

# CONSTITUTIONAL CHALLENGES TO COURT-ORDERED ARBITRATION

KIMBERLY J. MANN\*

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## I. INTRODUCTION

Legislatures and courts encourage, and sometimes require, parties to resolve their disputes using various alternatives to litigation. These alternative methods have the potential to increase the parties' satisfaction with the process and relieve stress on the court system.

Court-ordered, nonbinding arbitration<sup>1</sup> is one such alternative. This method requires parties to present their dispute to an arbitrator or a panel of arbitrators for resolution. When parties are ordered to arbitrate, however, they face the possibility of losing their day in court. For example, some jurisdictions have allowed judges to deny motions for a trial de novo when a party can show that it did not adequately participate in the arbitration.<sup>2</sup> Moreover, although parties may request a trial de novo if they are not satisfied with an arbitration result, those who do so are sometimes penalized if the result of the new trial is not more favorable than the arbitration decision.<sup>3</sup>

Parties who feel that mandatory, nonbinding arbitration deprives them of their day in court have challenged such arbitration on a variety of federal and state constitutional grounds. This Comment ex-

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1. This Comment uses the term "arbitration" to refer to this variety of dispute resolution. Court-ordered, nonbinding arbitration is distinguishable from voluntary, binding arbitration. Binding arbitration is typically a contractual obligation through which parties place the final disposition of their dispute in the hands of an arbitrator or arbitration panel. See FLA. STAT. § 44.104 (1995) (permitting parties in a civil action to submit their dispute to a court-appointed arbitrator). The United States Supreme Court has upheld the validity of binding arbitration agreements in order to advance new forms of dispute resolution. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 322-26 (1985). Nonbinding arbitration leaves the option of court action open by allowing the parties to appeal an arbitration decision through a motion for a trial de novo. See FLA. STAT. § 44.103(5) (1995).

2. See, e.g., *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712, 715 (E.D. Pa. 1983).

3. See, e.g., FLA. STAT. § 44.103(6) (1995) (allowing the assessment of arbitration costs, court costs, and attorney's fees when the trial outcome is not more favorable than the arbitration).

amines the relative merits of these challenges. Part II explores claims that arbitration deprives parties of their constitutional right to a jury trial. Part III examines due process challenges to arbitration. Part IV considers claims that arbitration violates the doctrine of separation of powers, while Part V explores claims that arbitration violates the Equal Protection Clause. Part VI considers whether parties who are ordered to arbitration are denied access to the courts. Finally, Part VII concludes that constitutional challenges against arbitration programs are unlikely to succeed because such programs generally do not place sufficiently heavy burdens upon litigants to violate the Constitution.

## II. TRIAL BY JURY

The right to a jury trial is a fundamental common-law right preserved by the Framers of the Constitution.<sup>4</sup> In England, jury trials were guaranteed to parties litigating legal claims, although not equitable or admiralty claims.<sup>5</sup> In the United States, the right is preserved for claims whose origins can be traced to a common-law cause of action that carried a jury trial right,<sup>6</sup> or for legislatively created causes of action that resemble those at common law.<sup>7</sup> The Seventh Amendment's jury trial mandate applies only to actions brought in federal court;<sup>8</sup> however, most state constitutions also contain jury trial guarantees.<sup>9</sup>

The United States Supreme Court has never addressed how the Seventh Amendment applies to challenges to nonbinding alternative dispute resolution. The Supreme Court has, however, addressed whether a party who is forced to participate in a program analogous to nonbinding arbitration is denied the right to a jury trial. In *Capital Traction Co. v. Hof*,<sup>10</sup> a corporation challenged a District of Columbia law that allowed justices of the peace to conduct jury trials in

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4. See U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

5. See *Capital Traction Co. v. Hof*, 174 U.S. 1, 8-9 (1899).

6. See *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990); see also generally Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 503 (1989). As with many rights, the right to a jury trial can be waived. See *Capital Traction*, 174 U.S. at 21. An argument claiming denial of this right after it has been waived is moot.

7. See *Terry*, 494 U.S. at 564-65 (holding that a jury trial is required for an action brought under the National Labor Relations Act).

8. See *Edwards v. Elliott*, 88 U.S. 532, 557-58 (1874); see also *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."); Golann, *supra* note 6, at 503.

