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Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution

Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law; B.A., 2003, Lafayette College. Thank you to Professor Jacqueline Nolan-Haley, my family, friends, and the Fordham Law Review Editors and Staff for your support and insights.

NOTES

IS COMPULSORY COURT-ANNEXED MEDICAL MALPRACTICE ARBITRATION CONSTITUTIONAL? HOW THE DEBATE REFLECTS A TREND TOWARDS COMPELSION IN ALTERNATIVE DISPUTE RESOLUTION

*Matthew Parrott**

INTRODUCTION

Alternative Dispute Resolution (ADR)¹ is a classification of methods used to efficiently, cost-effectively, and equitably resolve disputes² without resorting to litigation.³ “ADR is premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be

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1. Alternative Dispute Resolution (ADR) encompasses a variety of processes disputing parties may use to resolve their conflicts instead of resorting to litigation. See Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution* 1-2 (2001). ADR usually involves the assistance of a third-party neutral. Examples of such processes are arbitration, mediation, early neutral case evaluation, mini-trial, summary jury trial, and private judging. See Katherine V. W. Stone, *Private Justice: The Law of Alternative Dispute Resolution* 5-8 (2000) (describing different ADR processes); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 Ind. L.J. 591, 592 n.1 (2001) (noting the origins of ADR and its various forms).

2. See Monica L. Warmbrod, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 Cumb. L. Rev. 791, 794 (1997).

3. See Kenneth Gumbiner, *An Overview of Alternative Dispute Resolution*, in *Alternative Dispute Resolution: The Litigator's Handbook* 1, 1 (Nancy F. Atlas et al. eds., 2000) (“The concept of alternative dispute resolution . . . is, in a sense, nothing more than the nomenclature for the various creative ways that have been used to resolve disputes short of [the] ‘last resort’ [of litigation].”). Although litigation is an integral part of the U.S. civil justice system, “[m]any critics have claimed there is a crisis in the . . . system, . . . caused by the excessive delay, expense, inflexibility, and technicality of the courts.” Stone, *supra* note 1, at 2. Legal reformers have embraced ADR as a way to avoid these pitfalls inherent in the traditional civil justice system. *Id.*

achieved.”⁴ The principles of voluntariness and party control over process are traditionally considered essential to effective ADR.⁵ The ADR movement⁶ has been extremely successful in promoting ADR;⁷ the federal and state governments now embrace ADR,⁸ and ADR has become a permanent fixture in the United States’ legal framework.⁹

4. Weston, *supra* note 1, at 592.

5. See Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. Disp. Resol. 1, 1 (noting that the principle of voluntariness, traditionally a core tenet of ADR, has been “eroded”).

6. The notion of an “ADR movement” reflects the efforts of scholars, attorneys, and lawmakers who promote widespread use of ADR in various legal contexts. Judge Harry T. Edwards explains,

The Alternative Dispute Resolution (ADR) movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today, with the rise of public complaints about the inefficiencies and injustices of our traditional court systems, the ADR movement has attracted a bandwagon following of adherents. ADR is no longer shackled with the reputation of a cult movement.

Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 668 (1986).

7. Despite the ADR movement’s success, some scholars have been critical of ADR. See generally *id.*; Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. Rev. 833 (1990); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996).

8. The federal and state governments support ADR because it allows parties to resolve conflicts before they become ripe for litigation, which frees up traditional adjudicatory resources. For example, in the Alternative Dispute Resolution Act of 1998, Congress promoted the use of ADR to facilitate settlements and increase adjudicatory efficiency. See 28 U.S.C. § 651 (2000); see also *Developments in the Law—ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives*, 113 Harv. L. Rev. 1851, 1861-62 (2000) [hereinafter *Developments*] (describing the impact of the Alternative Dispute Resolution Act). Arbitration is especially encouraged by the U.S. Supreme Court as a viable alternative to litigation. See generally *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Institutions and private parties, on the other hand, like ADR because it affords flexibility, privacy, and speedy resolution of disputes, as opposed to the lengthy and expensive process of litigation. See Edward J. Costello, Jr., *Whether and When to Use Alternative Dispute Resolution*, in *Alternative Dispute Resolution: The Litigator’s Handbook*, *supra* note 3, at 15, 22-23.

9. See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211, 239-40 (1995) (“Via legislation, national and local rule making, and executive proclamation, every branch of the federal government has signalled its support of ADR.”).

Nevertheless, ADR is a relatively recent phenomenon,¹⁰ and its use in the U.S. civil justice system is still evolving.¹¹ The ADR movement has gone through a number of phases—from initially presenting arbitration as a viable supplement to litigation¹² to, more recently, encouraging greater use of processes like mediation and principled negotiation¹³ in various legal contexts.¹⁴ As the ADR movement developed, a trend of sacrificing the core principles of voluntariness and party control over process emerged.¹⁵ Two examples are illustrative of this trend: when judges misinterpret ADR contractual provisions, thereby sacrificing parties' ability to craft their own ADR processes for judicially mandated ADR;¹⁶ and when parties are essentially forced to use ADR when presented with adhesion contracts containing ADR clauses.¹⁷ These occurrences reflect how compulsion has become accepted within the ADR movement, a trend that heralded a new phase of the movement altogether: compulsory ADR in federal courts—a process whereby litigants with no prior contractual relationship are forced into court-annexed ADR.¹⁸

Concurrent with the ADR movement's initial period of evolution, during the mid- to late twentieth century, the United States experienced a proliferation of medical malpractice ("med-mal") lawsuits.¹⁹ The cause of the spike in med-mal suits during this period is unclear.²⁰ Nevertheless, the

10. The 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, convened by Chief Justice Warren Burger, is often considered to have spawned the modern ADR movement. See Stone, *supra* note 1, at 3-4; see also *infra* note 68 and accompanying text. However, arbitration, a type of ADR by which parties submit their "dispute to a third party who renders a decision after hearing arguments and reviewing evidence," has existed for hundreds of years. Stone, *supra* note 1, at 5-6; see also *infra* Part I.A.1.

11. See Carrie Menkel-Meadow *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. Rev. 1613, 1617 (1997) ("It is becoming harder and harder to keep definitional integrity between processes as the parties' needs and court requirements have altered our original understandings."); see also *Developments, supra* note 8, at 1857 (noting the widespread use of ADR in various industries and that "ADR mechanisms continue to evolve").

12. See *infra* Part I.A.1 (describing how courts and lawmakers ultimately embraced arbitration in the 1920s).

13. See, e.g., Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (2d ed. 1991).

14. Several industries, such as in the consumer and labor contracting contexts, have adapted ADR to address reoccurring legal disputes. See Stone, *supra* note 1, at 303; *Developments, supra* note 8, at 1855-57 (describing the use of ADR across industries). See generally *Alternative Dispute Resolution: The Litigator's Handbook, supra* note 3 (compiling articles discussing the use of ADR in the consumer, commercial, employment, labor, and other contexts).

15. See *infra* Part I.A.2.

16. See *infra* Part I.A.2.a.

17. See *infra* Part I.A.2.b.

18. See *infra* Part I.A.3.

19. See *infra* Part I.B. See generally James C. Mohr, *American Medical Malpractice Litigation in Historical Perspective*, 283 JAMA 1731 (2000).

20. See Edward A. Dauer & David W. Becker, Jr., *Conflict Management in Managed Care, in Health Care Dispute Resolution Manual: Techniques for Avoiding Litigation* 1:1, 1:25 (2000) ("[I]t remains an open question whether the insurance crises... were

effects were dramatic. Insurance premiums skyrocketed, forcing many physicians to abandon the practice of medicine altogether.²¹ Physicians needed a way to stop the influx of lawsuits and the rising costs of practicing medicine, and the modern health care tort reform movement was born.²² Interestingly, “[d]uring the liability insurance crises . . . tort reformers seized on ADR as a way to divert cases away from the courts. The ADR community, eager for an opportunity to advance [its] cause, joined league.”²³ In light of the ADR movement’s experimentation with compulsory processes around the same time, the stage was set for state lawmakers to devise tort reform strategies employing compulsory ADR.

In fact, the merger of the ADR and tort reform movements produced a new form of ADR altogether: compulsory court-annexed med-mal arbitration.²⁴ Seeking to control the flood of lawsuits, by the early 1970s nearly thirty states²⁵ had passed some form of a compulsory court-annexed med-mal arbitration law.²⁶ The process is modeled on private arbitration but operates under the authority of the state; a med-mal lawsuit is diverted to a court-annexed panel before proceeding in court.²⁷ The panel, consisting of attorneys, current or former judges, and oftentimes a physician, reviews the med-mal claim and decides issues of liability, and sometimes even damages.²⁸ The panel’s decision is nonbinding, so the disputants are ultimately permitted to have a trial on the merits of the med-

attributable to increases in legal liability, or to cyclic factors endogenous to the liability insurance industry.”); Michelle M. Mello et al., *The New Medical Malpractice Crisis*, 348 *New Eng. J. Med.* 2281, 2282-83 (2003) (“What has brought these troubling times to American medicine? The drivers of the crisis are a subject of intense political controversy, and the quantity and the quality of evidence on the issue are thin.”); see also Kyle Miller, Note, *Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law*, 59 *Vand. L. Rev.* 1457, 1469 (2006) (identifying a debate among physicians, insurers, and plaintiffs’ attorneys over the cause of the medical malpractice (“med-mal”) insurance crises and concluding that “[n]o one, not the [American Medical Association (AMA)], the American Trial Lawyers Association, the Insurance Information Institute, or the Governmental Accounting Office, has precisely determined what causes medical malpractice insurance crises”).

21. See *infra* Part I.B.2.

22. See *infra* Part I.B.3.

23. Edward A. Dauer, *Alternatives to Litigation for Health Care Conflicts and Claims: Alternative Dispute Resolution in Medicine*, 16 *Hematology Oncology Clinics N. Am.* 1415, 1428 (2002).

24. This procedure is also commonly referred to as a screening panel or mandatory arbitration. See *infra* Part I.B.3. See generally Dauer, *supra* note 23.

25. See Edward F. Seavers, Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 *Fordham L. Rev.* 322, 350-53 (1977) (describing twenty-eight states’ compulsory med-mal ADR statutes in appendices I-IV).

26. See *infra* Part I.B.3 (discussing the development of compulsory court annexed med-mal arbitration).

27. See *infra* Part I.B.3.

28. See Seavers, *supra* note 25, at 325 n.18 (“Most arbitration panels are composed of professional arbitrators, usually attorneys. On the other hand, every screening panel includes at least one member of the medical profession.” (citation omitted)).

mal lawsuit.²⁹ However, state laws differ over whether the record and decision generated by the panel is admissible during the trial phase.³⁰

The constitutionality of compulsory court-annexed med-mal arbitration is unclear.³¹ Rights to jury trial, equal protection, and due process challenges are most commonly raised.³² Some states' laws have withstood constitutional scrutiny, while other states' laws have been struck down as unconstitutional.³³ Procedural differences among the different laws, as well as different state constitutional standards, make it difficult to generate a black-letter rule regarding the constitutionality of compulsory court-annexed med-mal arbitration. Nevertheless, every compulsory court-annexed med-mal arbitration law raises basic constitutional concerns.³⁴

This Note examines the development of compulsory court-annexed med-mal arbitration and its constitutional implications.³⁵ Part I traces the evolution of the ADR and tort reform movements and examines how their merger produced compulsory court-annexed med-mal arbitration laws in many states. Particular attention is paid to recent trends in the ADR movement, reflecting the fact that compulsion has become intertwined with ADR. Part I also examines how the U.S. tort reform movement ultimately utilized compulsory ADR for its own purposes. Finally, Part I surveys current compulsory court-annexed med-mal arbitration laws and classifies them according to whether they allow admission of the arbitration result at trial.

Part II examines the constitutionality of compulsory court-annexed med-mal arbitration and describes how state laws have fared in federal and state

29. Parties must be afforded the opportunity to have a med-mal lawsuit decided by a court, pursuant to the constitutional right to a jury trial. *See infra* note 302. Interestingly, compulsory court-annexed med-mal arbitration has, in some states, been held to violate right to jury trial guarantees, even though a jury trial is ultimately afforded. *See infra* Part II.B.2.

30. *See infra* Part I.C (describing the distinction between the admissible and inadmissible approaches compulsory court-annexed med-mal arbitration laws follow).

31. *See infra* Part II. Additionally, critics complain that compulsory court-annexed med-mal arbitration distorts fundamental ADR principles. *See infra* notes 223-24 and accompanying text.

32. Other constitutional challenges to state laws mandating ADR for med-mal disputes are separation of powers concerns and principles of federalism, *see generally* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 Or. L. Rev. 487 (1989), and perhaps even First Amendment challenges, *see Katz, supra* note 5, at 22. However, these constitutional issues are infrequent in challenges to compulsory court-annexed med-mal arbitration laws.

33. *See infra* Part II.

34. *See infra* Part II.

35. During the 1970s, 1980s, and even into the 1990s, when states first passed compulsory court-annexed med-mal arbitration laws, scholars debated the constitutional implications of compulsory ADR. *See, e.g.,* Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 Tex. L. Rev. 759 (1977); Matthew Zimmerman, Comment, *The Constitutionality of Medical Malpractice Mediation Panels: A Maryland Perspective*, 9 U. Balt. L. Rev. 75 (1979); *see also* Golann, *supra* note 32; Katz, *supra* note 5. This Note assesses recent developments in the tort reform and ADR movements, paying particular attention to lessons learned from new trends in the ADR movement relating to compulsory ADR.

courts. Finally, Part III argues that compulsory court-annexed med-mal arbitration laws should be struck down or repealed, because they pose unnecessary constitutional risks and distort fundamental principles of ADR.

I. TWO MOVEMENTS COMING TOGETHER: ADR AND TORT REFORM

A. *ADR in the United States: An Evolving Movement*

ADR was not always accepted as a viable dispute resolution mechanism in the United States. Only since the late twentieth century has ADR become a fixture of the U.S. legal landscape.³⁶ Although the ADR movement has been judged to be a success,³⁷ the notion of exactly what ADR encompasses is still evolving.³⁸

Part I.A.1 examines the roots of the modern ADR movement, paying particular attention to the movement's core principles of voluntariness, party control over process, and delivery of justice.³⁹ Next, Part I.A.2 examines recent trends in the ADR movement, focusing on judicial misapplications of ADR agreements and ADR in adhesion contracts. Finally, Part I.A.3 explores the new direction the ADR movement has taken towards a system of compulsory ADR.

1. The ADR Movement: Achieving a Uniform Application of ADR Laws

While ADR, thought of as the umbrella classification for several types of dispute resolution methods,⁴⁰ is a relatively new legal phenomenon, arbitration has a rich history.⁴¹ Arbitration is a unique form of ADR.

36. See *supra* note 10 and accompanying text.

37. See *supra* note 6.

38. See *supra* note 11.

39. See *supra* notes 4-5 and accompanying text. As one scholar commented, [T]here is a view of ADR in which it is not merely an alternative forum, a more efficient version of the civil justice system. Some commentators claim that the alternative processes differ from courts not only in terms of the procedures followed, but also in terms of the substantive norms to be applied. It is claimed that alternative dispute resolution involves, and should involve, the application of different rules and different norms than a court would apply in the resolution of a dispute. . . . For this reason, some commentators advocate ADR not only as cheaper justice or expedited justice, but as better justice.

Stone, *supra* note 1, at 19; see also Golann, *supra* note 32, at 490 (“[A] major theme of ADR is to provide a better quality of dispute resolution. Economical ADR processes are attractive to judges and legislators concerned about the quality of conventional justice.”).

40. See *supra* note 1 and accompanying text.

41. In fact, it has been suggested that Aristotle extolled the value of arbitration. John D. Feerick has noted, “Had Athens and Sparta abided by the dispute resolutions provisions of their treaties, the Peloponnesian War may never have been ignited and, later, Athens vanquished.” John D. Feerick, Professor and former Dean, Fordham University School of Law, Federal Arbitration Act at 80: A Tribute Anniversary Lecture Series, Keynote Address at the American Arbitration Association Conference: Why a Federal Arbitration Act? Modern Arbitration at its Core 5-6 (Oct. 25, 2004) (on file with the Fordham Law Review) (citing L. B. Sohn, *International Arbitration in Historical Perspective: Past and Present*, in *International Arbitration: Past and Prospects* 9, 9 (A.H.A. Soons ed., 1990)).

Unlike negotiation and mediation, which are meant to facilitate value-maximizing settlements, arbitration requires parties to submit to the will of their arbitrator or panel, which usually issues a binding decision.⁴² Arbitration and mediation are the most used ADR processes,⁴³ and their core principles, voluntariness and party control over process, are common among all forms of ADR.⁴⁴

Since medieval times in England, merchants and private parties have sought ways to resolve disputes quickly and cheaply.⁴⁵ Arbitration was practiced in the United States during colonial times,⁴⁶ especially within local communities, religious groups, and voluntary associations.⁴⁷ For example, during the seventeenth century, the colonies of Connecticut and New York adopted policies requiring that some disputes be settled using arbitration.⁴⁸ Even George Washington appears to have served as an arbitrator and mediator for local disputes in Virginia, and he prescribed arbitration procedures for settling conflicts arising from his will.⁴⁹ In the early eighteenth century, immigrants and businessmen used negotiation and mediation as a method for seeking private justice and affirming community values like “mutual access [to decision makers], responsibility, and trust.”⁵⁰

Unfortunately, however, the practice of ADR was generally unregulated for the first 150 years in the United States, and common law judges⁵¹ often

42. See Louise A. LaMothe, *Choosing Who and What, in Alternative Dispute Resolution: The Litigator's Handbook*, *supra* note 3, at 59, 59.

