so no reason to believe dispute resolution serves a grievance-reducing function vis-a-vis these entities. Insurers do not grieve. True, insurers' employees may grieve, and may even benefit personally when the firm has its day in court. But the shareholders of publically traded corporations, at least, would presumably not want such employee grudges to influence the insurer's behavior.

### 2. Error Reduction and Medicare Payment Appeals

While grievance reduction is a function that dispute resolution process is uniquely capable of providing, error reduction is not. In many contexts, including the calculation of payments to insurers, the goal of error reduction can be more efficiently obtained by other means, such as greater investment in accuracy ex ante or auditing and random sampling by a neutral third party. As a result, dispute

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176. See *Fox Ins. Co. v. Ctrs. Medicare & Medicaid Servs.*, 715 F.3d 1211, 1217–19 (9th Cir. 2013) (describing procedural rights afforded terminated Part D insurer); cf. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (discussing the presumption of judicial review of agency action).

177. E.g., *Illinois Council on Long Term Care v. Shalala*, 529 U.S. 1, 18 (2000) (discussing “presumption against preclusion of judicial review” in context of Medicare provider suit for benefits); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 667 (1986) (same).

178. See *Fox*, 715 F.3d at 1222 (describing procedural rights afforded terminated Part D insurer).

resolution process should not be presumptively available in these areas if the insurers would be willing to go without.

The Centers for Medicare and Medicaid Services has already tentatively come to this conclusion in a very limited area, by providing that hospitals have no right to challenge the decision to reopen payment determinations (although they do have the right to challenge the decision made on reopening).<sup>179</sup> When challenged, the Ninth Circuit upheld this policy, noting and deferring to the CMS's determination that ex ante auditing of recovery audit contractors—the entities that make reopening determinations—was a superior means of error prevention than a claimant-driven dispute resolution process.<sup>180</sup> The argument of this section is that the CMS was right in that case, and that it should explore limiting provider and insurer rights to judicial review of individualized determinations in other areas.

There are three reasons to doubt the superiority of dispute resolution process as a tool of error reduction in paying Medicare contractors. First, dispute resolution in this context is a biased error reducer. Because companies only appeal errors that hurt them, false positives are never identified through the dispute resolution process. (Note that this bias could also be corrected by giving some entity the incentive and ability to discover and challenge through the dispute resolution process payment errors in favor of providers or insurers, but such a rule could create its own problems, as seen in the Recovery Audit Contractor program that has recently been the subject of controversy in the Medicare Part A context.)<sup>181</sup>

Second, dispute resolution is a costly means of error identification and correction.<sup>182</sup> Third, because the government processes a high volume of Medicare payment claims each year (and will process a high volume of claims from insurers participating on the exchanges), a certain number of errors is not only inevitable but desirable.<sup>183</sup> Unlike other tools of error reduction, such as auditing, dispute resolution process is not capable of error tolerance; it looks at determinations one at a time, and so provides a costly route by which even otherwise desirable errors are identified and corrected. Whether error reduction is ever most cost-effectively accomplished by hearings in Medicare is beyond the scope of this Article. But the preceding discussion offers reason for doubt. Wherever policymakers conclude that other means would be more cost-effective, they should consider conditioning participation in Medicare on a company's agreement to be subject to such means.

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179. *See* Palomar Med. Ctr. v. Sebelius, 693 F.3d 1151, 1161–62 (9th Cir. 2012).

180. *Id.* at 1165.

181. *See* Sandra M. Terra, *Regulatory Issues: Recovery Audit Contractors and Their Impact on Case Management*, 14 PROF. CASE MGMT. 217 (2009).

182. *See supra* Part I.

183. *See* Bowen v. Yuckert, 482 U.S. 137, 157 (1987) (stating that the “Secretary faces an administrative task of staggering proportions” in processing benefit claims and “[p]erfection in processing millions of such claims annually is impossible”); Mercer v. Birchman, 700 F.2d 828, 835 (2d Cir. 1983) (“It has never been expected that” a “vast” claims-processing department of government “can achieve absolute procedural perfection.”).

### 3. Deontological Justifications

Deontological justifications for dispute resolution process have diminished applicability to businesses that administer Medicare. If a business entity would be willing to attempt to earn a profit by assisting in the provision of government-subsidized healthcare whether or not they are afforded a right to ex post dispute resolution process, then why should such a right be afforded if it does not serve consequentialist ends?

This question is especially pronounced in the Medicare Part D context, where insurers compete to serve in the program by submitting premium bids to the government. Companies could incorporate the lost “value” of dispute resolution process in their premium bids, and those companies that did not value such process would have a competitive advantage. Such an arrangement would be a contrast to the current approach, which automatically gives all companies a right to dispute resolution process, benefitting those companies that are able to extract the most value out of the taxpayers through use of that process.

### CONCLUSION

This Article has offered an improved understanding of the value of process and, with it, a new explanation of when procedural rules should be made mandatory. Specifically, it has shown that people might fail to appreciate the potential value of a “day in court,” either by failing to anticipate that they may be bitterly disappointed by a potential outcome or by failing to anticipate that simply being heard could soothe that disappointment. Because laws making procedural rules mandatory are not as liberty-restricting as more run-of-the-mill mandates—they leave one party a meaningful choice ex post that he might otherwise have mistakenly given away ex ante—the possibility of such market failure makes process mandates justifiable in a wider range of contexts than more ordinary mandates.