9. See, e.g., FLA. CONST. art. I, § 22. The authors of one treatise found that 48 states provide for jury trials in their constitutions. See 2 RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.8 n.12 (1986).

10. 174 U.S. 1 (1899).

cases with amounts in controversy over twenty dollars.<sup>11</sup> Although the statute allowed parties to appeal cases decided by justices of the peace,<sup>12</sup> Capital Traction was concerned that it would be denied a proper jury trial in the District of Columbia's supreme court.<sup>13</sup> This concern was based upon the portion of the Seventh Amendment that prohibits a fact determined by a jury from being re-examined.<sup>14</sup>

The Supreme Court held that a decision made by twelve men in the presence of a justice of the peace did not constitute a trial by jury within the meaning of Seventh Amendment.<sup>15</sup> The Court concluded that the facts determined by the jury before the justice of the peace could be re-examined by a jury before a judge in the District's supreme court, thus preserving Capital Traction's right to a trial by jury.<sup>16</sup> The Court reasoned that the justice of the peace lacked the judicial power traditionally present during common-law actions.<sup>17</sup> Specifically, the Court found that unlike a judge, a justice of the peace did not have the power to instruct the jury on the law, advise it on the facts, or set aside the jury's verdict if it was not supported by the weight of the evidence.<sup>18</sup>

Courts have subsequently cited Capital Traction in support of the proposition that arbitration does not violate the Seventh Amendment because a party's right to have his or her claim heard by a jury is preserved by the guarantee of a trial *de novo*.<sup>19</sup> However, as the following cases illustrate, parties have argued that while *de novo* jury trials may protect constitutional rights, the delays and penalties suffered by parties ordered to arbitration effectively impinge upon these rights.<sup>20</sup> Delays appear in the form of preconditions to trial imposed on the parties.<sup>21</sup> The fact that litigants are required to participate in arbitration before being allowed to seek a jury trial is used as an example of a precondition that effectively strips away a party's right to a jury.<sup>22</sup>

In *In re Smith*,<sup>23</sup> a case brought under the Pennsylvania Constitution, the Pennsylvania Supreme Court held that a local rule requir-

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11. See *id.* at 3.

12. See *id.* at 4.

13. See *id.* at 3-4.

14. See *id.* at 7-8. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

15. See *id.* at 45.

16. See *id.*

17. See *id.* at 38.

18. See *id.* at 38-39.

19. See, e.g., *In re Smith*, 112 A.2d 625, 629 (Pa. 1955).

20. See generally Golann, *supra* note 6, at 505.

21. See *id.*

22. It should be noted, however, that considerable delays are also imposed upon trial participants in the form of a mandatory discovery process. See, e.g., FED. R. CIV. P. 26.

23. 112 A.2d 625 (Pa. 1955).

ing parties to go to arbitration did not violate Pennsylvania's jury trial guarantee.<sup>24</sup> The court found that the guarantee was intended to secure the right to a jury trial at some point before the issues were finally determined.<sup>25</sup> The court reasoned that the right to a jury trial was kept intact because the courts remained open to litigants who wished to appeal arbitration decisions.<sup>26</sup> If onerous conditions were placed on the availability of that right, however, the court felt that the state's guarantee of a jury trial would be effectively denied.<sup>27</sup>

A frequently litigated issue in right-to-jury-trial claims is whether a penalty or precondition burdens the right to a jury trial. Two penalties and preconditions frequently challenged are those that shift costs to unsuccessful appellants and admit arbitration results in the *de novo* trial. For example, in *Eastin v. Broomfield*,<sup>28</sup> the petitioner argued that mandatory arbitration violated the jury trial right in the Arizona Constitution.<sup>29</sup> The petitioner argued that the admission of arbitration findings would unduly influence the jury and effectively eliminate the petitioner's right to a trial by jury.<sup>30</sup> The court held that because the arbitrator's decision could be appealed to a jury, the right to a jury trial was not jeopardized.<sup>31</sup> The court also held that admission of the arbitration panel's findings did not violate the right to a jury trial because both parties had the opportunity to impeach the findings by presenting their own evidence.<sup>32</sup> The court analogized the panel's findings to the testimony of an expert witness, which is rebuttable through the introduction of other expert testimony.<sup>33</sup>