43. See *Developments*, *supra* note 8, at 1858 (“Mediation and arbitration remain the most widespread forms of ADR, but practitioners continue to develop additional problem-solving means of resolving disputes.”).

44. See *supra* notes 4-5 and accompanying text.

45. See Reuben, *supra* note 7, at 599 (explaining that merchants' arbitration agreements were typically enforced by medieval English courts during “arbitration's formative years”). *But see* Feerick, *supra* note 41, at 6 (suggesting that seventeenth century English courts usually enforced arbitration awards but did “little to enforce agreements to arbitrate future disputes” and that “the English history of arbitration is somewhat unclear”). For a historical account of mechanisms used for resolving civil disputes in the United States, see Jerold S. Auerbach, *Justice Without Law?* (1983).

46. See Reuben, *supra* note 7, at 600 (“The history of ADR in the United States involved both arbitration and mediation, and tracked the English evolution in many ways. Both techniques were commonly used in the colonial period.”).

47. See Stone, *supra* note 1, at 10-11 (citing Auerbach, *supra* note 45).

48. See Feerick, *supra* note 41, at 8 (citing Fred I. Kent, *Pioneers in American Arbitration: A Symposium on Commercial, Industrial and International Arbitration*, 27 N.Y.U. L.Q. Rev. 501 (1940)). Thus, it seems, the specter of compulsory ADR has existed since the early days of arbitration in the U.S. civil justice system.

49. See Feerick, *supra* note 41, at 8 (citing George Washington, *Last Will and Testament*, in 37 *The Writings of George Washington* 275, 294 (John C. Fitzpatrick ed., 1940)).

50. See Stone, *supra* note 1, at 11 (citing Auerbach, *supra* note 45).

51. Until the early twentieth century in the United States, common law judges often refused to order performance of arbitration agreements and awarded only nominal amounts for breaches of promises to arbitrate. See Stone, *supra* note 1, at 305. Once parties actually submitted to arbitration, however, most judges would convert arbitration awards rendered by arbitration panels into court judgments. *Id.*

rejected arbitration agreements⁵² that usurped traditional courts' jurisdiction.⁵³ For example, Judge Benjamin Cardozo proclaimed in a 1914 opinion that "[t]he jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties."⁵⁴ The U.S. Supreme Court considered "agreements in advance to oust the courts of the jurisdiction conferred by law [to be] illegal and void."⁵⁵

Federal and state governments took notice of arbitration largely in reaction to this type of judicial hostility.⁵⁶ Many lawmakers thought participants in interstate commerce should be free, and indeed encouraged, to resolve their disputes privately.⁵⁷ Furthermore, several Congressmen argued that "clogging of [the] courts [was] such that the delays amount to a virtual denial of justice."⁵⁸ Arbitration was seen as a viable alternative to litigation; it required low expenditures of judicial resources while ensuring more social justice than the courts were then able to provide.

Thus, in 1925, Congress passed the Federal Arbitration Act (FAA).⁵⁹ The FAA makes arbitration agreements in contracts involving interstate commerce enforceable in federal courts.⁶⁰ The FAA effectively allows parties' contractual agreements to preempt state laws, many of which proscribe nontraditional adjudication, and "validate almost anything that the private parties put into their agreement."⁶¹ The Supreme Court has held

52. The practice of arbitration and the notion that disputes could be resolved without judicial involvement catalyzed the ADR movement. Thus, to say that "ADR was unregulated" takes for granted the fact that new processes have been developed and subsumed within the concept of ADR during the movement's development.

53. See Feerick, *supra* note 41, at 8 ("[F]ollowing the adoption of the Constitution, the common law's disfavor of arbitration provisions expressed itself throughout the United States.").

54. *Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, 105 N.E. 653, 656 (N.Y. 1914) (Cardozo, J., concurring).

55. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

56. New York, in 1920, was one of the first states to pass a statute condoning private arbitration agreements. See Ian R. MacNeil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 34-37 (1992). This was one of the primary impetuses behind the attention Congress paid to the enforcement of arbitration agreements. See generally *id.* at 47, 83-122.

57. See Feerick, *supra* note 41, at 13 (noting that Senate records reflect a prevailing view in Congress that "the settlement of disputes by arbitration appeals to big business and little business alike, to corporate interest as well as to individuals. . . . [T]he record . . . shows not only the great value of voluntary arbitrations, but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into" (internal quotation marks omitted)).

58. See Feerick, *supra* note 41, at 10 (internal quotation marks omitted).

59. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2000)).

60. See Stone, *supra* note 1, at 312-15.

61. *Dauer & Becker*, *supra* note 20, at 1:57; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989). Interestingly, "[m]uch of health care does indeed involve interstate commerce . . . [because] [t]he federal government itself funds a good deal of it," so arbitration clauses in

that the FAA preempts state laws limiting the effectiveness of ADR agreements⁶² and that the Act should be read broadly when deciding whether a contract involves interstate commerce.⁶³

The FAA made arbitration a viable dispute resolution mechanism during the turbulent periods of the mid- and late twentieth century and helped raise social consciousness about ADR.⁶⁴ For example, in the 1960s, arbitration and mediation were used as problem-solving tools for disputes arising out of “the civil rights struggles and the Vietnam War” which led to “considerable strife and conflict.”⁶⁵ As former Dean of Fordham Law School John D. Feerick explains,

[T]he century that unfolded after 1925 involved military conflicts on a world stage, a Great Depression, technological and scientific developments of unfathomable proportions, and exponential growth in the law and its reach to practically every aspect of human existence. As citizens, by the millions, turned more and more to the courts for relief, the need for other means of resolving disputes became an imperative, leading to the [modern] alternative dispute resolution movement⁶⁶

Thus, the modern ADR movement signified more than a critique of the traditional U.S. civil justice system: ADR represented a new means of securing justice in a turbulent sociopolitical society.⁶⁷

The modern ADR movement flourished in the 1970s, when Chief Justice Warren Burger called for greater use of ADR to replace litigation that had become inefficient, overly expensive, and too technical for the average citizen.⁶⁸ The 1980s and 1990s saw an explosion of ADR.⁶⁹ This explosion coincided with Supreme Court decisions reaffirming ADR as a

health care agreements are almost always enforceable. Dauer & Becker, *supra* note 20, at 1:57.

62. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); see also Golann, *supra* note 32, at 558 (discussing federal preemption of state laws governing ADR processes).

63. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

64. Additionally, the American Arbitration Association (AAA), which was formed in 1926, only a year after the FAA was adopted, provides institutional ADR services for the business community. See MacNeil, *supra* note 56, at 41; see also American Arbitration Association, Public Service at the American Arbitration Association 2 (2004) (on file with the Fordham Law Review) (outlining the successful history of the Federal Arbitration Act (FAA) and noting that “[i]n post-World War I America, as public courts were flooded with cases, the business community became increasingly interested in private arbitration tribunals”).

65. Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. Fla. L. Rev. 1, 2 (1985).

66. See Feerick, *supra* note 41, at 4.

67. See generally *id.*

68. Many scholars consider the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, or the Pound Conference, as the event that initiated the modern ADR movement. See Stone, *supra* note 1, at 3-4.

69. In the case of just one institutional provider of ADR services, the American Arbitration Association, there were over 1,170,000 arbitration cases filed from 1990 to 2001, and by 2000, 872 new cases were being filed on average every working day. See Feerick, *supra* note 41, at 4-5.

viable and necessary alternative to litigation.⁷⁰ “The Supreme Court’s broad judicial support of ADR has continued into the 1990s—as the Court has cast aside generalized concerns over power imbalances and . . . expanded the reach of the FAA by giving the term ‘commerce,’ as used in the Act, its broadest possible construction.”⁷¹

Mediation, another integral component of the ADR movement, became part of the national consciousness with the adoption of the Uniform Mediation Act by the National Conference of Commissioners on Uniform State Laws.⁷² In 1990, Congress enacted the Administrative Dispute Resolution Act,⁷³ “which requires federal agencies to consider ADR in settling disputes. As a result, numerous federal and state agencies now utilize ADR procedures to handle their caseloads.”⁷⁴ ADR mandates have also become common in other federal statutes,⁷⁵ such as the Civil Justice Reform Act of 1990 (CJRA).⁷⁶

Ironically, the federal government’s broad support of ADR, one of the original aims of the ADR movement, has altered the notion of what ADR is. The federal government’s impact has been so significant, some argue, that the movement’s original focus, providing just and equitable conflict resolution in a turbulent society with overburdened courts, has been distorted.⁷⁷ As one scholar suggests,

Twenty years ago, the ADR movement was overwhelmingly focused on developing alternatives to the costs of litigation. Since then, we have discovered that reducing litigation cost and delay are only some of the benefits of ADR. Today, we possess a knowledge that contributes to the

70. See Rueben, *supra* note 7, at 602-03 (describing the impact of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and the Court’s willingness to enforce arbitration clauses in contracts).

71. See *id.* (footnotes omitted).

72. Unif. Mediation Act (amended 2003), 7A U.L.A. 91 (2006).

73. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C. §§ 571-84 (2000)); see also Katz, *supra* note 5, at 18 (“Every federal agency must ‘adopt a policy that addresses the use of alternative means of dispute resolution and case management’ and ‘examine alternative means of resolving disputes in connection with adjudication, rulemaking, enforcement, issuing of licenses or permits, contract administration, litigation involving the agency, and ‘other agency matters.’” (quoting Administrative Dispute Resolution Act § 3)).

74. Stone, *supra* note 1, at 5.

75. See Katz, *supra* note 5, at 19 (describing how ADR has been incorporated into the Americans with Disabilities Act and the Civil Rights Act of 1991, among others). Furthermore, “[i]n 1996, Congress significantly extended the scope of the [Administrative Dispute Resolution] Act, by authorizing true binding arbitration for federal agencies, simplifying the procedural requirements for negotiated rulemaking, and enhancing confidentiality protections.” *Developments, supra* note 8, at 1860; cf. *infra* Part I.A.3.

76. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471-82 (2000)); see also *infra* Part I.A.3 (discussing effects of the CJRA).

77. See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 Iowa L. Rev. 889, 957 (1991) (“The time has long since come, not for expanded use of ADR as a court management tool, but to question more seriously the premises underlying the ADR movement.”).

broadest range of conflict resolution. We have discovered the relevance of ADR tools to conflicts that are not on a litigation track—policy disputes for instance. Without neglecting ADR’s importance in litigated matters, “alternatives to litigation” no longer describes the subject; “appropriate dispute resolution” probably does.⁷⁸

Perhaps one of the ADR movement’s greatest successes has been the shift in focus from merely providing an alternative to litigation during a socially turbulent and increasingly litigious era to offering new perspectives on common social problems, whether they be purely legal, policy oriented, or even political.

2. New Trends in the ADR Movement: Judicial Misapplications of ADR and ADR in Adhesion Contracts

The ADR movement’s expansion, however, has not been applauded by everyone.⁷⁹ Several recent developments in the ADR movement have been particularly controversial: judicial misapplication of ADR agreements and the enforcement of ADR clauses in adhesion contracts. These occurrences represent a shift in the ADR movement away from its core principles of voluntariness and party control over process. Furthermore, ADR has been extended beyond private contracts and into court-annexed programs.⁸⁰ These trends in the ADR movement are central to the analysis of how the tort reform movement eventually borrowed ADR for its own purposes.⁸¹

a. *Judicial Misapplications of ADR*

Parties usually agree to participate in ADR voluntarily by signing a contract with an ADR clause. For example, arbitration is often contracted for, since the FAA fosters arbitration and state judges may no longer refuse to honor such agreements merely because they take a dispute out of the public sphere.⁸² Although arbitration has largely been “federalized,”⁸³ the main impetus for the enforcement of arbitration agreements is still state contract principles, such as party autonomy and specific performance.⁸⁴

78. James F. Henry, *Some Reflections on ADR*, 2000 J. Disp. Resol. 63, 63.

79. Take, for instance, Richard Reuben’s suggestion that ADR distorts, and even has the potential to completely displace, important aspects of the U.S. legal justice system. See Reuben, *supra* note 7, at 582 (“ADR arguably presents one of the greatest challenges American civil justice has ever encountered.”).

80. See, e.g., Katz, *supra* note 5, at 55 (noting a transformation of ADR during the 1980s and lamenting that “some forms” of ADR “will probably continue to evolve on their own, regardless of how precise or imprecise our knowledge”).

81. See *infra* Part I.B.3.

82. See *supra* notes 61-63 and accompanying text.

83. See generally Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 396 (1992) (examining the federalization of state arbitration laws).

84. See Dauer & Becker, *supra* note 20, at 1:59 (“[S]ince arbitration is a creation of contract, all of the rules of law that apply to all other contracts generally will also apply to agreements to arbitrate.”). Section 2 of the FAA reaffirms this principle and requires that

This means that parties may contractually agree to use personally crafted arbitration procedures, and courts are obligated to ensure that parties comply with their agreements.⁸⁵ This combination of federal support and state laws favorable to arbitration agreements has been central to the success of the ADR movement.⁸⁶

Nevertheless, some scholars suggest that courts are becoming increasingly more willing to forsake party autonomy and basic contractual interpretation principles in order to support a broad application of federal ADR laws.⁸⁷ In the case of arbitration agreements, “[i]t may be that courts view the [FAA’s] scheme as an easy avenue to clear court dockets. Applying the FAA . . . allows courts to hurry parties out of court without first tackling difficult common law contract remedy analysis.”⁸⁸ While the level of misapplication of ADR clauses is not easily measured, it is clear that the ADR movement’s central tenets of voluntariness and party control over process are not always respected by judges.⁸⁹ In fact, some judges are in “a rush to ride roughshod over individual rights and basic notions of fairness in the heat of pursuing a popular current goal,” thus securing wider use of ADR.⁹⁰

Of course, judges are fully capable of interpreting contractual language constituting ADR clauses, and the state of judicial misapplications is likely not as bad as some scholars claim.⁹¹ The problem centers on judicial misunderstanding of what ADR processes involve,⁹² rather than an

contract law doctrines such as fraud, duress, and unconscionability are considered in challenges to the arbitration agreements themselves. *Id.*

85. Thus, at least in terms of arbitration, there are three levels of legal authority for the use of ADR: “(1) the FAA; (2) the agreement of the parties; and (3) state arbitration statutes” and state common law contract principles. *Id.* at 1:54.

86. While arbitration is generally considered to be the most “enforceable” type of ADR in light of the FAA, other ADR procedures are fundamentally no different in terms of enforceability. State contract law principles require enforcement of contractual agreements to use ADR, regardless of the process selected. *See generally* Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 Harv. Negot. L. Rev. 1, 4 (2004) (suggesting that while non-arbitration ADR agreements are enforceable, “[t]he time is ripe to clarify the law applicable to these agreements and to spark modern contractual enforcement of these non-FAA . . . procedures”).

87. *See id.* at 16-21 (describing recent cases in which courts failed to distinguish between different types of ADR clauses and protect party autonomy).

88. *Id.* at 26 (footnote omitted).

89. *See* Reuben, *supra* note 7, at 596 (“[ADR contract] clauses have been enormously controversial, raising substantial questions of voluntariness, as well as ones over the ability of the parties (especially those with lesser power) to make such a knowledgeable choice in the absence of a specific context.”).

90. *See generally* Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 Brook. L. Rev. 1381, 1383 (1996).

91. *See, e.g.,* Schmitz, *supra* note 86, at 4 (suggesting that the current state of judicial interpretation of ADR clauses “has left contracting parties lost in a landscape of ‘fundamentally aimless, meandering, and above all, confusing’ judicial decisions governing enforcement of ADR agreements” (quoting Macneil, *supra* note 56, at 172)).

92. For example, Nancy Welsh explains that “[i]n spite of the increasing number of ADR programs, in courts and communities, mediation remains a largely unfamiliar process

overzealous judiciary. In other words, unfamiliarity with the many types of ADR may lead to judicial misapplications.⁹³ Recognizing the dangers inherent in grouping binding and nonbinding, transformative and facilitative, and other dissimilar processes together under a single ADR umbrella, some scholars even suggest reclassifying arbitration as something other than ADR.⁹⁴

b. *ADR in Adhesion Contracts*

Considering the strong presumption in favor of enforcing contractual agreements that call for ADR,⁹⁵ and the occasional judicial misapplication of ADR,⁹⁶ it is not surprising that ADR has crept into adhesion contracts.⁹⁷ Adhesion contracts are not defined by their subject matter, but rather by the relationship of power between the contracting parties.⁹⁸ Adhesion contracts allow the powerful party—i.e., the drafting party—“to legislate in a substantially authoritarian manner.’ This notion of legislating is not in any sense figurative. It dramatizes the point that the drafter has the power to create new and different ‘law’ to govern the relations and disputes between itself and the adherer.”⁹⁹

The relationship between contracting parties is a fundamental concern of the ADR movement.¹⁰⁰ Party control over process, preserving relationships, and delivering private justice were initially extolled as the primary benefits of ADR.¹⁰¹ However, these core principles are

to judges, court administrators, citizens and attorneys. Judges, lawyers and clients tend to do things in the way to which they are accustomed and may resist new processes with which they are unfamiliar.” Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1, 24 n.95 (2001) (internal quotation marks omitted).