The plaintiffs in *Firelock Inc. v. District Court*<sup>34</sup> argued that shifting litigation costs to unsuccessful litigants created an onerous condition that interfered with the party's right to a jury trial.<sup>35</sup> The Colorado Supreme Court held that requiring a prevailing party to pay arbitration costs when the trial judgment was not ten percent higher than the corresponding arbitration result was not unreasonable.<sup>36</sup> The court recognized that prerequisites for a jury trial were

24. See *id.* at 629-31 (citing PA. CONST. art. I, § 6).

25. See *id.*

26. See *id.*

27. See *id.*

28. 570 P.2d 744 (Ariz. 1977).

29. See *id.* at 747 (citing ARIZ. CONST. art. II, § 23).

30. See *id.* at 748.

31. See *id.*

32. See *id.* at 748-49.

33. See *id.* at 749; cf. *Meecker v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915) (holding that the introduction of an Interstate Commerce Commission report did not abridge the right to trial by jury). But see *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903, 907-09 (Ohio Ct. C.P. 1976) (holding that the introduction of an arbitration panel report violated the right to trial by jury).

34. 776 P.2d 1090 (Colo. 1989).

35. See *id.* at 1095-96.

36. See *id.* at 1096.

common and, in the case of jury fees, were imposed in every case tried before a jury.<sup>37</sup>

Although the Firelock court found that the penalty of paying arbitration costs was reasonable, such a penalty can act as a deterrent. Parties who face such a penalty may be hesitant to risk losing their money even though they have a meritorious appeal. If a penalty is unusually severe and deters more people from appealing than it was meant to, it may be held unconstitutional as a barrier to the right to a jury trial.

### III. DUE PROCESS

The Fifth and Fourteenth Amendments guarantee due process of law in federal and state court proceedings.<sup>38</sup> These amendments prevent the government from depriving an individual of life, liberty, or property without due process of law. A legal cause of action has traditionally been construed as a property right that is protected by the Due Process Clause.<sup>39</sup> The U.S. Supreme Court has noted that “[t]he hallmark of property is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’ ”<sup>40</sup> If courts do not find that the arbitration process itself sufficiently protects parties’ due process rights,<sup>41</sup> the option of a de novo appeal creates an alternative that should survive any due process challenge.<sup>42</sup>

In *United States v. Raddatz*,<sup>43</sup> the Supreme Court heard a due process challenge to a federal statute that allowed magistrates to preside over certain preliminary motions.<sup>44</sup> In rejecting the petitioner’s due process argument, the Court emphasized that the magistrate’s recommendation was not a final decision.<sup>45</sup> Instead, the final judgment was made by a judge, who could either accept the recommendation of the magistrate or rehear testimony to decide the is-

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37. See *id.* at 1097.

38. See U.S. CONST. amend. V. (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”); *id.* amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”).

39. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

40. *Logan*, 455 U.S. at 430 (citations omitted).

41. Traditional aspects of due process include formal testimony and the right to cross-examine witnesses. See *Golann*, *supra* note 6, at 540 n.238; see also *Goldberg v. Kelly*, 397 U.S. 254, 268-70 (1970) (holding that a pre-termination hearing is necessary to provide due process to welfare recipients who are losing their benefits). However, the Supreme Court has held that less formal procedures may be sufficient to protect due process. See *Hardware Dealers’ Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (upholding use of mandatory binding arbitration to resolve amount of loss in fire insurance claim).

42. See *Golann*, *supra* note 6, at 540.

43. 447 U.S. 667 (1980).

44. See *id.* at 669.

45. See *id.* at 673.

sue.<sup>46</sup> The Court held that Raddatz's due process rights were not violated because the magistrate was hearing a motion rather than conducting a full trial, and because the judge had the freedom to accept or deny the magistrate's recommendation.<sup>47</sup>

The question raised in Raddatz can be compared with the due process issues raised by arbitration. The power of an arbitrator is similar to that of a magistrate. An arbitrator can make a decision and file it with the court, but the ultimate decision lies with the judge if the dissatisfied party elects to appeal.<sup>48</sup>

Courts have found that a party is denied due process when aspects of the appeals process become too burdensome. In *Logan v. Zimmerman Brush Co.*,<sup>49</sup> the Supreme Court held that Logan was denied due process because of a procedural mistake on the part of the Illinois Fair Employment Practices Commission.<sup>50</sup> Specifically, the Commission had failed to schedule a hearing on Logan's discrimination charges within the 120 days required by Illinois law.<sup>51</sup> The Illinois Supreme Court had held that this mistake deprived the Commission of jurisdiction to hear Logan's charge.<sup>52</sup> The court had also ruled that Logan could not refile his claim because such an action would circumvent the Illinois Fair Employment Act's purpose of just and expeditious resolutions of employment disputes.<sup>53</sup> The U.S. Supreme Court held that Logan's interest in his cause of action was protected by the Due Process Clause and that he was entitled to some sort of hearing on the merits before being deprived of his property, i.e., his cause of action.<sup>54</sup> The Court pointed out that Logan could not appeal the Commission's action.<sup>55</sup> The Court cautioned that the process of randomly depriving potential claimants of their right to assert their claims presented an unjustifiably high risk of terminating meritorious claims.<sup>56</sup>

Issues similar to those in *Logan* arose in challenges to medical dispute resolution statutes in Florida and Pennsylvania. Those

46. See *id.* at 680-81.

47. See *id.* at 683-84.

48. See *id.* at 680-81.

49. 455 U.S. 422 (1982).

50. See *id.* at 437.

51. See *id.* at 426.

52. See *id.* at 427.

53. See *id.* (citing *Zimmerman Brush Co. v. Fair Employment Practices Comm'n*, 411 N.E.2d 277, 282-83 (Ill. 1980)).

54. See *id.* at 433-34; see also *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (finding that a university professor's interest in renewing his employment contract was not sufficient to be protected by the Due Process Clause).

55. See *Logan*, 455 U.S. at 434.

56. See *id.* at 434-35; cf. *Parratt v. Taylor*, 451 U.S. 527, 542 (1981) (holding that inadvertent withholding of property did not deny due process when state tort law provided an adequate remedy), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986).

states' respective supreme courts originally upheld both statutes.<sup>57</sup> The statutes required medical-related disputes to go to mediation before proceeding to court.<sup>58</sup> Both supreme courts felt that the state interest in keeping medical malpractice costs to a minimum was strong enough to allow the legislature to require parties to mediate before going to court.<sup>59</sup> However, both courts ultimately overturned their earlier rulings.<sup>60</sup> The Florida Supreme Court did so because the process established by the statute proved too "arbitrary and capricious in operation."<sup>61</sup> The Pennsylvania medical arbitration program caused such lengthy delays that only 134 of the 2909 cases filed between April 1976 and December 1979 received a certificate of readiness.<sup>62</sup> Similarly, the Florida program caused delays beyond the statutory time limits for mediation and led many Florida courts to deprive parties of their right to mediation.<sup>63</sup> Facially, the statutes survived challenges on due process grounds.<sup>64</sup> In operation, however, the statutes proved too burdensome on litigants to satisfy due process requirements.<sup>65</sup> Thus, the Pennsylvania Supreme Court finally addressed the concern about onerous conditions that it had first articulated nearly twenty-five years earlier in *Smith*.<sup>66</sup> Both the Pennsylvania and Florida decisions demonstrate that a statute that imposes onerous conditions in operation may be struck down even though it facially complies with due process requirements.<sup>67</sup>

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57. See *Carter v. Sparkman*, 335 So.2d 802, 808 (Fla. 1976); *Parker v. Children's Hosp. of Philadelphia*, 394 A.2d 932 (Pa. 1978).

58. See *Carter*, 335 So. 2d at 805 (citing FLA. STAT. § 768.133 (1975)); *Parker*, 394 A.2d at 935-36 (citing PA. CONS. STAT. § 1301.101 (Supp. 1977)).

59. See *Carter*, 335 So. 2d at 805; *Parker*, 394 A.2d at 936.

60. See *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980); *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980).

61. *Aldana*, 381 So. 2d at 238. The Pennsylvania Supreme Court cited the lengthy delays caused by the arbitration system. See *Mattos*, 421 A.2d at 195.