93. Lynn A. Kerbeshian, *ADR: To Be Or . . . ?*, 70 N.D. L. Rev. 381, 434 (1994) (“Judges’ attitudes toward ADR are dependent upon familiarity; however, a significant number of judges are unfamiliar with specific ADR procedures.”).

94. See, e.g., Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. Disp. Resol. 97.

95. See *supra* notes 84-85 and accompanying text.

96. See *supra* Part I.A.2.i.

97. An adhesion contract is “a privately created document drafted by the dominant party to a legal relationship and imposed on the adherent without opportunity for negotiation or change.” Stephan Landsman, *ADR and the Cost of Compulsion*, 57 Stan. L. Rev. 1593, 1596 (2005).

98. See *id.* at 1602; see also Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 Cal. L. Rev. 1239, 1247 (1983) (“An adhesion contract is a ‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Ct. App. 1961))).

99. Landsman, *supra* note 97, at 1602 (quoting Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 640 (1943)).

100. See Robert B. Moberly & Judith Kilpatrick, *Introduction: The Arkansas Law Review Symposium on Alternative Dispute Resolution*, 54 Ark. L. Rev. 161, 166-68 (2001). “ADR can better preserve ongoing party relationships.” *Id.* at 166 (emphasis omitted).

101. Weston, *supra* note 1, at 592; see also *supra* notes 4-5, 39 and accompanying text.

unquestionably distorted when ADR is used in adhesion contracts. As one scholar explains,

One of the . . . vehicles primarily responsible for driving the growth of ADR is arbitration mandated by a predispute stipulation. Such a stipulation is most often contained in form contracts imposed by a powerful drafting party on a consumer, customer, or employee who has no choices besides accepting the contract in toto or forgoing the desired goods, services, or job. This take-it-or-leave-it arrangement has become ubiquitous, and millions of adhering parties today simply have no choice but to yield on the question of arbitration [and other ADR processes]. Arrangements of this sort have all the characteristics of the classic adhesion contract.¹⁰²

It is hard to imagine relationships flourishing under such circumstances.¹⁰³

Furthermore, the ADR procedures included in adhesion contracts are often less than desirable for the non-drafting party.¹⁰⁴ For example, ADR clauses in adhesion contracts have been used to “rewrite” consumer protection laws¹⁰⁵ and establish onerous obstacles and fees that thwart virtually all claims.¹⁰⁶ In one particularly egregious case, an adhesion contract’s ADR clause, requiring arbitration of medical malpractice disputes, created such a long delay in the process that a patient died before his malpractice claim was decided.¹⁰⁷

The advent of ADR in adhesion contracts represents a controversial shift within the modern ADR movement: from promoting private justice and participant autonomy¹⁰⁸ to allowing forced private adjudication, without the procedural assurances of fairness afforded by the traditional system.¹⁰⁹ The Supreme Court has fueled this shift, specifically in the context of arbitration

102. Landsman, *supra* note 97, at 1601-02 (footnotes omitted).

103. *See id.* at 1602 (“Adhesion contracts can have a dramatic impact on the relationship between contracting parties.”).

104. One study found that ninety-four percent of commercial franchise adhesion contracts drafted by the principal corporations provided some type of relief, like an escape clause to avoid arbitration, for the corporate drafters, but not for the franchisees. *Id.* at 1605 (citing Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 739).

105. *See* Landsman, *supra* note 97, at 1608-09 (describing how ADR in adhesion contracts has been used to overcome paternalistic protections for consumers embodied in the Truth in Lending Act and the Magnuson-Moss Warranty Act).

106. *See id.* at 1612-13 (describing adhesion employment contracts that established such lopsided and expensive ADR processes that employees were effectively “deprived . . . of any realistic opportunity for a hearing”).

107. *See* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 913-14 (Cal. 1997); *see also* Landsman, *supra* note 97, at 1614 (describing *Engalla*).

108. *See supra* notes 4-5, 39 and accompanying text.

109. *See, e.g.,* Allor, *supra* note 98, at 1242 (describing how the California Supreme Court has “recognized a policy of preventing a party with superior bargaining power from avoiding resolution of numerous small disputes by contractually protecting itself from classwide proceedings. . . . [T]he court recognized that the arbitration clause [in an adhesion contract] may be invalid as to the class of franchisees when it oppressively foreclosed their ability to bring ‘any form of class proceeding’” (quoting *Keating v. Superior Court*, 645 P.2d 1192, 1207 (Cal. 1982))).

in adhesion contracts.¹¹⁰ Over a series of decisions, the Supreme Court has “embraced a policy liberally favoring arbitration pursuant to the FAA[,] . . . enforc[ed] adhesive agreements to arbitrate and [struck] down state legislation designed to limit such agreements.”¹¹¹

Of course, one might argue that adhesion contracts containing ADR provisions are perfectly consistent with the ADR movement’s focus on securing widespread use of ADR.¹¹² After all, the FAA, the watershed event in the early ADR movement, requires courts to enforce all agreements in which parties choose to use arbitration.¹¹³ Nevertheless, non-drafting signatories of adhesion contracts can hardly be considered voluntary participants in ADR and have no meaningful opportunity to shape the process.¹¹⁴ The Court’s recent jurisprudence and the trend among state judges to encourage—some might argue overencourage—ADR signifies that ADR in adhesion contracts is here to stay.¹¹⁵

But what happens when a state forces disputing parties to use ADR if the parties never had a contractual relationship in the first place? Another controversial shift in the ADR movement concerns compulsory ADR, a process embraced by the modern med-mal tort reform movement.

3. A Radical New Trend: Compulsory ADR

Central to the ADR movement’s success was the tenet that ADR is voluntary and consensually agreed to by the participants, usually by means of a contract.¹¹⁶ For example, “[i]t is frequently stated that arbitration is a creature of contract. This axiom means that arbitration cannot be imposed on parties without their consent and that the form of arbitration to be

110. In fact, adhesion contracts may be merely an inevitable, although unfortunate, phenomenon in light of common law contract principles promoting party autonomy and an environment of judicial *laissez-faire*. See generally Kessler, *supra* note 99.

111. See Landsman, *supra* note 97, at 1602-04 (outlining the Court’s jurisprudence on arbitration clauses in adhesion contracts under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 617-19, 640 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 3-4, 16 (1984); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); and *Wilko v. Swan*, 346 U.S. 427, 435-37 (1953)).

112. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 7-9 (1997) (discussing the widespread use of adhesion contracts containing ADR clauses).

113. See *supra* notes 59-63 and accompanying text.

114. See Sternlight, *supra* note 112, at 6 (“While such arbitration is said to be justified on the ground that it is voluntary, in fact consumers and employees are given no real opportunity to choose litigation or other dispute-resolution techniques over arbitration.”).

115. See generally Sternlight, *supra* note 112.

116. In the case of adhesion contracts, the fact that a party signed the contract in the first place reassures judges who are hesitant to require specific performance of ADR clauses. See, e.g., Landsman, *supra* note 97, at 1596 (discussing enforcement of ADR in adhesion contracts involving securities disputes as long as the party signed a contract).

utilized is determined by the parties' agreement."¹¹⁷ Similarly, the Model Standards of Conduct for Mediators stress that "[s]elf-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."¹¹⁸

However, just as the ADR movement's themes of voluntariness and preserving party autonomy are distorted by judicial misapplications of ADR¹¹⁹ and ADR in adhesion contracts,¹²⁰ the ADR movement went down a new path when federal lawmakers began experimenting with compulsory ADR.¹²¹ In order to avoid confusion of compulsory ADR with voluntary ADR, a brief description of the two types of voluntary ADR agreements is provided: pre-dispute ADR agreements and post-dispute ADR agreements.

a. *Voluntary ADR: Pre-dispute ADR Agreements*

Pre-dispute ADR agreements, usually prescribing arbitration as the method for resolving future disputes, are common contractual provisions.¹²² "Contracting parties often include broadly worded arbitration clauses in their agreements. Typical is a clause whereby the parties promise to arbitrate 'all disputes that arise out of or in relation' to a specified transaction."¹²³ Parties may also draft a pre-dispute agreement mixing other ADR processes like mediation and negotiation.¹²⁴ These types of ADR provisions are often unartfully referred to as "mandatory ADR" because a contracting party is binding himself to participate in ADR, should a dispute arise, despite objections he might have to the process after the dispute has occurred.¹²⁵

117. Stone, *supra* note 1, at 378.

118. Landsman, *supra* note 97, at 1600; *see also* Model Standards of Conduct for Mediators (2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2006.pdf.

119. *See supra* Part I.A.2.a.

120. *See supra* Part I.A.2.b.

121. *See* Welsh, *supra* note 92, at 3-4 ("[T]he originally dominant vision of self-determination, which borrowed heavily from concepts of party empowerment, is yielding to a different vision in the court-connected context."). *See generally* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. Pa. L. Rev. 2169 (1993).

122. *See* Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 Alb. L. Rev. 905, 931 (1996) (suggesting that "[a]rbitration is strictly a matter of contract; therefore, a party usually can be compelled to arbitrate only when it has agreed to do so").

123. Stone, *supra* note 1, at 378 (discussing how broadly or narrowly a judge might interpret pre-dispute arbitration agreements).

124. Richard Reuben explains, "In the . . . pre-dispute setting, the parties have agreed, at least theoretically, prior to the dispute, to resolve the problem through ADR. . . . These clauses often contain mediation, 'med/arb,' early neutral evaluation, and other types of procedures . . ." Reuben, *supra* note 7, at 595-96 (emphasis omitted).

125. *See, e.g.,* Kenneth Gumbiner, *An Overview of Alternative Dispute Resolution, in Alternative Dispute Resolution: The Litigator's Handbook*, *supra* note 3, at 1, 10 ("Mandatory arbitration usually arises because of a contract clause that requires it.").

There are several reasons pre-dispute ADR agreements are enforced.¹²⁶ The Supreme Court sanctions ADR, thereby fostering pre-dispute ADR agreements, and federal legislation, like the FAA, makes certain types of ADR agreements enforceable.¹²⁷ State contract law principles also require specific performance of ADR contractual clauses.¹²⁸ Additionally, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by the FAA, ensures that arbitration agreements with foreign parties and foreign arbitral awards are enforced in U.S. courts.¹²⁹

b. *Voluntary ADR: Post-dispute ADR Agreements*

On the other hand, parties may agree to use ADR after a dispute has arisen and litigation has commenced. Courts can encourage settlement between litigating parties by asking them to agree to use ADR before proceeding with their lawsuit.¹³⁰ Central to this interplay between traditional adjudication and ADR is the willingness of the parties to participate in the court-encouraged procedures.¹³¹ As one scholar explains, "Some courts have instituted voluntary arbitration programs in which one or both parties can choose whether or not to take advantage of an arbitration service before trial . . . [while] [c]ourt-annexed voluntary mediation is generally found in courts with access to some external organization willing to provide mediation and other services."¹³² In both pre-dispute and post-dispute agreement scenarios, the parties freely choose to employ ADR procedures. A quite different scenario is presented when parties have no say in the matter and are forced to use ADR.

126. It has been suggested that pre-dispute ADR agreements maximize the "private and social benefits" of ADR because they are not tainted by animosity, which often exists in the context of post-dispute ADR agreements and thus distorts the ADR process. See Bernstein, *supra* note 121, at 2252 n.279.

127. See *supra* Part I.A.1.

128. See *supra* notes 84-85 and accompanying text.

129. See Carolyn B. Lamm & David W. Rivkin, *International Disputes, in Alternative Dispute Resolution: The Litigator's Handbook*, *supra* note 3, at 307, 312.

130. Judges often consider Federal Rule of Civil Procedure 16 as authorizing them to encourage litigants to use ADR before proceeding with a lawsuit. See Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. Rev. 1259, 1299 n.148 (1995) (noting that "FRCP 16 [is often considered] the legal predicate upon which authority for court-annexed mediation has been historically found"); see also *infra* note 136.

131. See Reuben, *supra* note 7, at 595 ("In the post-dispute setting, the parties agree after a conflict has arisen to have a third party decide the dispute, without resort to courts for adjudication." (emphasis omitted)).

132. Katz, *supra* note 5, at 9, 11-12.

c. *Compulsory ADR: No Agreement at All*

Although ADR is usually voluntarily agreed to, parties are sometimes¹³³ forced out of the traditional adjudicatory system and into court-annexed¹³⁴ ADR.¹³⁵ For example, some judges *require* litigants, with no prior contractual relationship, to use negotiation, mediation, summary jury trials, and mini-trials based on an interpretation of Federal Rules of Civil Procedure Rule 16¹³⁶ that gives judges the authority to facilitate settlements.¹³⁷ Compulsion seeped into the ADR movement gradually. Initially, state and federal legislators encouraged courts to promote voluntary ADR in the form of post-dispute ADR agreements.¹³⁸ In 1990, Congress passed the CJRA, which encouraged federal district courts to create pilot programs using ADR and to consider implementing compulsory ADR procedures.¹³⁹

133. See Reuben, *supra* note 7, at 594; see also Stone, *supra* note 1, at 4 (“[S]ince the 1970s, many state and federal courts began to experiment with court-annexed arbitration systems in which litigants were offered, or in some cases required, to take their claims to an arbitrator before getting a hearing before a judge.”).

134. The concept of “court-annexed ADR” has always involved some aspect of compulsion:

One of the first proponents of court-annexed ADR was Harvard Law Professor Frank Sander. In 1979, Professor Sander expressed concern about the increasing demands placed on courts in the United States and stated that the courts must examine other dispute resolution alternatives. He proposed a multi-door courthouse, in which courts would supply the parties in legal disputes with a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes according to set criteria. [The theory envisioned] not simply a courthouse but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process . . . most appropriate to his case type. In that manner, grievants would be fitting the forum to the fuss.

James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. Contemp. L. 1, 4 (1995) (citations and internal quotation marks omitted); see also Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 Harv. L. Rev. 1086, 1087 (1990) (suggesting that court-annexed ADR can be either voluntary or mandatory).

135. For an overview of the use of ADR in federal courts in the early 1990s, see Dayton, *supra* note 77.

136. Fed. R. Civ. P. 16 (“(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and; (5) facilitating the settlement of the case.”).

137. See Katz, *supra* note 5, at 14-15.

138. See Holbrook & Gray, *supra* note 134, at 5 (“In May of 1989, the Administrative Office of the United States Courts (Administrative Office) informed the courts that they could apply to participate in a pilot program in which ten selected U.S. district courts would implement a voluntary arbitration program.”).

139. See *id.* at 5 (explaining that the CJRA “required all federal district courts to develop and implement a Civil Justice Expense and Delay Plan (Plan) to, among other things, ‘improve litigation management[,] and ensure just, speedy, and inexpensive resolutions of civil disputes’” (quoting 28 U.S.C. § 471 (2000))).

Only ten federal courts experimented with compulsory court-annexed ADR at first.¹⁴⁰ These early court-annexed ADR programs usually applied to suits for money damages below a particular amount (ranging between \$50,000 and \$150,000) and which did not involve federal constitutional questions or alleged violations of civil rights.¹⁴¹ Under CJRA programs implementing compulsory ADR, parties were required to participate in good faith and were permitted to request a trial de novo after the ADR.¹⁴²

Interestingly, some district courts have refused requests for a trial de novo in cases where a party was found to have not meaningfully participated in court-annexed arbitration.¹⁴³ Soon after the federal courts began experimenting with compulsory court-annexed ADR, state legislatures followed suit, at “an increasingly rapid rate.”¹⁴⁴ States “began passing laws requiring parties to participate in an ADR process as a precondition to judicial resolution of their dispute.”¹⁴⁵

Supporters of compulsory court-annexed ADR argue that it facilitates settlement by forcing disputants to face the strengths and weaknesses of their cases at an early stage.¹⁴⁶ However, it would be hard to argue that compulsory court-annexed ADR furthers the ADR movement’s values of party control over process or more equitable dispute resolution,¹⁴⁷ since parties often end up back in court after the court-annexed process runs its course.¹⁴⁸ Furthermore, as one commentator noted,

Supporters of court-administered arbitration programs do not generally expect to change case outcomes. Instead, the distribution of outcomes prevailing prior to establishing an arbitration program is frequently viewed as the benchmark for assessing arbitration’s effect on equity, and a program is viewed as successful if it does not perceptibly alter that

140. See Katz, *supra* note 5, at 17 (“All the pilot plans must include the six ‘principles and guidelines of litigation management and cost and delay reduction’ identified in [17 U.S.C.] § 473(a); three of the guidelines refer directly to settlement and ADR.” (footnotes omitted)); see also Reuben, *supra* note 7, at 583 n.9 (“In 1980, only 10 state courts and one federal district court had ADR programs. By 1996, nearly half of all federal district courts used mediation programs and about one-fourth also had arbitration programs.” (citation omitted)).

141. See Bernstein, *supra* note 121, 2177 n.24, 2178 n.25.

142. *Id.* at 2182 n.41.

143. *Id.* at 2183 n.46.

144. *Id.* at 2172 n.3.

145. *Id.* at 2172.

146. *Id.* at 2196 n.113.

147. See *supra* notes 4-5, 39 and accompanying text.

148. In one set of compulsory ADR pilot programs a party [may] request[] a trial, [in which case] the case is restored to its original place on the docket and treated as if it had never been arbitrated; neither the record of the hearing, if made, nor the arbitrator’s decision are admissible at trial. In the pilot districts, trial de novo request rates range from forty-six to seventy-four percent of arbitrated cases.