62. See *Mattos*, 421 A.2d at 194.

63. See *Aldana*, 381 So. 2d at 236-37. Among the reasons cited for the delays were the death of a mediation panel member, clerical mistakes, and failure to select a panel in time. See *id.*

64. See *id.* at 237-38; *Mattos*, 421 A.2d at 192.

65. See *Aldana*, 381 So. 2d at 238; *Mattos*, 421 A.2d at 196.

66. See *supra* text accompanying note 27.

67. See *Aldana*, 381 So. 2d at 237 ("While we originally upheld the facial validity of the medical mediation act . . . the practical operation and effect of the statute has rendered it unconstitutional."); *Mattos*, 421 A.2d at 190 ("[W]e . . . must regrettably conclude that the lengthy delay occasioned by the arbitration system . . . does in fact burden the right of a jury trial.").

Other grounds for due process challenges have included the admission of arbitration decisions as evidence in subsequent proceedings and bond requirements for appeals. See *Eastin v. Broomfield*, 570 P.2d 744, 748-49 (Ariz. 1977) (holding that an arbitration panel's finding constitutes an expert opinion that is rebuttable through introduction of competent evidence, but that the \$2000 bond required for appeal denied access to Arizona's courts). The arguments surrounding these challenges do not shed light on the other arguments made on due process grounds and are not given in-depth treatment in this Comment.

## IV. SEPARATION OF POWERS

The Constitution is premised on the doctrine of separation of powers.<sup>68</sup> Specifically, the Constitution establishes a tripartite system of government in which the legislative, executive, and judicial branches are equal and must generally refrain from intruding upon each others' domains.<sup>69</sup> Mandatory arbitration has been challenged on the ground that it violates separation of powers. The argument in such challenges is that the legislative branch has intruded upon the power of the judicial branch by creating a system that usurps judicial authority.

Article III of the Constitution provides protection to federal judges by providing them with life tenure, thereby eliminating salaries and job security as devices for leverage by the other branches of government.<sup>70</sup> Separation-of-powers arguments are often premised on a contention that one of the other branches has attempted to thwart this security by depriving the court of jurisdiction in order to weaken the judiciary's influence.<sup>71</sup> Mandatory proceedings such as arbitration have been criticized because arbitrators are not insulated from possible coercion from the other branches of government.<sup>72</sup>

The Supreme Court addressed the scope of Article III's protection of federal judges in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>73</sup> The Court held that an act of Congress amending the Bankruptcy Act was unconstitutional because the judges sitting on bankruptcy courts did not have Article III protection, yet the Act allowed them to resolve disputes involving individuals' private rights.<sup>74</sup> The Act also allowed a bankruptcy judge to pass final judgment on a case without bringing it before a district judge.<sup>75</sup> The appellants argued that the Act did not violate Article III because the

68. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 3.5, at 129 (5th ed. 1995).

69. See *id.*

70. See U.S. CONST. art. III, § 1. ("The Judges . . . shall hold their Offices during good Behavior, and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.")

71. See, e.g., *Firelock Inc. v. District Court*, 776 P.2d 1090, 1093 (Colo. 1989) (separation of powers challenge made under the Colorado Constitution).

72. See Golann, *supra* note 6, at 523 (discussing the possible pressures that can be used to induce mediators and arbitrators to resolve cases quickly).

73. 458 U.S. 50 (1982).

74. See *id.* at 67-72, 76. Bankruptcy is a public right, which is a "matter[] arising 'between the Government and persons subject to its authority.'" *Id.* at 67-68 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). "In contrast, 'the liability of one individual to another under the law as defined,' is a matter of private rights." *Id.* at 69-70 (quoting *Crowell*, 285 U.S. at 50). The litigation of public rights requires neither a jury trial nor an Article III judge, whereas the litigation of private rights requires both. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989).

75. See *Northern Pipeline*, 458 U.S. at 77-81.

bankruptcy courts were adjuncts to the district courts.<sup>76</sup> The Court rejected this argument because approved adjuncts previously had limited power and were required to apply to the district courts for enforcement of their findings, thus providing at least some measure of review.<sup>77</sup> Had Congress not given bankruptcy judges final authority over private rights, the Court probably would have found the amended Bankruptcy Act constitutional.

Although Northern Pipeline did not expressly address arbitration, comparable principles are involved. Arbitrators do not exercise the amount of power that Congress had given the bankruptcy judges in Northern Pipeline. Moreover, the nonbinding decision of an arbitrator may vanish if one of the parties requests a trial *de novo*.<sup>78</sup> Further, arbitrators in a nonbinding case may not enter a final judgment; rather, a party must apply to the local court for final judgment.<sup>79</sup> If a state legislature were to mandate binding arbitration in private cases, however, the constitutionality of such a requirement would be questionable under Northern Pipeline. Nevertheless, absent application to private cases, arbitration is likely to survive separation-of-powers challenges.

A separation-of-powers argument can only be raised under a state constitution if that constitution contains an explicit separation of powers clause.<sup>80</sup> For example, the plaintiff in *Firelock* claimed that the power exercised by the arbitration panel usurped the judiciary's power and therefore violated the state constitution.<sup>81</sup> The Colorado Supreme Court rejected the claim, however, holding that the panel was not exercising sovereign authority because the decision was nonbinding.<sup>82</sup> The limited authority given to those who preside over nonbinding arbitration bodes well for arbitration's insulation from challenges based on separation-of-powers arguments.

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76. See *id.* at 77. Adjuncts generally handle certain fact-finding functions to assist the federal courts. See *id.*

77. See *id.* at 77-87 (citing *Crowell*, 285 U.S. at 54 (holding that the use of administrative agencies to determine issues of fact was constitutional because the sole power to enforce the findings was with the district courts); *United States v. Raddatz*, 447 U.S. 667, 681 (1980) (holding that the use of magistrates to determine certain pretrial motions did not violate Article III because the process was under the complete control of the judiciary)).

78. See, e.g., FLA. STAT. § 44.103(5) (1995).

79. See *id.*

80. The Florida Constitution contains such a clause. See FLA. CONST. art. II, § 3 ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

81. 776 P.2d 1090, 1093 (Colo. 1989).

82. See *id.* at 1094; see also *Eastin v. Broomfield*, 570 P.2d 744, 750 (Ariz. 1977). But see *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736, 740 (Ill. 1976) (holding that allowing nonjudicial members of medical review panels to exercise judicial functions violated Illinois' separation of powers doctrine).

## V. EQUAL PROTECTION

No citizen of the United States may be denied the equal protection of the laws.<sup>83</sup> The Fourteenth Amendment not only guarantees that the laws of the United States will be applied without illegitimate distinctions based on gender or race, but also precludes discriminatory application of laws based on arbitrary classifications.<sup>84</sup> Not all classifications are unconstitutional, however. Courts apply a strict scrutiny test to determine the validity of laws that harm a suspect class or deprive people of fundamental rights.<sup>85</sup> When laws do not involve a suspect class or fundamental right, courts usually uphold them unless they lack a rational basis.<sup>86</sup>

Courts have generally refused to void arbitration on equal protection grounds, holding that no suspect class or fundamental right is at issue and that the arbitration requirement is rational. For example, the plaintiffs in *Firelock* and *Eastin* argued that arbitration violated the Equal Protection Clause because only certain litigants were forced to go to arbitration.<sup>87</sup> In *Firelock*, a Colorado law required arbitration of lawsuits for less than \$50,000 in damages.<sup>88</sup> In *Eastin*, an Arizona statute required all medical malpractice suits to go to arbitration.<sup>89</sup> Both courts applied a rational basis test because neither statute grouped litigants according to suspect classifications.<sup>90</sup> Both courts found that the classifications were rationally related to a legitimate state interest.<sup>91</sup> The Colorado Supreme Court

83. See U.S. CONST. amend. XIV ("[N]or shall any State . . . deny to any person within its jurisdiction the equal Protection of the laws.")

84. See *Romer v. Evans*, 116 S. Ct. 1620, 1627-29 (1996) (holding that Colorado's state constitutional amendment prohibiting governmental action to protect homosexuals violated the Equal Protection Clause); *Morey v. Doud*, 354 U.S. 457, 467-69 (1957) (holding that the creation of a closed class receiving differential treatment violated the Equal Protection Clause).

85. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 356 (1978) (Brennan, J., concurring in part and dissenting in part).

86. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); see also *Evans*, 116 S. Ct. at 1627-29.

87. See *Firelock Inc. v. District Court*, 776 P.2d 1090, 1097 (Colo. 1989); *Eastin v. Broomfield*, 570 P.2d 744, 747 (Ariz. 1977).