Bernstein, *supra* note 121, at 2183. As will be discussed, the admissibility of the ADR record and award at trial is a distinguishing feature of states’ compulsory court-annexed med-mal ADR laws. See *infra* Part I.C.

distribution to the advantage or disadvantage of any of the major participants in the system.¹⁴⁹

If court-annexed arbitration is intended to merely replicate the traditional adjudicatory system, the goal of promoting more equitable or just dispute resolution through ADR is minimized.¹⁵⁰

Despite the distortion of the fundamental ADR principles of voluntariness and control over process compulsory court-annexed ADR caused, the process became popular in the late twentieth century.¹⁵¹ At the same time, the United States experienced a deluge of med-mal lawsuits, and a national tort reform movement was developing.¹⁵² The stage was set for the passage of tort-reform legislation that borrowed procedures from the ADR movement and the new phenomenon of compulsory court-annexed ADR.

B. *The Med-Mal Tort Reform Movement*

Part I.B.1 traces the evolution of the med-mal cause of action and its history in the U.S. civil justice system. Part I.B.2 focuses particularly on recent med-mal crises, in which the rate of med-mal lawsuits skyrocketed and liability insurance became unaffordable. Finally, Part I.B.3 examines how tort reformers utilize ADR in their efforts to discourage med-mal lawsuits.

1. Development of the Med-Mal Lawsuit and the Liability Insurance System

Medical malpractice is a common law cause of action based in tort.¹⁵³ The earliest med-mal lawsuits relied on legal principles used today.¹⁵⁴ Initially, claims by injured patients were brought in the form of writs of trespass on the case, intended to secure “damages sustained as the result of [their physician’s] breach of duty, negligence, or carelessness,” or, in other

149. Golann, *supra* note 32, at 518 n.129 (quoting Deborah R. Hensler, *What We Know and Don’t Know About Court-Administered Arbitration*, 69 *Judicature* 270, 272 (1986)).

150. *See supra* note 77 and accompanying text.

151. *See generally* Bernstein, *supra* note 121.

152. *See infra* Part I.B.1.

153. *See* Restatement (Second) of Torts § 299A (1965) (“Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”).

154. While the concept of professional malpractice existed in eighteenth century England and in the American colonies, the modern conception of med-mal emerged in U.S. courts around the 1840s. *See* Mohr, *supra* note 19, at 1732; *see also* Kenneth Allen De Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* 5-7 (1990) (describing the origins of the med-mal suit). The development of the modern med-mal lawsuit, understood in terms of modern tort law, appears to have developed in the mid-nineteenth century. *See id.* at 49 (noting that “the first American treatise on tort law, published by Francis Hillard in 1859, reinforced the essential permanence of the ordinary skill and care doctrine, as did Amasa Redfield’s important *Treatise on the Law of Negligence* in 1870”).

words, a failure to exercise “ordinary diligence, care, and skill.”¹⁵⁵ Juries played a prominent role, even in the earliest med-mal suits.¹⁵⁶ Interestingly, while “physicians occasionally favored the use of arbitrators to decide malpractice complaints, by the 1840s it was an uncommon practice. Jury trials were the almost unalterable rule.”¹⁵⁷ It would take nearly 130 years before arbitration again became involved in med-mal adjudication.¹⁵⁸

In the 1840s, med-mal suits flourished¹⁵⁹ due, in large part, to a series of cultural and legal developments: “a sharp decline of religious fatalism and a dramatic rise of religious perfectionism”; increased social attention to physical fitness and food standards; the opening of the medical and legal professions to the general public, creating a “marketplace professionalism”; and a trend in U.S. courts towards “relaxing the once-rigid standards for initiating civil tort proceedings of all sorts.”¹⁶⁰ These factors resulted in a 950% increase¹⁶¹ of medical malpractice suits¹⁶² in state appellate courts from 1840 to 1860.

155. De Ville, *supra* note 154, at 5-7 (internal quotation marks omitted) (describing how attorneys who brought med-mal suits in the late eighteenth century relied on Blackstone’s *Commentaries*, made available in 1765). Interestingly, Abraham Lincoln’s work as an Illinois attorney played a significant role in developing the “ordinary diligence, care, and skill” doctrine, at least in that state. *Id.* at 49, 101 (describing Lincoln’s representation of both patients and physicians in several cases).

156. De Ville explains,

While trial judges articulated the legal standards by which juries were required to assess physicians, jurors were asked to determine “questions of fact” such as what constituted carelessness and the standards of the profession at large. Although expert medical testimony was required to guide the jury’s deliberations, laymen were entrusted with the tremendous power to designate the boundaries of acceptable medical behavior. Since juries made these decisions on a case-by-case basis, acceptable standards of care, skill, and diligence were highly sensitive to popular conceptions of the medical profession and medical practice.

Id. at 6-7.

157. *Id.* at 47.

158. *See infra* Part I.B.3.

159. *See* De Ville, *supra* note 154, at 26 (“[T]he initial explosion of [med-mal] litigation in the 1840s represented a basic, fateful, and irrevocable shift in attitudes toward the practice.”).

160. Mohr, *supra* note 19, at 1732 (emphasis omitted); *see also* De Ville, *supra* note 154, at 24 (describing a similar set of cultural changes that promoted a med-mal friendly environment in U.S. courts).

161. Mohr, *supra* note 19, at 1732; *see also* De Ville, *supra* note 154, at 3 (explaining that the number of med-mal suits may have been even higher in state district courts during this period).

162. During the early stages of the med-mal lawsuit’s development, only the most unusual injuries formed the basis of claims. But mundane and otherwise common medical mistakes became more common bases for lawsuits as the med-mal cause of action became popular in the early nineteenth century. De Ville explains, “[I]n the first third of the Nineteenth Century malpractice cases typically involved severe deformity, vaccination, or obstetrics; less severe injuries seldom led to lawsuits. After 1840, however, patients began to charge physicians for malpractice involving a wider range of treatments” like fractures, lacerations, and abandonment. De Ville, *supra* note 154, at 31.

Ironically, many physicians initially saw the med-mal explosion as “a useful method of driving charlatans and amateur hacks from the field” and a needed safeguard to protect the public from “rampant irresponsibility in medicine.”¹⁶³ The American Medical Association (AMA) was founded in 1847 to regulate medical education, promote state licensing guidelines, and develop national standards of practice.¹⁶⁴ The AMA “established a board to analyze quack remedies and . . . [educate] the public.”¹⁶⁵ And “[i]n the 1870s, medical education started its long trek toward excellence and respectability.”¹⁶⁶ By the 1930s, nearly a decade after the introduction of the modern med-mal lawsuit, the medical profession no longer was open to “amateur hacks” and “only the most learned physicians” could practice medicine.¹⁶⁷

Thus, at least during its early stages in the U.S. civil justice system, the med-mal lawsuit played an important public function: addressing a dangerous regulatory imbalance.¹⁶⁸ However, med-mal lawsuits continued to flourish in the years following the implementation of strict regulations within the medical industry.¹⁶⁹ Lawyers stopped suing the “hacks and quacks,” instead focusing on the “best-educated and most successful physicians.”¹⁷⁰ As the United States experienced a period of innovation and technological advancement in medical science during the early twentieth century,¹⁷¹ the industry became more litigious—with experimentation came inevitable failures, leading to more lawsuits.¹⁷²

As a result, the modern med-mal insurance system developed.¹⁷³ Insurance premiums are meant to reflect a physician’s likelihood of being

163. Mohr, *supra* note 19, at 1732.

164. *See id.* at 1734.

165. Patricia A. Costante & Janet Spicer Puro, *Medical Malpractice: An Historical Perspective*, N.J. Med., July-Aug. 2003, at 21, 22.

166. De Ville, *supra* note 154, at 90.

167. *See* Mohr, *supra* note 19, at 1732.

168. *See* De Ville, *supra* note 154, at 87 (“[I]n 1847 one writer recognized that the lack of effective licensure in most states left to the common law the task of guarding their citizens by suits for malpractice.” (internal quotation marks omitted)).

169. *See id.* at 187 (“Medical malpractice suits continued to plague physicians through the last third of the Nineteenth Century. Although the suits and professional responses to them changed in several important respects, the trends and patterns that surfaced between 1835 and 1865 endured.”).

170. Costante & Puro, *supra* note 165, at 22.

171. *See* De Ville, *supra* note 154, at 215-23 (describing medical innovations around the beginning of the twentieth century).

172. Costante & Puro, *supra* note 165, at 23; *see also* De Ville, *supra* note 154, at 23 (“American patients began to sue their physicians on a wide scale because of specific social, medical, and technological developments . . .”).

173. *See generally* Richard L. Abbott et al., *Medical Professional Liability Insurance and its Relation to Medical Error and Healthcare Risk Management for the Practicing Physician*, 140 J. Ophthalmology 1106, 1106 (2005) (describing how the med-mal insurance industry was “[i]nitially . . . provided by large commercial carriers,” but, as a result of insurance crises, “many new malpractice liability companies were founded by physicians”).

sued.¹⁷⁴ However, when “insurers set their prices, most of the costs of the insurance coverage will be incurred only in the future. As a result, insurers constantly have to imagine the future to decide how to price their products today. This situation creates a remarkably high degree of uncertainty in insurance pricing”¹⁷⁵ Although premiums may fluctuate due to market uncertainty, securing liability insurance is essential to the responsible practice of medicine.¹⁷⁶

In order to keep insurance premiums down, some physicians feel obliged to practice “defensive medicine,” a process where physicians “substitute often unnecessary laboratory tests for reliance on their own sound medical judgments.”¹⁷⁷ Defensive medicine reflects a major consequence of the rise in med-mal lawsuits and its impact on insurance, but it was not until the late twentieth century that the insurance system reached a “crisis” level.

2. Recent Med-Mal Insurance Crises

In the 1960s and 1970s, med-mal disputes increased and juries began awarding astronomical damages in high-profile cases.¹⁷⁸ Insurers increased premiums, allegedly to keep up with the increasing number and amount of malpractice judgments; for some physicians, premiums tripled or quadrupled.¹⁷⁹ Soon “[i]nsurance simply could not be purchased at any price for most of the nation’s physicians in private practice,” leading to the first modern medical malpractice crises in the United States.¹⁸⁰

Again in the 1980s, the rate of med-mal suits increased, and premiums skyrocketed.¹⁸¹ Take, for example, New York City’s experience from 1977 to 1985: City hospitals, which were entirely self-insured and presumably paid low premiums, faced an increase in liability payments from about \$24 million to nearly \$120 million, almost a 400% increase over eight years.¹⁸² “Doctors in certain specialties, such as obstetrics and gynecology, cut back

174. However, Tom Baker argues that the med-mal insurance industry reflects a “specific business cycle that consists of alternating periods in which insurance is priced below cost (a ‘soft’ market) and periods in which insurance is priced above cost (a ‘hard’ market).” Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DePaul L. Rev. 393, 396 (2005). In order to tie insurance premiums more closely with actual physician malpractice risks, a system of experience rating has been proposed. See generally Lori L. Darling, Note, *The Applicability of Experience Rating to Medical Malpractice Insurance*, 38 Case W. Res. L. Rev. 255 (1987).

175. Baker, *supra* note 174, at 396.

176. See Margaret T. Mangan, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. Rev. 279, 281 (1997) (suggesting that “[m]edical liability insurance is mandatory and without it, physicians could not practice medicine because of the risks and uncertainties placed upon them as a result of medical malpractice litigation”).

177. Costante & Puro, *supra* note 165, at 23.

178. See *id.*

179. See *id.*

180. See *id.* However, the notion that med-mal lawsuits caused the modern medical insurance crises is controversial; no single cause has been established. See *supra* note 20 and accompanying text.

181. See Costante & Puro, *supra* note 165, at 23.

182. See James E. Hamner III, *Medical Malpractice—Tort Reform 6* (1987).

on performing high-risk procedures and treating high-risk patients in order to decrease their insurance costs and reduce their risk.”¹⁸³

More recently, “[s]ince late 1999, medical malpractice insurance premiums have increased at an unprecedented rate”—as high as a 165% increase in premiums for some specialties between 1999 and 2002.¹⁸⁴ To make matters worse, instead of continuing to raise premiums, some insurance providers simply abandoned the market altogether, causing the demand for insurance, and thus the price of premiums, to rise even higher.¹⁸⁵ “As of 2006, the [AMA] categorized twenty-two states as being in a ‘medical liability crisis’ and an additional twenty states as being on the verge of crisis.”¹⁸⁶

Although the effects are palpable, what caused the med-mal insurance crises is not clear. Some physicians criticize insurers for raising premiums higher than necessary—exaggerating the impact of frequent med-mal suits.¹⁸⁷ Other commentators claim the crises were directly correlated to the rising numbers of lawsuits.¹⁸⁸ Most commentators merely look to the fact

that juries were awarding excessive malpractice damages more frequently than ever before and that these awards caused a rise in malpractice insurance premiums. The existence of the crisis was largely supported by anecdotal evidence. Other likely causes of higher premiums, such as the “cyclical pricing and investment practices of insurance companies” were ignored.¹⁸⁹

The debate over what caused the med-mal insurance crises is fierce,¹⁹⁰ and whether they were actually caused by increased threats of med-mal liability remains unclear.¹⁹¹

183. See Costante & Puro, *supra* note 165, at 23-24.

184. Miller, *supra* note 20, at 1461 n.16 (citing U.S. Gen. Accounting Office (GAO), *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates 10* (2003)).

185. *Id.* at 1461-62.

186. *Id.* at 1462.

187. See Baker, *supra* note 174, at 393 (“[T]rial lawyers and others who seek to preserve existing medical malpractice liability rules commonly report that the high-priced, ‘hard market’ phase of the liability insurance underwriting cycle, and not real developments in malpractice litigation, fueled the medical malpractice insurance crises of the mid-1970s, mid-1980s, and early 2000s.”).

188. See *id.* (“[M]edical associations and others who seek further restrictive tort reforms claim that [the] crises represented the long overdue consequences of escalating tort costs . . .”).

189. Heather Brann, *Utah’s Medical Malpractice Prelitigation Panel: Exploring State Constitutional Arguments Against a Nonbinding Inadmissible Procedure*, 2000 *Utah L. Rev.* 359, 359 (footnote omitted). For an analysis of the cyclical pricing and investment practices of insurers, see Baker, *supra* note 174.

190. The insurance crises have become a national issue, often prompting threats of federal preemption. For example,

[o]n January 16, 2003, President [George W.] Bush delivered a speech at the University of Scranton in Scranton, Pennsylvania. While standing before a backdrop emblazoned with the words “Access,” “Affordability,” and “Quality,” the President . . . [said that] the medical liability system in the United States . . . is

3. The Tort Reform Movement's Adoption of ADR

Despite uncertainty regarding what caused the med-mal insurance crises, medical lobbyists have demanded legislative protection from the constant threat of litigation and rising insurance premiums.¹⁹² Tort reform proposals have included caps on noneconomic damages, caps on punitive damages, specialized courts, and certificates of merit, to name only a few.¹⁹³ Many “notable reforms address not the substantive law of medical malpractice, but rather the procedures by which that substantive law is enforced.”¹⁹⁴ Thus, in response to the med-mal insurance crises of the late twentieth century, it is not surprising that tort reformers turned to ADR, which had by then become an integral procedural component of the U.S. civil justice system, due to the success of the ADR movement.¹⁹⁵

ADR played a prominent role in tort-reform proposals during the 1970s and 1980s.¹⁹⁶ Tort reformers advocated greater use of ADR on two separate fronts: (1) in the private world governed by contracts—between physicians and their patients, as well as between health care providers and insurers; and (2) in the public sphere—state legislatures under pressure to reform the procedural process of med-mal litigation.

In the private contractual setting, health care providers began including ADR provisions in their contracts with patients and insurers, often

“broken.” The President believes that “junk lawsuits” will continue to plague the American people with skyrocketing medical costs and dwindling access to medical professionals unless the government quickly takes decisive action.

Collin Sult, Note, *Questionable Medicine—Why Federal Medical Malpractice Reform May Be Unconstitutional*, 47 *Ariz. L. Rev.* 195, 195 (2005) (footnotes omitted). For a critique of federal tort reform plans, see Jordyn K. McAfee, Note, *Medical Malpractice Crisis Factional or Fictional?: An Overview of the GAO Report as Interpreted by the Proponents and Opponents of Tort Reform*, 9 *Mich. St. J. Med. & Law* 161 (2005).

191. See *supra* note 20.

192. For example, the American Tort Reform Association, founded in 1986, is “dedicated to reforming the civil justice system.” American Tort Reform Association: Bringing Greater Fairness, Predictability and Efficiency to the Civil Justice System, <http://www.atra.org/about> (last visited Feb. 28, 2007).

193. See generally Miller, *supra* note 20, at 1458-59 (suggesting that “increased regulation of the medical profession, regulation of the insurance market, imposition of certificates of merit at the pretrial stage, and alterations in the manner through which the standard of care is defined” constitute valid reform proposals).

194. Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 *Fordham L. Rev.* 943, 945 (2004) (emphasis omitted) (describing recent procedural reform proposals, such as screening panels, restrictions on expert witness qualifications, revisions of remittitur standards, and even the adoption of a special court system for med-mal cases). It is arguably less controversial, and thus more achievable, to lobby for procedural changes to the way med-mal suits proceed in court than to overhaul completely the med-mal cause of action.