88. See 776 P.2d at 1092-93. In Florida, courts are permitted to send almost any type of dispute to nonbinding arbitration, regardless of the amount in controversy. See FLA. STAT. § 44.103(2) (1995); FLA. R. CIV. P. 1.700(a), 1.800 (establishing that courts can refer any case or portion thereof to arbitration except bond estreatures, habeas corpus or other extraordinary writs, bond validations, civil or criminal contempt, and other matters specified by the chief judge).

89. See 570 P.2d at 750-51.

90. See *Eastin*, 570 P.2d at 751; *Firelock*, 776 P.2d at 1098.

91. See *Eastin*, 570 P.2d at 750-51; *Firelock*, 776 P.2d at 1098-99; see also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (holding that imperfect classifications do not offend equal protection if the classification has some reasonable basis); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (holding that the safeguard of equal protection is offended

held that the use of a dollar amount was not irrational.<sup>92</sup> The court cited several other situations in which monetary classifications are used, including the limitation on diversity jurisdiction in federal court.<sup>93</sup> The court also found that the Legislature had a legitimate interest in examining the effects of arbitration.<sup>94</sup>

The Arizona Supreme Court's conclusion in *Eastin* was tied to the Legislature's interest in curbing the costs of medical malpractice insurance.<sup>95</sup> The court held that because premiums for such insurance were doubling every three years, the Legislature had a legitimate interest in treating malpractice litigants differently.<sup>96</sup> The classification that required malpractice litigants to use arbitration before they went to court was held to be rationally related to the interest in keeping malpractice costs down.<sup>97</sup> The arbitration system created an opportunity to separate meritorious claims from frivolous ones,<sup>98</sup> thereby reducing the amount of malpractice litigation. Other courts, however, have found that the differential treatment of medical malpractice cases serves no legitimate legislative purpose, "unless it [can] be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence."<sup>99</sup>

Penalties and preconditions on appeals that act as barriers to prospective appellants have also been challenged on equal protection grounds.<sup>100</sup> However, the practice of shifting arbitration costs to unsuccessful parties is likely to withstand most equal protection challenges based upon the U.S. Supreme Court's decision in *Bankers Life & Casualty Co. v. Crenshaw*.<sup>101</sup> In *Crenshaw*, the Court upheld a Mississippi statute that levied a penalty on unsuccessful appellants from money judgments.<sup>102</sup> The penalty was fifteen percent of the total damages owed by the unsuccessful appellant, which in this case was \$243,000.<sup>103</sup> The appellant argued that the penalty statute sin-

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when the state creates a classification that bears no rational relation to the object of the legislation). But see *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903, 906-07 (Ohio Ct. C.P. 1976) (holding that compulsory arbitration discriminates against medical malpractice claimants).

92. See *Firelock*, 776 P.2d at 1098-99.

93. See *id.* at 1099 (citing 28 U.S.C.A. § 1332 (West Supp. 1989)).

94. See *id.* at 1099. The program scrutinized by the court was a pilot program used in only a few district courts across Colorado. See *id.* at 1098.

95. See 570 P.2d at 751.

96. See *id.*

97. See *id.*

98. See *id.*

99. *Graley v. Satayatham*, 343 N.E.2d 832, 836-37 (Ohio Ct. C.P. 1976) (holding that rules requiring listing of collateral benefits in complaint and deducting certain collateral benefits from medical claim awards violated the Equal Protection Clause).

100. See, e.g., *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80-81 (1988).

101. 486 U.S. 71 (1988).

102. See *id.* at 85.

103. See *id.* at 75.

gled out appellants from money judgments and penalized those who were unsuccessful, regardless of the merit of their appeal.<sup>104</sup> In upholding the statute, the Court endorsed as legitimate the five state interests the Mississippi Supreme Court had earlier detailed the statute as serving: (1) discouraging frivolous appeals; (2) providing compensation for the appellee for having endured the tribulations of successful litigation; (3) protecting the integrity of the judgment by discouraging the parties from seeking a more favorable settlement; (4) impressing upon litigants the significance of the trial itself; and (5) conserving judicial resources by serving these other four interests.<sup>105</sup>

In light of the large penalty at issue in *Crenshaw*, statutes that shift the costs of arbitration to parties who are unsuccessful on appeal are likely to be upheld. Unfortunately, penalties imposed without considering the cost to individuals are more likely to prevent meritorious claims from being appealed than reduce frivolous claims. Wealthy litigants will always be able to afford frivolous claims while impoverished litigants will be discouraged by the risk of possible penalties. Differential treatment of various claims, however, should not be the basis for an equal protection challenge unless it can be shown that both the purpose and application of the process are discriminatory.