195. See *supra* Part I.A.

196. See, e.g., Hamner, *supra* note 182, at 8 (listing the recommendation to “encourage use of alternative dispute resolution mechanisms to resolve cases out of court” as one of several tort-reform recommendations given to President Ronald Reagan by the Tort Policy Working Group in 1986).

developing a “conflict management” strategy relying heavily on ADR.¹⁹⁷ This was not a completely new phenomenon in the medical industry; physicians have recognized that ADR may be productively applied to medical complaints since the tort’s formation.¹⁹⁸ Recognizing the potential ADR posed for reducing litigation, health care providers revised their modern conflict management strategies to encourage voluntary ADR and began including pre-dispute ADR clauses in contracts.¹⁹⁹ “ADR devices such as arbitration and mediation were thought of as substitutes for litigation. . . . Dissatisfaction with litigation led to an interest in finding alternative ways to bring a suit to an efficient, even if not a wholly satisfactory, solution.”²⁰⁰ In other words, pre-dispute ADR agreements were expected to prevent med-mal disputes from reaching courts—a matter particularly interesting to insurers—and to bring about a more cooperative and equitable health care industry.²⁰¹

However, health care conflict management strategies employing voluntary ADR got off to a rocky start.²⁰² Practitioners and health care managers generally did not have the training or expertise needed to implement ADR every time a patient complained, and the industry was unguided by studies explaining best practices.²⁰³ Furthermore, in some health care contexts, it did not take long before pre-dispute ADR agreements reflected the trend of compulsory ADR.²⁰⁴ For example, Utah “authorize[d] health care providers to require patients to sign . . . arbitration agreements and give up their right to pursue malpractice claims in court or risk being denied treatment.”²⁰⁵ Utah’s experience is an example of the distortion of the ADR movement’s core principles of voluntariness and party control over process, caused by adhesion contracts that use ADR.²⁰⁶

197. See generally Dauer & Becker, *supra* note 20, at 1:35.

198. Arbitrators were sometimes used to review med-mal complaints during the early nineteenth century, but “by the 1840s it was an uncommon practice.” See De Ville, *supra* note 154, at 47.

199. Dauer & Becker, *supra* note 20, at 1:37-38.

200. *Id.* at 1:5.

201. *Id.* (“ADR . . . [can] forestall the development of conflicts into lawsuits, and [can] go so far back into the transaction or the relationship as to try to prevent the conflict from arising in the first place.”).

202. See *id.* at 1:4 (suggesting that “ADR in health care had rather a bad false start” and is underutilized because there is a lack of data on private application of ADR in health care).

203. *Id.* at 1:30-35 (describing the lack of data but summarizing recent positive case studies, which suggest that data is becoming more prevalent).

204. See *supra* Part I.A.2-3.

205. Tony Kreindler, *Sponsor of Utah Malpractice Arbitration Bill Now Wants Repeal*, ADRworld.com, Jan. 21, 2004 (on file with the Fordham Law Review).

206. See *supra* Part I.A.2.b. In fact, a report by the joint Commission on Health Care Dispute Resolution of the American Medical Association, the American Bar Association and the American Arbitration Association . . . calls into question the fairness of mandatory arbitration for medical malpractice claims . . . [and suggests that] “[i]n disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises [i.e., post-dispute ADR agreements].” Kreindler, *supra* note 205.

Fortunately, data on the use of ADR in health care agreements is becoming more widely available today and best practices, balancing physicians' and patients' interests, are being developed.²⁰⁷

ADR was used quite differently in the public sphere. In the 1990s, state legislatures, under pressure from medical industry lobbying²⁰⁸ and encouraged by national experiments with compulsory ADR,²⁰⁹ began proposing and implementing laws mandating that med-mal lawsuits brought in state courts undergo some form of ADR before proceeding to trial.²¹⁰ Legislators have proposed that ADR facilitative and screening processes, such as "arbitration, summary jury trials, early neutral evaluation or mediation," be applied to all med-mal lawsuits.²¹¹ Most state legislatures provide only vague justifications for such laws; in one case, merely "to control rising health care costs."²¹²

These legislative reactions reflect one of the oldest criticisms of the traditional med-mal adjudicatory system: the alleged inability of ordinary juries to make fair or competent decisions in cases involving complex medical procedures.²¹³ Tort reformers have proposed getting rid of juries in

207. See, e.g., Am. Arbitration Ass'n, Am. Bar Ass'n & Am. Med. Ass'n, Commission On Health Care Dispute Resolution, Final Report (1998), available at <http://www.ama-assn.org/amal/pub/upload/mm/395/healthcare.pdf>.

208. See, e.g., *Doctors Push for Medical Malpractice ADR in WA Ballot Drive*, ADRworld.com, Sept. 20, 2004 (on file with the Fordham Law Review); *Wyoming Faces Key Vote on ADR for Medical Malpractice Claims*, ADRworld.com, Oct. 5, 2004 (on file with the Fordham Law Review) (describing lobbying efforts for and against mandatory health care-related ADR in Wyoming, Washington, and Kentucky). Medical lobbying has also reached Congress. See, e.g., Robert Pear, *Stung by Defeat in House, H.M.O.'s Seek Compromise*, N.Y. Times, Oct. 9, 1999, at A12. However, should medical industry lobbying result in federal legislation, the constitutionality of federal health care tort reform is unclear. See generally Sult, *supra* note 190.

209. See *supra* Part I.A.3.c (discussing the ADR movement and the first wave of federal compulsory court-annexed ADR).

210. See generally Dauer & Becker, *supra* note 20, at 1:24-30 (outlining health care tort reformers' early, and arguably unsuccessful, experimentation with ADR). States have continued to pass laws experimenting with mandatory ADR into the twenty-first century. See, e.g., *Veto Beaten, Maryland Mandates ADR for Malpractice Claims*, ADRworld.com, Jan. 14, 2005 (on file with the Fordham Law Review) (describing proposed legislation mandating ADR for state med-mal claims in Maryland, New Jersey, and Washington).

211. See *New Jersey Grants New ADR Powers to Judges in Malpractice Cases*, ADRworld.com, June 16, 2004 (on file with the Fordham Law Review) (describing New Jersey's "sweeping medical malpractice reform plan that authorizes judges presiding in medical malpractice cases to refer a dispute to arbitration, mediation or other alternative dispute resolution processes").

212. See, e.g., *Wyoming Lawmakers Seek to Mandate Medical Malpractice ADR*, ADRworld.com, June 30, 2004 (on file with the Fordham Law Review) (reprinting draft Wyoming legislation proposing to amend the Wyoming Constitution to authorize the legislature to enact measures to control health care costs).

213. See Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards* 17-18 (1998); see also De Ville, *supra* note 154, at 54 (recognizing the common complaint that "[a] single dissenting voice among the surgeons on the stand is enough to turn the scale in favor of the plaintiff, toward whom the sympathies of the jury invariably run" (internal quotation marks omitted)).

med-mal cases, often advocating for disposition of med-mal cases through expert panel reviews or allowing judges to sit as fact-finders.²¹⁴ Not surprisingly then,

[t]he device known as the medical malpractice screening panel was among the reform measures initiated by some states during the initial crisis of the mid-1970s. Typically, a screening panel is comprised of members of the legal and medical communities who render an opinion regarding the liability of [the alleged tortfeasor, before a case proceeds to trial].²¹⁵

However, screening panels cannot completely displace juries; rather, screening panels merely delay med-mal claims from reaching juries.²¹⁶

Essentially, screening panels serve as nonbinding court-annexed arbitration.²¹⁷ Claimants and respondents are usually each allowed to appoint one member of the panel, after which a neutral panel member is selected by the parties' appointees.²¹⁸ In most cases, after the panel is convened, "[t]he patient (and the defending practitioner) . . . offer a brief recital of the facts of the claim. The screening panel . . . consider[s] those facts and . . . issue[s] an opinion about the probability that the mishap was the result of negligence."²¹⁹ The aims of screening panels are primarily to reduce the flood of med-mal litigation and promote settlement.²²⁰

However, the merger of the ADR and tort reform movements quickly led to problems. Compulsory med-mal ADR laws generated mixed results and several states soon repealed them.²²¹ Scholars and lawmakers continue to

214. See Vidmar, *supra* note 213, at 18.

215. Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 *Geo. Wash. L. Rev.* 181, 186 (1990).

216. See Harold A. Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 *Forum* 682, 685-86 (1982).

217. See Dauer & Becker, *supra* note 20, at 1:26 ("[I]t was recognized (thanks partly to the ADR crowd) that much of the expense of the law of liability lay in the procedures by which it was imposed—namely litigation. Therefore one branch of the reform initiative tried to create systems that would divert some number of the apparently growing volume of claims away from the courts and into a less dangerous alternative. Thus were born such devices as medical screening panels."); Sakayan, *supra* note 216, at 685-86 (equating screening panels with "mandatory arbitration"); *cf. supra* Part I.A.3.c (describing the evolution of court-annexed ADR).

218. Sakayan, *supra* note 216, at 685 ("Since it is perceived that this type of arbitration provides finality, confidentiality, informality, speed and economy, as well as meeting the requirements of constitutional due process, selection of arbitration has been recognized as a proper and effective alternative.")

219. Dauer & Becker, *supra* note 20, at 1:26.

220. See Sakayan, *supra* note 216, at 686 (describing the four primary objectives of med-mal arbitration as "1. . . . to weed out unjustified suits; 2. to encourage pretrial settlements of meritorious claims; 3. to decrease the number of cases which ordinarily go to trial and thereby reduce court congestion; and 4. [to] reduce the cost of medical care by lowering the cost of liability insurance").

221. See Miller, *supra* note 20, at 1483 ("[T]he goal of arbitration panels has failed to be realized by the various states that have implemented this procedure."); Dauer & Becker, *supra* note 20, at 1:26-27 ("The hoped-for reduction in the number of cases going on to trial has not been achieved, and for those meritorious cases that did go on to trial the cost was

debate whether compulsory med-mal ADR processes actually alleviate insurance crises or exacerbate them.²²² Also, ADR advocates quickly realized that compulsory med-mal ADR processes distort fundamental notions of how ADR should be practiced.²²³ Critics of compulsory med-mal ADR suggest that ADR should not be used as a “one size fits all” solution to every med-mal claim and that ADR practiced according to a court’s busy schedule distorts the optimal timing and procedures needed to develop equitable resolutions.²²⁴

Nevertheless, many compulsory med-mal ADR laws remain on the books and states continue to experiment with new compulsory processes.²²⁵ Most common are laws providing for variations on the med-mal screening panel system, in the form of compulsory court-annexed med-mal arbitration.

C. *Compulsory Court-Annexed Med-Mal Arbitration: A Survey of State Approaches*

As the pressure on states to reform their med-mal tort systems grew²²⁶ and the ADR movement achieved national success,²²⁷ many states turned to compulsory court-annexed arbitration as a viable and efficient method of tort reform.²²⁸ Since the med-mal insurance crises of the 1970s, at least thirty states have experimented with some variation of compulsory court-annexed med-mal arbitration.²²⁹ Some states require med-mal disputes to

raised rather than reduced by the introduction of an additional procedure required prior to the ultimate resolution. Many of the mandatory [ADR] programs have likewise been repealed or allowed to sunset. . . . [ADR] showed results that were quite mixed when it was used as a mandatory pretrial device.”)

222. See Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 Penn St. L. Rev. 1077, 1079 (2004) (“[S]creening and arbitration panels actually increase litigation costs and considerably reduce insurer profitability.”); see also Dauer & Becker, *supra* note 20, at 1:27.

223. See, e.g., Katz, *supra* note 5.

224. See Dauer & Becker, *supra* note 20, at 1:27-28.

225. See *supra* notes 210-12 and accompanying text (describing recent state proposals for new laws).

226. See generally Alan Feigenbaum, Note, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 Cardozo L. Rev. 1361 (2003) (tracing the two major med-mal crises in the United States during the 1970s and 1980s); Douglas W. Taylor, Comment, *Assessment and Plan for Medical Malpractice: Quality Improvement Through Mediation*, 6 DePaul J. Health Care L. 343, 345 (2003) (examining the social consequences of medical malpractice).

227. See *supra* Part I.A.1; see also Christopher S. Kozak, Note, *A Review of Federal Medical Malpractice Tort Reform Alternatives*, 19 Seton Hall Legis. J. 599, 638 (1995) (outlining the benefits of using ADR in med-mal tort reform).

228. See Kozak, *supra* note 227, at 636 n.192 (providing a comprehensive list of state med-mal legislation utilizing ADR techniques as of 1995); see also Ellwood F. Oakley III, *The Next Generation of Medical Malpractice Dispute Resolution: Alternatives to Litigation*, 21 Ga. St. U. L. Rev. 993, 998 (2005) (“Presently, arbitration of medical malpractice claims is an option in 13 states, and 12 states mandate arbitration in some cases.”).

229. See Seavers, *supra* note 25, at 350-53 (describing twenty-eight states’ compulsory med-mal ADR statutes in appendices I-IV); see also *infra* Part I.C.1-3.

undergo arbitration before being litigated in court.²³⁰ Others have a similar effect, giving the judge or the parties themselves discretion as to when a lawsuit must be diverted to arbitration.²³¹ Common to every law is the requirement that the dispute be allowed back into the courtroom—either in the form of a trial *de novo* or an appeal of the panel's decision.²³²

The different state approaches in force today encompass a slew of creative provisions, usually labeling the ADR procedure as arbitration or a screening panel.²³³ Some state laws require parties who do not improve their position at the trial phase, after having previously lost in the arbitration phase, to pay the opponent's costs.²³⁴ Other laws allow penalties for parties that do not participate in the arbitration procedure in good faith.²³⁵ The most significant defining feature of the different state approaches is whether the record and decision from the arbitration phase is admissible in subsequent litigation.²³⁶ This distinction may determine a law's constitutionality.²³⁷

This section examines the modern state approaches to compulsory court-annexed med-mal arbitration, dividing them into two categories based on the admissibility of the arbitration result at trial.

230. See Seavers, *supra* note 25, at 325 (“The majority [of med-mal arbitration systems] are mandatory, either as a prerequisite to the filing of the complaint or as a requirement prior to trial, but after the action has been commenced in court.”).

231. See *id.* (“[Some states] provid[e] that panels are to be used only in the discretion of the presiding judge.” (emphasis omitted)).

232. See Redish, *supra* note 35, at 792 (“[S]ince no jurisdictions make screening panel decisions binding upon the parties, either party may seek redress in a jury trial.”). Of course, should the parties agree, in the form of a post-dispute ADR agreement, to be bound by the ADR panel's decision, no jury trial would be afforded. See *supra* Part I.A.3.b. Redish explains, “Written agreements to be bound by the panel findings do not violate the right to jury trial since a party is capable of waiving that right.” Redish, *supra* note 35, at 792 n.204.

233. Initially, compulsory arbitration was seen as a distinctly separate process from the medical screening panel. See Redish, *supra* note 35, at 768 (suggesting that “[t]he difference between screening panels and arbitration is significant: the former is a proceeding held prior to an actual trial to encourage or induce settlement, rendering a later trial unnecessary; the latter avoids a trial by vesting full decisionmaking power in the hands of nonjudicial arbitrators selected by the parties”). However, since the 1970s, as states have experimented with different compulsory med-mal ADR systems, screening panels and arbitration have assumed essentially the same function: “a gatekeeper on the path to the courtroom.” Dauer & Becker, *supra* note 20, at 1:26.

234. See Golann, *supra* note 32, at 500-02 (describing cost-shifting and security requirements as the most popular penalty provisions incorporated in compulsory ADR laws).

235. See *id.* at 502.

236. While Golann suggests that admission of the arbitration result is a “penalty,” see *id.* at 501-02, this Note considers provisions allowing admission of arbitration evidence at trial as integral components of certain states' laws. In other words, whether or not a state allows admission of the arbitration result at trial defines the type of compulsory med-mal ADR at issue in a constitutional analysis. See *infra* Part II. In any event, admissibility provisions likely “discourage ADR participants from proceeding with conventional litigation by changing the nature of any subsequent trial.” Golann, *supra* note 32, at 501.

237. See *infra* Part II.

1. “The Inadmissible Approach”: Keeping the Arbitration Result from the Jury

The “inadmissible approach” describes state laws that require compulsory court-annexed med-mal arbitration, but proscribe the introduction of the arbitration record and result as evidence at trial.²³⁸ Although the arbitration panel is directed to “consider all relevant evidence and decide the issues of liability, amount of damages, and apportionment of responsibility among the parties,”²³⁹ the panel’s award is nonbinding and either party can demand a trial de novo, in which the arbitration record is inadmissible.²⁴⁰ States generally following the “inadmissible approach” are Florida,²⁴¹ Hawaii,²⁴² Idaho,²⁴³ Montana,²⁴⁴ New Mexico,²⁴⁵ Utah,²⁴⁶

238. For example, Florida has experimented with creative uses of compulsory arbitration for med-mal suits since the late 1970s. *See Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979); *see also* Fla. Stat. Ann. § 766.107 (West 2005). Florida does not allow admission of the arbitration result at trial. *See id.* § 766.107(4)-(5) (“The decision of the arbitration panel shall not be binding. . . . After the arbitration award is rendered, any party may demand a trial de novo in the circuit court At the trial de novo, the court shall not admit evidence that there has been an arbitration proceeding, the nature or the amount of the award, or any other matter concerning the conduct of the arbitration proceeding Panel members may not be called to testify as to the merits of the case.”).

239. *Id.* § 766.107(3)(b).

240. *Id.* § 766.107(4)-(5). The Florida law also penalizes parties who reject their opponent’s offer to arbitrate, by limiting the amount or type of damages recoverable at trial, but this type of provision is uncommon. *See id.* § 766.209(3)-(4).

241. *See supra* notes 238-40 and accompanying text.

242. *See* Haw. Rev. Stat. § 671-12 (2005) (“[A]ny person or the person’s representative claiming that a medical tort has been committed shall submit a statement of the claim to the medical claim conciliation panel before a suit based on the claim may be commenced in any court of this State.”); *see also id.* § 671-16 (“No statement made in the course of the hearing of the medical claim conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action No decision, conclusion, finding, or recommendation of the medical claim conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the medical claim conciliation panel hearing, or the counsel or other representative of such party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury”).

243. *See* Idaho Code Ann. § 6-1001 (2004) (“[P]roceedings shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation.”); *see also* Rudd v. Merritt, 66 P.3d 230, 235 (Idaho 2003) (describing the nature of Idaho’s screening panels as “entirely separate” from civil lawsuits, “informal and nonbinding,” and noting that “no record is kept”).

244. *See* Mont. Code Ann. § 27-6-701 (2005) (“No malpractice claim may be filed in any court against a health care provider before an application is made to the panel and its decision is rendered.”); *see also id.* § 27-6-704 (requiring nondisclosure of panel proceedings in subsequent court actions).

245. *See* N.M. Stat. Ann. § 41-5-15 (LexisNexis 1996) (“No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered.”); *id.* § 41-5-20(A)-(D) (“The deliberations of the panel shall be and remain confidential. . . . The report of the medical review panel shall not be admissible as evidence in any action subsequently brought in a court of law.”).

246. *See* Utah Code Ann. § 78-14-12(1)(c) (2002) (“The proceedings are informal, nonbinding, and . . . are compulsory as a condition precedent to commencing litigation.”); *id.*

Wisconsin,²⁴⁷ Wyoming,²⁴⁸ and Washington.²⁴⁹ Interestingly, Ohio²⁵⁰ provides for *voluntary* arbitration, but dictates that the arbitration result is inadmissible at trial.²⁵¹

2. “The Admissible Approach”: Allowing Admission of the Arbitration Result at Trial

The “the admissible approach” describes state compulsory court-annexed med-mal arbitration laws that allow admission of the arbitration record and result as evidence at trial. For example, in Delaware,²⁵² the panel reports its findings regarding liability directly to the court in which litigation is pending, such findings constituting *prima facie* evidence of liability at trial.²⁵³ An adversely affected party may petition the court to review the panel’s findings, and the complete panel record is admissible in court.²⁵⁴ “Thus, [in systems following the admissible approach] if a disputant loses in arbitration and demands a trial, the fact that he lost, and perhaps the

§ 78-14-15(1)-(2) (“Evidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction. . . . No panelist may be compelled to testify in a civil action subsequently filed with regard to the subject matter of the panel’s review.”).

247. See Wis. Stat. Ann. § 655.44(5) (West 2004) (“[N]o court action may be commenced unless a request for mediation has been filed under this section and until the expiration of the mediation period”); *id.* § 655.58 (describing the confidential nature of the mediation proceedings). Wisconsin’s compulsory med-mal ADR system details the procedures for appointing the panel, but does not govern how the process should be conducted. See *id.* § 655.465. Although the process is referred to as “mediation,” the compulsory nature of the law makes it similar to other states’ compulsory arbitration systems.

248. See Wyo. Stat. Ann. § 9-2-1518(a) (2005) (“[N]o complaint alleging malpractice shall be filed in any court against a health care provider before a claim is made to the panel and its decision is rendered.”); *id.* § 9-2-1523 (requiring panel records to be kept private and proscribing calling of panel members at trial).

249. See Wash. Rev. Code Ann. § 7.70.100 (West Supp. 2007) (providing for mandatory court-ordered mediation for all health care claims).

250. See Ohio Rev. Code Ann. § 2711.21(A) (LexisNexis 2000) (“[I]f all of the parties to the medical, dental, optometric, or chiropractic claim agree to submit it to nonbinding arbitration, the controversy shall be submitted to an arbitration board consisting of three arbitrators to be named by the court.”).

251. See *id.* § 2711.21(C) (“If the decision of the arbitration board is not accepted by all parties to the medical, dental, optometric, or chiropractic claim, the claim shall proceed as if it had not been submitted to nonbinding arbitration pursuant to this section. The decision of the arbitration board and any dissenting opinion written by any board member are not admissible into evidence at the trial.”).

252. See Del. Code Ann. tit. 18, § 6802 (1999) (“In any civil action alleging medical negligence at any time after the filing of an answer or any motion filed in lieu thereof, any party shall have the right to convene a medical negligence review panel”); *id.* § 6808 (providing the panel with “the authority to subpoena witnesses, administer oaths and compel the production of documents”).

253. See *id.* § 6811(b)-(c). In other states, “[t]he ADR outcome may . . . shift the burden of proof at trial.” Golann, *supra* note 32, at 502.

254. Del. Code Ann. tit. 18, § 6811(d), (f).

amount of any finding against him, will be evidence which any later judge or jury may consider.”²⁵⁵

States generally following the admissible approach²⁵⁶ are Delaware,²⁵⁷ Indiana,²⁵⁸ Kansas,²⁵⁹ Louisiana,²⁶⁰ Maine,²⁶¹ Maryland,²⁶² Massachusetts,²⁶³ Michigan,²⁶⁴ Nebraska,²⁶⁵ and Virginia.²⁶⁶ Although no longer in force, Vermont²⁶⁷ and Wyoming²⁶⁸ once had laws following the

255. Golann, *supra* note 32, at 502.

256. Interestingly, Delaware courts have held that the system by which the panel reports its findings to the court does not violate the Seventh Amendment right to trial or the Fourteenth Amendment due process protections. *See* Del. Code Ann. tit. 18, § 6811 (describing Delaware cases in the note and comments section); *see also infra* Part II. Commentators suggest that the admissible approach is unextraordinary. *See* Feigenbaum, *supra* note 226, at 1379 n.105 (discussing states with mandatory screening panels).

257. *See supra* notes 252-54 and accompanying text.

258. *See* Ind. Code Ann. §§ 34-18-8-4, -6 (LexisNexis 1998) (requiring panel review as a condition precedent to filing any med-mal lawsuit involving more than \$15,000). The panel opinion is admissible in court. *See id.* § 34-18-10-23.

259. *See* Kan. Stat. Ann. § 65-4901 (2002) (describing formation of the panel); *id.* § 65-4904 (requiring the panel to issue an opinion, which is delivered to the parties and the presiding judge and which “shall be admissible in any subsequent legal proceeding, and either party may subpoena any and all members of the panel as witnesses for examination relating to the issues at trial”).

260. *See* La. Rev. Stat. Ann. § 40:1299.47 (Supp. 2007). Subsection (H) dictates that “[a]ny report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness.” *Id.* § 40:1299.47(H).

261. *See* Me. Rev. Stat. Ann. tit. 24, §§ 2851, 2852, 2857 (2000). Under Maine’s system, only unanimous findings are admissible in court, *id.* § 2857(B), and the panel may not decide “dispositive legal affirmative defenses, and comparative negligence,” *id.* § 2853(5) (Supp. 2006).

262. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-2A-06(d) (LexisNexis 2006) (“Unless vacated by the court . . . , the unmodified arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.”)

263. *See* Mass. Ann. Laws ch. 231, § 60B (LexisNexis 2000) (establishing the criteria for convening a med-mal review tribunal and establishing that “[t]he testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial”).

264. *See* Mich. Comp. Laws Ann. § 600.4915 (West 2000) (establishing a system of compulsory “mediation,” which is, in fact, just like arbitration because, “within 14 days after the mediation hearing, the panel shall make an evaluation and notify the attorney for each party of its evaluation in writing. The evaluation shall include a specific finding on the applicable standard of care”); *id.* § 600.4919 (establishing procedures for use of the mediation panel’s evaluation if the parties proceed to trial).

265. *See* Neb. Rev. Stat. §§ 44-2840, 44-2841, 44-2844(2) (2004). Since the claimant may waive his “right” to the panel’s review, Nebraska’s law could be classified as voluntary med-mal arbitration.

266. *See* Va. Code Ann. § 8.01-581.2 (Supp. 2006) (establishing that any party may convene a review panel); *id.* § 8.01-581.8 (2000) (allowing for admission of the panel opinion at trial and the right to call panel members as witnesses).

267. *See* Vt. Stat. Ann. tit. 12, § 7002 (2002). Today in Vermont, “persons asserting a claim based on medical malpractice may submit the claim in writing to arbitration prior to the commencement of any trial as to said claim, but not thereafter, providing that all parties having an interest in the claim agree to arbitration,” thus establishing a system of voluntary med-mal arbitration. *Id.*

admissible approach, and the District of Columbia has experimented with procedures similar to the admissible approach.²⁶⁹

3. Miscellaneous Provisions in Compulsory Court-Annexed Med-Mal Arbitration Laws

Some states encourage parties involved in any lawsuit meeting certain criteria, irrespective of the lawsuit's subject matter, to undergo arbitration or some form of ADR before being litigated ("across-the-board ADR").²⁷⁰ These state laws resemble the federal courts' use of court-annexed ADR in the 1990s.²⁷¹ States with across-the-board ADR statutes include Minnesota,²⁷² New Jersey,²⁷³ North Carolina,²⁷⁴ North Dakota,²⁷⁵ Oregon,²⁷⁶ and Pennsylvania.²⁷⁷

Some states have compulsory court-annexed med-mal arbitration laws, but also provide for a controversial fee-shifting provision.²⁷⁸ After arbitration and before proceeding on a complaint, the plaintiff must post a bond that goes towards paying the defendant's costs if the plaintiff loses at

268. See Wyo. Stat. Ann. § 9-2-1501 (1986). In *Hoem v. State*, 756 P.2d 780, 782 (Wyo. 1988), the Supreme Court of Wyoming held the 1986 Wyoming Medical Review Panel Act—which followed the admissible approach—unconstitutional on equal protection grounds because the "act treats medical malpractice victims differently than those injured by the tortious conduct of someone other than a health care provider in that only medical malpractice victims are prohibited from filing a claim for personal injury directly in court." Today, Wyoming follows the inadmissible approach. See *supra* note 248 and accompanying text.

269. See McCulloch, Campbell & Lane LLP, Summary of Medical Malpractice Law: District of Columbia, <http://www.mcandl.com/dc.html> (last visited Mar. 16, 2007).

270. Commentators have debated the viability of mandatory arbitration for all civil claims. See generally Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. Disp. Resol. 101, 105-06, 105 n.18; Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 Hastings L.J. 239, 286 (1987).

271. See *supra* Part I.A.3.c.

272. See Minn. Stat. Ann. § 484.74 (West 2002) (establishing the possibility of court-ordered, nonbinding ADR for any civil suit over \$7,500 in select districts).

273. See N.J. Stat. Ann. §§ 2A:23A-20, -28 (West 2000) (providing for mandatory, nonbinding arbitration for any civil claim \$20,000 or less).

274. See N.C. Gen. Stat. § 7A-38.1 (2005) (providing for mandatory court-ordered mediation for all civil actions).

275. See N.D. Cent. Code, § 32-42-03 (1996) (mandating good-faith effort to use ADR before filing complaint).

276. See Or. Rev. Stat. Ann. § 36.400 (West Supp. 2006) (providing for mandatory arbitration of matters involving \$50,000 or less in all circuit courts).

277. See 42 Pa. Cons. Stat. Ann. § 7361 (1998) (providing for mandatory arbitration for certain claims involving \$50,000 or less). However, even though Pennsylvania requires arbitration for any suit involving \$50,000 or less, the constitutionality of compulsory med-mal arbitration in the state is unclear. In *Mattos v. Thompson*, 421 A.2d 190, 196 (Pa. 1980), the Pennsylvania Supreme Court declared the Pennsylvania compulsory med-mal arbitration statute unconstitutional "because the delays involved in processing these claims under the prescribed procedures set up under the Act result in an oppressive delay and impermissibly infringes upon the constitutional right to a jury."

278. Golann describes common penalty provisions in mandatory ADR laws. Golann, *supra* note 32, at 500-01.

trial.²⁷⁹ States with a cost-shifting component of their compulsory court-annexed med-mal arbitration systems are Massachusetts,²⁸⁰ Michigan,²⁸¹ Oregon,²⁸² Wisconsin,²⁸³ and formerly Nevada.²⁸⁴

Some state laws include provisions complicating categorization. For example, compulsory med-mal arbitration laws include different provisions for when arbitration shall be judge-ordered, party-requested, or simply a condition precedent to filing a complaint.²⁸⁵ Additionally, some laws only require certain issues in med-mal lawsuits, such as the issue of damages, to undergo court-annexed ADR.²⁸⁶

II. CONSTITUTIONAL CHALLENGES TO COMPULSORY COURT-ANNEXED MED-MAL ARBITRATION

Regardless of the approach adopted, any state law mandating court-annexed med-mal arbitration implicates the Seventh Amendment right to jury trial²⁸⁷ and Fifth and Fourteenth Amendment guarantees of due process and equal protection of the laws.²⁸⁸ Compulsory court-annexed med-mal arbitration laws may also violate state constitutional protections, depending on the jurisdiction.²⁸⁹ Anticipating these constitutional issues, states

279. See, e.g., Mass. Ann. Laws ch. 231, § 60B (LexisNexis 2000) (“If a finding is made for the defendant or defendants in the [panel phase of the] case the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars . . . payable to the defendant or defendants in the case for costs assessed . . . [A] single justice may, within his discretion, increase the amount of the bond required to be filed.”).

280. *Id.*

281. See Mich. Comp. Laws Ann. § 600.4921 (West 2000) (“If a party has rejected an evaluation and the action proceeds to trial, that party shall pay the opposing party’s actual costs unless the verdict is more favorable to the rejecting party than the mediation [panel] evaluation.”).

282. See Or. Rev. Stat. Ann. §§ 36.400, 36.425 (West Supp. 2006) (requiring arbitration of any civil claim less than \$50,000 in Oregon circuit courts, while providing a right to a trial de novo, but also requiring a claimant to pay his opponent’s attorney fees if the claimant’s position is not improved after trial).

283. See Wis. Stat. Ann. § 655.61 (West 2004) (establishing a mediation fund and requiring contributions from health care providers).

284. See Nev. Rev. Stat. Ann. § 41A.016 (LexisNexis 2001) (repealed 2002).

285. See *supra* notes 230-31 and accompanying text.

286. See, e.g., N.Y. C.P.L.R. § 3045 (McKinney 1991) (allowing a defendant to concede liability and file for compulsory arbitration regarding damages issues only).

287. See Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. U. L. Rev. 737, 742 n.32 (1989) (suggesting that “plaintiffs have argued, with little success, that mandatory submission of a plaintiff’s claim to a medical malpractice review or arbitration panel before the plaintiff may proceed in the courts constitutes a denial of the plaintiff’s right to trial by jury”); Kozak, *supra* note 227, at 640 (“Admission of panel findings has been contested, rather unsuccessfully, as a violation of the Seventh Amendment right to a jury trial.”).

288. See Golann, *supra* note 32, at 493. Other constitutional issues implicated by compulsory court-annexed med-mal ADR laws include principles of federalism, access to courts, and separation of powers. *Id.*

289. For example, “every state except Colorado and Louisiana . . . provide[] a jury trial guarantee in civil cases through [their] state constitution.” Seavers, *supra* note 25, at 328.

drafted their laws so that the losing party in arbitration is always afforded a full trial.²⁹⁰ In other words, compulsory med-mal arbitration systems delay, but do not deny, plaintiffs' ability to bring med-mal lawsuits in court.²⁹¹ Thus, defenders of the laws argue that, although compulsory in nature, the laws merely add an extra procedural hurdle in med-mal lawsuits, thereby preserving the traditional adjudicatory system.²⁹²

Nevertheless, the question remains: Is the extra procedural hurdle constitutional? The answer often depends on whether a state's system follows the admissible or inadmissible approach.²⁹³ Federal courts have tended to reject constitutional challenges to compulsory court-annexed med-mal arbitration laws.²⁹⁴ Some state courts strike the laws down as violating constitutional guarantees,²⁹⁵ while other state courts uphold them as constitutional.²⁹⁶ Additionally, "[i]n some instances . . . [laws] have been accepted in theory, but adjudged unconstitutional in operation."²⁹⁷

Part II examines constitutional challenges to compulsory court-annexed med-mal arbitration laws, both in federal and state courts, and explains why the laws have sometimes been upheld as constitutional and other times declared unconstitutional. Particular attention is paid to the most notable cases analyzing the constitutionality of compulsory court-annexed med-mal arbitration laws.

290. Redish, *supra* note 35, at 792 ("On first appearances, claiming a threat to the jury trial right may seem puzzling: since no jurisdictions make screening panel decisions binding upon the parties, either party may seek redress in a jury trial.").

291. Delaying a claimant's right to trial is generally not considered an unconstitutional denial of that right or of due process rights afforded by most states and the Federal Constitution. *See infra* note 306 and accompanying text.

292. *See infra* notes 306-07 and cases cited therein.

293. *See supra* Part I.C.

294. *Compare infra* Part II.A.1, with *infra* Part II.B.1.

295. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976); Arneson v. Olson, 270 N.W.2d 125, 125 (N.D. 1978); Mattos v. Thompson, 421 A.2d 190 (Pa. 1980); *see also infra* Part II.B.2.