## VI. ACCESS TO COURTS

Access-to-courts provisions are found only in state constitutions.<sup>106</sup> Nonetheless, access-to-courts claims are sometimes brought under the Due Process Clause of the U.S. Constitution.<sup>107</sup> A party may be denied access to the court system in several ways. The Florida Supreme Court held in *Psychiatric Associates v. Siegel*<sup>108</sup> that requiring a party to post a bond covering an opponent's costs and attorney's fees before appeal from a decision by a medical review board created an impermissible restriction on the right of access to courts.<sup>109</sup> The plaintiff was given no alternative to posting the bond and could not be heard in court until the bond was posted, which served to cut off his access to the courts.<sup>110</sup>

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104. See *id.* at 80-81.

105. See *id.* at 81-82 (citing *Walters v. Inexo Oil Co.*, 440 So. 2d 268, 274-75 (Miss. 1983)).

106. See, e.g., FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.").

107. See Golann, *supra* note 6, at 547 ("[F]ederal access claims are usually analyzed under due process principles."); see generally *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (holding that state due process clauses require that parties not be denied divorce by high filing fee).

108. 610 So. 2d 419 (Fla. 1992).

109. See *id.* at 423-24 (citing FLA. CONST. art. I, § 21).

110. See *id.* at 424; see also *Eastin v. Broomfield*, 570 P.2d 744, 754 (Ariz. 1977) (holding that a \$2000 appeal bond placed too heavy a burden on access to court). Florida

In *People ex. rel. Christiansen v. Connell*,<sup>111</sup> a statute requiring married couples to go to mediation before they could file for divorce was also held to violate the parties' access to courts.<sup>112</sup> The Illinois Supreme Court rejected the state's argument that because the right to get a divorce was granted by the state, the state could place conditions on the right.<sup>113</sup> Rather, the court found that once the right was granted, the state could not place unconstitutional conditions on its exercise.<sup>114</sup> However, the same court later concluded that access to courts was not denied when the legislature reversed the process and required the parties go to mediation after filing suit with the court.<sup>115</sup> The Colorado Supreme Court, dealing with the same issue in *Firelock*, also held that requiring arbitration before litigation did not violate the state's constitutional guarantee of access to courts.<sup>116</sup> The court aptly summarized this area of law: "[A] burden on a party's right of access to the courts will be upheld as long as it is reasonable."<sup>117</sup>

## VII. CONCLUSION

Court-ordered, nonbinding arbitration is emerging in various forms throughout the country as a quick, inexpensive, and effective alternative to litigation. Notwithstanding these benefits, arbitration programs must be carefully designed to protect constitutional rights. Arbitrators' decisions must not be final in order to protect the right to a jury trial. Arbitration statutes must comport with due process requirements and provide access to courts, both by design and in operation. In addition, arbitration statutes must allow parties to appeal arbitration decisions to judicial tribunals. Finally, arbitration statutes must be rationally related to legitimate state interests. The constitutional challenges to arbitration that have been raised thus far suggest that legislatures may constitutionally mandate nonbinding arbitration as long as they do not use it to deprive parties of their day in court.

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does not require a bond when appealing a nonbinding arbitration decision. See FLA. STAT. § 44.103 (1995) (setting out the procedures and costs for arbitration and trials de novo).

111. 118 N.E.2d 262 (Ill. 1954).

112. See *id.* at 267-68.

113. See *id.* at 266-67.

114. See *id.* at 267; cf. *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 496-97 (1927) (holding that companies allowed to conduct business in a state are not required to accept unconstitutional conditions in order to continue doing business).

115. See *People ex rel. Doty v. Connell*, 137 N.E.2d 849, 852 (Ill. 1956).

116. See 776 P.2d at 1096.

117. *Id.* at 1096.