296. *See, e.g.*, Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980); Att'y Gen. v. Johnson, 385 A.2d 57 (Md. 1978) (overruling a lower court opinion holding the Maryland law mandating arbitration to be unconstitutional because the arbitration panel did not have final adjudicatory power and the claimant was ultimately allowed to exercise his right to trial); Prendergast v. Nelson, 256 N.W.2d 657 (Neb. 1977); Beatty v. Akron City Hosp., 424 N.E.2d 586 (Ohio 1981); State *ex rel.* Strykowski v. Wilkie, 261 N.W.2d 434 (Wis. 1978); *see also infra* Part II.A.2. In *Beatty*, the Supreme Court of Ohio held that mandatory arbitration was compatible with the constitutional rights to a jury trial, *Beatty*, 424 N.E.2d at 590-91 (citing U.S. Const. amend. VII; Ohio Const. art. 1, § 5), and equal protection, *id.* at 591-95 (citing U.S. Const. amend XIV; Ohio Const. art. 1, § 2). The Ohio compulsory med-mal arbitration law has since been amended and now only provides for arbitration of med-mal claims if both parties agree. *See* Ohio Rev. Code Ann. § 2711.21 (LexisNexis Supp. 2006); *see also supra* notes 250-51 and accompanying text.

297. Golann, *supra* note 32, at 493; *see also infra* notes 400-03 and accompanying text.

A. Compulsory Court-Annexed Med-Mal Arbitration Is Constitutional

Part II.A.1 examines federal cases that have declared compulsory court-annexed med-mal arbitration laws constitutional. Part II.A.2 examines state cases that have held similarly.

1. Federal Cases Upholding Compulsory Med-Mal Arbitration Laws

When med-mal claims are heard in federal court,²⁹⁸ the most common constitutional challenge to compulsory court-annexed med-mal arbitration is based on the Seventh Amendment, or a state constitutional equivalent, right to jury trial.²⁹⁹ Med-mal claims derive from common law causes of action³⁰⁰ and thus must receive a jury trial in federal courts.³⁰¹ However, as noted, no compulsory court-annexed med-mal arbitration law completely denies parties the opportunity to present their case to a jury.³⁰² Thus, right to jury trial challenges are usually unsuccessful.³⁰³

298. "Under the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity apply federal procedural rules but decide substantive issues of law in accord with applicable state law." *Hum v. Dericks*, 162 F.R.D. 628, 635 (D. Haw. 1995). Federal courts considering med-mal claims usually have jurisdiction based on diversity, see 28 U.S.C. § 1332 (2000), and tend to declare med-mal statutes to be substantive state law for *Erie* purposes. See, e.g., *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880 (1st Cir. 1981); *Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979); *Daniel v. Jones*, No. 4:96CV00024, 1996 U.S. Dist. LEXIS 15436 (E.D. Va. May 3, 1996) (sitting in diversity because the plaintiff had moved from Virginia since the alleged malpractice, yet referring the lawsuit to arbitration pursuant to Virginia's compulsory arbitration statute); *Hill v. Morrison*, 870 F. Supp. 978 (W.D. Mo. 1994); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 423-25 (N.D. Ind. 1979) (analyzing Indiana's compulsory med-mal arbitration statute in light of federal diversity jurisdiction jurisprudence, ultimately concluding that "[i]t cannot be logically argued that the [statute] does not, by its own terms, apply to diversity claims pending before this Court"); *Davison v. Sinai Hosp. of Balt., Inc.*, 462 F. Supp. 778, 781 (D. Md. 1978), *aff'd per curiam*, 617 F.2d 361 (4th Cir. 1980). But see *Hum*, 162 F.R.D. at 635-37 (refusing to require a class of med-mal plaintiffs to undergo Hawaii's compulsory med-mal arbitration process when suing in federal court); *Adkins v. Commonwealth of Va. ex rel. Univ. of Va. Med. Ctr.*, 154 F.R.D. 139, 141 (W.D. Va. 1994) (refusing to apply Virginia's compulsory med-mal arbitration statute in a federal diversity case, based on the plain language of the statute); *Wheeler v. Shoemaker*, 78 F.R.D. 218, 229 (D.R.I. 1978) (refusing to apply Rhode Island's compulsory med-mal arbitration law when a med-mal claim was being heard in federal court on diversity jurisdiction). For a discussion of preemption and choice of law issues regarding med-mal claims in federal courts, see Golann, *supra* note 32, at 561-64.

299. See Golann, *supra* note 32, at 502.

300. See *supra* note 153 and accompanying text; see also Golann, *supra* note 32, at 505 n.69 (explaining that "legislatures could not impose binding ADR on medical malpractice claims because such claims clearly exist at common law" (citing Redish, *supra* note 35, at 797-98)).

301. Since the Seventh Amendment preserves the right of trial by jury in suits at common law as of the time the Seventh Amendment was ratified, but does not guarantee a jury trial for every legal claim, only historically valid or newly created causes of action "which closely resemble common law claims" must be presented to a jury. See Golann, *supra* note 32, at 502-03. Med-mal claims exist at common law and thus fall within the scope of the Seventh Amendment. See Redish, *supra* note 35, at 797-98.

302. See *supra* note 232 and accompanying text. Of course, should a state completely eliminate the med-mal cause of action, no jury trial rights would exist. See, e.g., Golann, *supra* note 32, at 504 ("For example, the right of an employee to sue his employer in tort for

Federal courts that reject right to jury trial challenges to compulsory med-mal arbitration laws consider dispositive the fact that a jury trial is ultimately afforded.³⁰⁴ For example, in rejecting a challenge to a Florida law mandating med-mal arbitration, the Fifth Circuit explained that

[n]othing in the seventh amendment requires that a jury make its findings at the earliest possible moment in the course of civil litigation; the requirement is only that the jury ultimately determine the issues of fact if they cannot be settled by the parties or determined as a matter of law.³⁰⁵

This rationale follows Supreme Court precedent holding that delayed access to a jury does not violate the Seventh Amendment, so long as delays or conditions placed on the right to jury trial are “reasonable.”³⁰⁶ Compulsory court-annexed med-mal arbitration laws that withstand Seventh Amendment challenges must not impose unreasonable burdens on litigants’ jury trial rights.³⁰⁷

job-related injuries has been abolished in many states and replaced by worker’s compensation statutes. Under such laws, an employee no longer needs to prove employer negligence in order to recover, but must submit all other issues concerning his injury claim to binding arbitration by an administrative agency. The traditional jury trial has been eliminated as an option”). So far, no state has completely eliminated the med-mal cause of action. *See generally* Redish, *supra* note 35, at 797-98.

303. *See* Weiss, *supra* note 287, at 742 n.32 (“[P]laintiffs have argued, with little success, that mandatory submission of a plaintiff’s claim to a medical malpractice review or arbitration panel before the plaintiff may proceed in the courts constitutes a denial of the plaintiff’s right to trial by jury.”).

304. *See, e.g.,* Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 426 (N.D. Ind. 1979) (rejecting a claimant’s Seventh Amendment challenges because “[u]nquestionably, the [state law] does not foreclose a medical malpractice claimant’s right to have his claim against a qualified health care provider tried before a jury; rather, the [law] requires that the claimant first participate in the medical review panel procedure described in the [law] and permits the admissibility of the resulting determination as an expert opinion and further permits panel members to be called as witnesses at trial”).

305. *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1178 (5th Cir. 1979) (emphasis omitted). The court went on to conclude that

[o]nce the [court-annexed] panel has considered the evidence and rendered its decision either party to the claim is free to proceed to a jury trial; the jury will remain the ultimate arbiter of the case. So long as [the plaintiff’s] right to have her claim fully and finally determined by a jury is preserved, she cannot be heard to complain that her right to a jury trial has been unconstitutionally restricted.

Id. at 1179.

306. *See* Golann, *supra* note 32, at 506. “Courts should ask, in effect, whether an innovation challenged under the Seventh Amendment serves the basic purposes of adjudicative procedure—speed, low cost, and just results—as well as the traditional process it replaces.” *Id.* at 516. The Supreme Court has established the reasonableness standard to be applied to procedural innovations that legislatures may devise. *See Ex parte Peterson*, 253 U.S. 300, 309-10 (1920) (applying the reasonableness standard in rejecting a Seventh Amendment challenge to a judge’s determination to allow an “auditor” to review evidence and issue a report that could be introduced at trial); *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (declaring a plan that diverted jury trials to justices of the peace not to violate the Seventh Amendment because the justices’ of the peace decisions were nonbinding and the procedure furthered a reasonable state interest).

307. *See* Katz, *supra* note 5, at 23 (“Generally, the benefits of arbitration, such as speed and the elimination of frivolous suits, outweigh the burdens, such as delay in obtaining a jury trial, and so the procedure is deemed reasonable.”).

The difference between the admissible and inadmissible approaches appears to make little difference in right to jury trial challenges in federal courts. The Fifth Circuit suggests that

[t]he panel finding is a particularly relevant, but not conclusive, form of evidence. The parties to a malpractice dispute are free to present the same witnesses and exhibits before the trial jury that they presented to the mediation panel, and the jury may draw its own conclusions from their testimony, even if in so doing it rejects the panel's finding.³⁰⁸

Most circuits considering the issue are in accordance.³⁰⁹ However, it has been suggested that by introducing the arbitration record and award as evidence in the subsequent trial, "the jury may be so swayed by those findings that the party who lost at the . . . [arbitration] stage will—in substance, if not in form—also lose the right to jury trial."³¹⁰ This argument has not been successful at the federal level,³¹¹ perhaps because federal courts routinely allow introduction of appointed fact-finders' opinions and recommendations at trial.³¹² According to one commentator, "There is no apparent reason why the results of an ADR proceeding cannot be critiqued at trial as effectively as the report of a master or neutral expert."³¹³ In any event, laws following the inadmissible approach should

308. *Woods*, 591 F.2d at 1180; see also *Hines*, 465 F. Supp. at 428 (equating the ADR panel's findings with expert opinions, which are authorized as admissible under federal evidence rules).

309. See, e.g., *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146, 149 (5th Cir. 1981) ("The statutes clearly prescribe that the panel's report constitutes no more than expert opinion evidence, the use of which is not incompatible with the seventh amendment." (footnote omitted)); *Davison v. Sinai Hosp. of Balt., Inc.*, 462 F. Supp. 778, 781 (D. Md. 1978), *aff'd per curiam*, 617 F.2d 361 (4th Cir. 1980) ("This provision only establishes a rebuttal presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents." (internal quotation marks omitted)).

310. *Redish*, *supra* note 35, at 792.

311. However, the argument has been considered by New York and Ohio state courts. See *Comiskey v. Arlen*, 390 N.Y.S.2d 122, 126 (App. Div. 1976) (rejecting the argument and overturning a trial court ruling declaring New York's compulsory med-mal mediation statute unconstitutional); *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903, 908 (Ohio C.P. 1976) (agreeing with the argument and declaring Ohio's compulsory med-mal arbitration statute unconstitutional).

312. See, e.g., *Gronne v. Abrams*, 793 F.2d 74, 78 (2d Cir. 1986) ("[T]he seventh amendment merely requires 'that the ultimate determination of issues of fact by the jury be not interfered with.' Under [the New York compulsory med-mal arbitration law], the jury remains the final arbiter of factual questions raised at trial. The panel's recommendation, if unanimous and therefore admissible at trial, is in effect an expert opinion which is to be evaluated by the jury in the same manner as it would evaluate any other expert opinion." (quoting *In re Peterson*, 253 U.S. 300, 310 (1920))); see also *Golann*, *supra* note 32, at 513-15 (comparing admission of the arbitration record to admission of an auditor's report, which the Supreme Court has held does not infringe on Seventh Amendment guarantees, because "the auditor's findings could be questioned and rebutted").

313. See generally *Golann*, *supra* note 32, at 542-43.

have no problem overcoming right to jury trial challenges since the trial phase is unaffected.³¹⁴

Compulsory court-annexed med-mal arbitration laws have also been challenged on due process grounds in federal courts, but with little success.³¹⁵ The Fifth and Fourteenth Amendments guarantee that the federal and state governments shall not deprive any person of "life, liberty, or property," without due process of law.³¹⁶ This guarantee has been interpreted as a right to procedural due process: "The Supreme Court has characterized the right as 'an opportunity to be heard at a meaningful time and in a meaningful manner' which is 'appropriate to the nature of the case.'"³¹⁷ The main due process issue involved in compulsory court-annexed med-mal arbitration "is whether [the arbitration process] constitutes an unreasonable barrier to disputants' access to court, or unreasonably impairs the quality of the later adjudicative hearing."³¹⁸

Federal courts have tended to reject due process challenges to compulsory court-annexed med-mal arbitration laws. Federal courts reason that merely delaying due process does not automatically deny due process.³¹⁹ Interestingly, in upholding Indiana's compulsory med-mal arbitration law, the District Court for the District of Indiana ruled that a claimant had no "fundamental right" to pursue a med-mal claim, and thus whatever procedural burdens the state implemented did not violate due process.³²⁰ This holding is in line with state court cases, which tend to

314. See Redish, *supra* note 35, at 793 ("A legislature troubled by the jury trial argument could follow the lead of jurisdictions that refuse to admit the panel's findings into evidence in a subsequent trial.")

315. See Golann, *supra* note 32, at 531. The Fifth Amendment requires that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

316. See U.S. Const. amend. V.

317. Golann, *supra* note 32, at 535 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) and *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 313 (1950), respectively). However, since these pronouncements were in the context of government decisions regarding public benefits, the level of due process necessary in private adjudication is not clearly defined. See *id.* at 537 ("Although the Court has also applied due process principles to private adjudication, it has not described the minimum standards for such processes with any specificity."). In some cases, "where there is a greater need for speed and economy of adjudication, expertise is important, and the dispute has less of an adversarial character, the [C]ourt has been willing to curtail or abandon the adjudicatory model altogether." *Id.* at 538 (describing why the court has rejected due process challenges to alterations of the traditional adjudicatory model in family law and mental health decision-making contexts).

318. *Id.* at 540-41 (noting that "where a state provides a civil cause of action, due process principles bar the state from imposing preconditions or barriers to a claimant's access to adjudication, or obstacles to the conduct of the adjudicatory hearing itself, which are either irrational or unreasonable in light of the goals they serve." (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30, 433, 437 (1982))).

319. See Golann, *supra* note 32, at 541 n.241 (analyzing the Supreme Court's pronouncement that imposing preconditions on proceeding with litigation does not automatically violate due process).

320. See *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 433 (N.D. Ind. 1979) ("The provisions of the Act assailed by the plaintiffs do not violate . . . the Indiana Constitution[']s

decide the issue similarly.³²¹ Due process challenges also sometimes rely on the theory that a civil claim constitutes a property interest, and thus governmental interference with filing of a claim is similar to an uncompensated taking.³²² However, compulsory court-annexed med-mal arbitration laws are never binding,³²³ so litigants are never deprived of their due process “property” interests in filing med-mal lawsuits.³²⁴

When examining the laws under a due process lens, federal courts have not been troubled by laws employing the admissible approach—allowing evidence of the arbitration record and results at trial.³²⁵ While several state courts find the admissible approach constitutionally impermissible on due process grounds,³²⁶ federal courts tend to be less willing to strike down a state’s compulsory med-mal arbitration law according to this rationale.³²⁷

Federal courts also consider equal protection challenges to compulsory court-annexed med-mal arbitration laws.³²⁸ In addition to the Fourteenth Amendment’s guarantee that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,”³²⁹ the Supreme Court has

due process guarantee] nor do they violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. . . . [S]ince a claimant’s right to pursue litigation does not constitute a fundamental right, as clearly established by the case law cited above, no real due process issue arises in consideration of such medical malpractice statutes concerning the purported burdens placed upon claims by medical review panel procedures.”).

321. The court in *Hines* cited *Prendergast v. Nelson*, 256 N.W.2d 657, 663-64 (Neb. 1977) and *Everett v. Goldman*, 359 So. 2d 1256, 1268-69 (La. 1978), both of which rejected due process challenges. *Hines*, 465 F. Supp. at 433.

322. See *Logan*, 455 U.S. at 434; *Colton v. Riccobono*, 496 N.E.2d 670, 672 (N.Y. 1986) (“Petitioner’s claim of right rests solely on constitutional due process grounds; she claims that she has a property interest in access to the courts and that application of the statute and rule unfairly deprive her of that access.”); see also *Golann*, *supra* note 32, at 532 n.194.

323. See *supra* notes 232, 301 and accompanying text; see also *Katz*, *supra* note 5, at 25 (“Under the Due Process Clause, mandatory arbitration is invalid only if the arbitral result is final and binding and parties are deprived of any subsequent judicial hearing.”).

324. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (outlining a three-pronged balancing test for determining whether due process is afforded by governmental decision-making procedures). Although generally not applicable to nonbinding med-mal arbitration, which operates in the context of private adjudication, the *Mathews* formula suggests that the Court is willing to defer to the state’s interest rather than providing heightened procedural protections for individuals. When examining decisions involving liberty and property interests

that are wholly adversary, the Court has imposed a high level of procedural protection. By contrast, where there is a greater need for speed and economy of adjudication, expertise is important, and the dispute has less of an adversarial character, the Court has been willing to curtail or abandon the adjudicatory model altogether.

Golann, *supra* note 32, at 538 (footnote omitted).

325. See, e.g., *Davison v. Sinai Hosp. of Balt., Inc.*, 462 F. Supp. 778, 781 (D. Md. 1978), *aff’d per curiam*, 617 F.2d 361, 362 (4th Cir. 1980) (finding no due process violation with the provision of the Maryland law allowing admission of the arbitration result at trial).

326. See *infra* notes 412-14 and accompanying text.

327. See generally *Golann*, *supra* note 32, at 531-49.

328. See generally *id.* at 549-57.

329. U.S. Const. amend. XIV.

ruled that the Fifth Amendment's Due Process Clause incorporates the Fourteenth Amendment's guarantee of equal protection of the laws, thus litigants are afforded equal protection of the laws in federal courts.³³⁰ However, according to the different standards of equal protection review pronounced by the Court,³³¹ only classifications applying to "suspect" groups or "fundamental" rights receive the most searching review: strict scrutiny review.³³² In most other cases, including classifications involving med-mal litigants, rational basis review is applied—"there must exist a logical connection between the classification at issue and a legitimate governmental goal."³³³ Furthermore, under the rational basis standard of review, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."³³⁴

Federal courts apply rational basis review when reviewing compulsory med-mal arbitration laws because neither suspect classifications nor fundamental rights are implicated.³³⁵ Since rational basis review presumes state legislation is constitutional as long as it is based on a legitimate governmental goal, courts are likely to defer to legislative findings that compulsory med-mal arbitration improves states' medical systems.³³⁶ For example, the Fifth Circuit found that

330. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); see also Golann, *supra* note 32, at 549 n.276.

331. See generally Patrick J. Norton, Comment, *Is Equality Foundation the Latest Chapter in America's Culture War?*, 48 Case W. Res. L. Rev. 903, 905-07 (1998) (describing the three main standards of equal protection review: rational basis, intermediate scrutiny, and strict scrutiny).

332. See Golann, *supra* note 32, at 550.

333. *Id.* The rational basis standard of equal protection review has also been phrased as asking whether

the statutory classification has some rational basis in fact and bears a rational relationship to legitimate governmental objectives. . . .

[T]here are two separate and distinct prongs to the rational basis test. The first prong of the test has been formulated as requiring that the classification is reasonable, not arbitrary, . . . or that the statutory classification has some rational basis in fact. . . . The second prong requires either that the statutory classification . . . bear a rational relationship to legitimate state objectives, . . . or that it be reasonably related to a legitimate governmental interest.

R. George Wright, *Low-Level Equal Protection: The Scope and Logic of Deferential Review*, 77 Ky. L.J. 117, 121 (1988) (footnote and internal quotation marks omitted).

334. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

335. See, e.g., *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1173 (5th Cir. 1979) (describing the application of rational basis review and concluding that "[t]he Florida provisions at issue need not be evaluated under the strict scrutiny standard, as neither a suspect class nor a fundamental right is involved in the classifications"); *Seoane v. Ortho Pharm., Inc.*, 472 F. Supp. 468, 471-72 (E.D. La. 1979) (comparing Louisiana's statute with the statute scrutinized in *Woods* and similarly applying rational basis review).

336. *Woods*, 591 F.2d at 1174 (approving of the Florida legislature's justifications for passing a compulsory court-annexed med-mal arbitration law); see also *Gronne v. Abrams*, 793 F.2d 74, 77-78 (2d Cir. 1986); *DiFilippo v. Beck*, 520 F. Supp. 1009, 1016 (D. Del. 1981).

[o]ne significant factor causing the rising insurance rates was an increase in malpractice litigation, and one way to reduce such litigation was to screen out nonmeritorious claims through the use of [compulsory ADR] panels. In addition, such panels could encourage the settlement of meritorious claims, since after a panel found a malpractice defendant negligent he would be encouraged to settle the dispute rather than proceed to a trial in which the panel finding would be introduced into evidence against him.³³⁷

While a state's alleged interest in discouraging med-mal litigation is controversial,³³⁸ federal courts have considered it legitimate.³³⁹ Whether a law follows the admissible or inadmissible approach seems to have little impact on equal protection challenges in federal courts.³⁴⁰

2. State Cases Upholding Compulsory Med-Mal Arbitration Laws

State courts usually reject right to jury trial challenges to compulsory court-annexed med-mal arbitration laws.³⁴¹ "The seventh amendment does not apply to litigation in state courts, but, similar to the federal Constitution, the constitutions of forty-eight states provide generally that the right to jury trial shall be preserved inviolate."³⁴² State courts usually rule that a legislature has a legitimate interest in passing a compulsory med-mal arbitration law, and thus defer to the legislature's prerogatives.³⁴³ In one of the most widely cited state court cases rejecting a right to jury trial

337. *Woods*, 591 F.2d at 1174 (citations omitted).

338. *Compare infra* note 375, with *infra* note 418 and accompanying text.

339. *See DiAntonio v. Northampton-Accomack Mem'l Hosp.*, 628 F.2d 287, 290 (4th Cir. 1980) ("There was a legislative finding that the high cost of medical malpractice insurance was beyond the means of some health care providers and that they were ceasing to render services. It was thought that passage of the Act would lower the cost of medical malpractice insurance, since the panel would weed out frivolous claims and would perform a mediation function with respect to other claims. In consequence of the panel's performance of these functions, it was believed that the amount of medical malpractice litigation would be substantially reduced, thus substantially lowering the cost of medical malpractice insurance."); *Woods*, 591 F.2d at 1174-75; *see also Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 430-31 (N.D. Ind. 1979).

340. *See, e.g., Woods*, 591 F.2d at 1175 n.17 (finding that the statute's provision allowing admission of the ADR results as evidence at trial did not violate equal protection).

341. *See, e.g., Eastin v. Broomfield*, 570 P.2d 744, 750 (Ariz. 1977); *Att'y Gen. v. Johnson*, 385 A.2d 57, 71 (Md. 1978); *Paro v. Longwood Hosp.*, 369 N.E.2d 985 (Mass. 1977); *Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977); *Comiskey v. Arlen*, 390 N.Y.S.2d 122 (App. Div. 1976); *State ex rel. Strykowski v. Wilkie*, 261 N.W.2d 434 (Wis. 1978); *see also Kristine Cordier Karnezis*, Annotation, *Validity and Construction of State Statutory Provisions Relating to Limitations on Amount of Recovery in Medical Malpractice Claim and Submission of Such Claim to Pretrial Panel*, 80 A.L.R.3d 583, § 9(a) (LEXIS through 2007) (listing cases upholding compulsory med-mal ADR laws).

342. Golann, *supra* note 32, at 503 (footnote omitted).

343. *See, e.g., Parker v. Children's Hosp. of Phila.*, 394 A.2d 932, 937 (Pa. 1978) ("[I]t must be remembered that a legislative enactment enjoys a presumption in favor of its constitutionality The legislature must be respected in its attempt to exercise the State's police power and the power of judicial review must not be used as a means by which the courts might substitute its [sic] judgment as to public policy for that of the legislature.").

challenge, the Pennsylvania Supreme Court upheld Pennsylvania's compulsory med-mal arbitration law, recognizing that a state had a reasonable interest in passing the law.³⁴⁴

With the ever increasing demand upon judicial time, one of the accepted solutions in recent years has been the attempt to divert dispute-resolution, where appropriate, to forums other than the court rooms. This trend has been motivated by the realization that the traditional trial is not necessarily the exclusive and only effective means by which the disagreements that arise within our society may be resolved.³⁴⁵

State courts have also relied on the reasonableness standard to declare other state interests—such as “weeding out” frivolous claims, reducing delay and court congestion, and even reducing excessive monetary jury awards—as valid justifications for the laws.³⁴⁶ For example, in *Parker v. Children's Hospital of Philadelphia* the Pennsylvania Supreme Court was “satisfied that any theoretical burden upon the victim's right to trial by jury is counterbalanced by the substantial advantages [to the state] provided” by using compulsory med-mal arbitration.³⁴⁷

Whether a state's law follows the admissible or inadmissible approach can be determinative in right to jury trial challenges in state courts.³⁴⁸ According to the Pennsylvania Supreme Court, as long as admission of the arbitration result does not “place[] that information in the status of a presumption nor . . . shift the burden of going forward with evidence or change the burden of persuasion,” the compulsory arbitration system does not deprive parties of their right to jury trial.³⁴⁹ In other words, state courts are most concerned with ensuring that “[t]he jury remains the final arbiter

344. *Parker*, 394 A.2d at 938.

345. *Id.*; see also Golann, *supra* note 32, at 519-20, 519 n.133 (footnote omitted).

346. See, e.g., *Keyes v. Humana Hosp. of Alaska, Inc.*, 750 P.2d 343 (Alaska 1988); *Kranda v. Houser-Norborg Med. Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981); see also Golann, *supra* note 32, at 519-20, 520 n.134 (compiling a list of several state cases rejecting right to jury trial challenges to compulsory med-mal ADR laws based on allegedly reasonable state interests).

347. See, e.g., *Parker*, 394 A.2d at 939 (“Appellants stress the difficulties encountered by plaintiffs in these actions in securing and paying the expert witnesses necessary to establish the case. Arbitration however, provides the flexibility that will permit an accommodation to the schedules of these witnesses that could not be obtained in the traditional trial setting. Thus arbitration not only facilitates the availability of these witnesses, it also tends to decrease the cost of their appearance since these hearings eliminate much of the loss of time associated with regular trials.”). But see *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980) (declaring Pennsylvania's compulsory med-mal arbitration law unconstitutional); *infra* notes 393-403 and accompanying text.

348. Compare *Att'y Gen. v. Johnson*, 385 A.2d 57, 67-68 (Md. 1978) (finding no right-to-jury-trial violation raised by the admissibility of the ADR panel's award at trial), with *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903, 908 (Ohio C.P. 1976) (“While the right to proceed to a jury trial still exists under [the Ohio med-mal arbitration statute], it is clearly not a free and unfettered right as was certainly intended by the framers of Article I, Section 5 of the Ohio Constitution. Therefore, the arbitration provisions under [the statute], which permit the introduction into evidence and exposure to the jury of the arbitrator's decision, are a violation of the right to trial by jury.”).

349. *Parker*, 394 A.2d at 941.

of the issues raised and the facts presented.”³⁵⁰ Thus, the inadmissible approach is more likely to withstand constitutional scrutiny than the admissible approach.³⁵¹

The admissible approach raises particularly relevant right to jury trial concerns when the state’s system allows the arbitration result to serve as prima facie evidence of liability or allows admission of the arbitration result to shift the burden of proof at trial.³⁵² In essence, the concern is that these provisions put one of the litigating parties at a disadvantage, significantly altering the traditional jury trial system.³⁵³ Nevertheless, state courts have rejected these concerns, providing state legislatures with substantial leeway in assigning burdens of proof and rules of evidence.³⁵⁴ Thus, right to jury trial challenges to compulsory court-annexed med-mal arbitration laws tend to fail in state courts.³⁵⁵

Similarly, due process challenges in state courts turn on whether the court accepts the state’s justifications for passing its compulsory court-annexed med-mal arbitration law.³⁵⁶ For example, the Indiana Supreme

350. *Id.*; see also *Prendergast v. Nelson*, 256 N.W.2d 657, 665 (Neb. 1977) (“The medical review panel does not decide the case. It does provide evidence which may be considered by the jury. The net effect of this provision is to furnish the parties with the opinion of an expert panel. In this respect, it is no different from any other expert testimony received at a trial. The jury still remains as the ultimate arbiter of all fact questions raised.”). Interestingly, Maryland courts are untroubled by Maryland’s compulsory med-mal arbitration law, which establishes a presumption of validity for the arbitration panel’s decision when introduced as evidence at trial. See *Johnson*, 385 A.2d at 69 (“That the legislature may . . . pass rules affecting the burden of proof without infringing the right to jury trial is not to be doubted, as is evident from both our own case law and decisions of the Supreme Court of the United States.”); see also *Newell v. Richards*, 594 A.2d 1152, 1160 (Md. 1991) (“If either the claimant or health care provider is unsuccessful at arbitration, the award is admissible and will have evidentiary impact on the trier of fact. If the claimant is unsuccessful at arbitration, the burden of proof was on the claimant before arbitration and will be on the claimant after arbitration. Thus, as far as the burden of proof is concerned, the unsuccessful claimant is in the same position as if arbitration had not occurred. On the other hand, if the health care provider is unsuccessful at arbitration, in addition to the evidentiary effect of the adverse award, the health care provider would be further penalized by a shifting of the usual burden of proof as the result of the arbitration award.”).

351. See *infra* notes 412-14 and accompanying text (describing cases in which state courts struck down laws following the admissible approach); see also *supra* note 314 and accompanying text.

352. See *Golann, supra* note 32, at 514-15.

353. Particularly unusual are compulsory arbitration systems following the admissibility approach, but which do not allow cross-examination of the arbitration panel members at trial. Such a system has been upheld as constitutional. See *Keyes v. Humana Hosp. of Alaska, Inc.*, 750 P.2d 343 (Alaska 1988). But see *id.* at 362 (Burke, J., dissenting) (“[A] statute which injects influential, court-sponsored evidence into jury trials as a matter of course, where the only real purpose in doing so is to influence the jury’s verdict one way or the other, intrudes upon the parties’ basic right to be free from undue court interference in the jury trial process.”).

354. See, e.g., *Keyes*, 750 P.2d at 343, 349; *Johnson*, 385 A.2d at 67-68 (Md. 1978); see also *Golann, supra* note 32, at 515 (discussing *Keyes* and *Johnson*).

355. But see *infra* notes 393-403 and accompanying text.

356. See *Golann, supra* note 32, at 546 (“State courts have often framed the question as whether the challenged scheme has a reasonable or rational relationship to a legitimate legislative goal, usually the resolution of a crisis in affordable malpractice insurance and

Court upheld an Indiana law over a due process challenge because the law addressed the state's interest of limiting the number of malpractice suits, which, the court decided, contributed to the high cost and unavailability of liability insurance.³⁵⁷ As the New York Court of Appeals explained when upholding New York's compulsory med-mal arbitration statute,³⁵⁸

[The statute] was one of a series of legislative responses to rising medical malpractice insurance rates. It was seen as a means of better equipping litigants to mediate a settlement, if warranted, or to prepare and narrow the issues for trial, if trial was required, thereby reducing the cost of litigation and helping preserve quality health care in this State. Since the legislation bears a rational relationship to that need, it does not violate substantive due process concerns.³⁵⁹

Most states employ a similar analysis in rejecting due process challenges to the laws.³⁶⁰

In due process challenges, whether a law follows the admissible or inadmissible approach usually does not have a significant impact. "For the same reasons that the [admission of the arbitration results at trial] does not violate the right to jury trial, it is even less likely to offend the more flexible standards of due process."³⁶¹ However, due process challenges focus more attention on the arbitration procedures themselves than do right to jury trial challenges, and some courts are troubled by the evidentiary implications of the admissibility approach.³⁶² The due process issue sometimes turns on

medical care, and have found that it does."); *see also* *Carter v. Sparkman*, 335 So. 2d 802, 805 (Fla. 1976); *Jones v. State Bd. of Med.*, 555 P.2d 399, 407 (Idaho 1976); *Johnson*, 385 A.2d at 60-62; *Prendergast v. Nelson*, 256 N.W.2d 657, 663-65 (Neb. 1977); *Parker v. Children's Hosp. of Phila.*, 394 A.2d 932, 939 (Pa. 1978); *State ex rel. Strykowski v. Wilkie*, 261 N.W.2d 434, 449 (Wis. 1978).

357. *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 594 (Ind. 1980) ("The Legislature was undoubtedly moved because of its appraisal that the services of health care providers were being threatened and curtailed contrary to the health interests of the community because of the high cost and unavailability of liability insurance. This cost and unavailability was in turn in part the product of an increase in the number of malpractice claims and large judgments and settlements in connection with them, and that they were in turn in part the result of the fact that medical opinion, as free from influence and prejudice as possible under the circumstances, was not readily available to the parties and to the courts. The requirement of the statute that malpractice claims be first submitted to a medical panel for evaluation is one reasonable means of dealing with the threatened loss to the community of health care services in this situation.").

358. Note, however, that New York's compulsory court-annexed med-mal arbitration statute has since been repealed. *See* Jud. Ct. Acts Law § 148-a (McKinney, LEXIS through Feb. 14, 2007 Sess.) (describing the reason for repeal of New York's compulsory med-mal arbitration statute in the notes and annotations section).

359. *Colton v. Riccobono*, 496 N.E.2d 670, 673-74 (N.Y. 1986).

360. *See, e.g., Keyes v. Humana Hosp. of Alaska, Inc.*, 750 P.2d 343, 353 (Alaska 1988); *Halpern v. Gozan*, 381 N.Y.S.2d 744, 745-47 (Sup. Ct. 1976) (outlining extensively the New York legislature's justifications for enacting the compulsory med-mal ADR statute); *see also* *Karnezis*, *supra* note 341, § 11(a) (providing a list of state cases rejecting due process challenges to compulsory med-mal ADR statutes).

361. *Golann*, *supra* note 32, at 545 (footnote omitted).

362. The New York Supreme Court framed the issue well:

the technical differences among laws following the admissible approach—for example, whether or not cross-examination of the arbitrators is allowed after admission of arbitration evidence.³⁶³ Admission of arbitration evidence likely will not run afoul of due process as long as sufficient jury instructions are provided regarding the evidence's probative value.³⁶⁴

Equal protection challenges, on the other hand, focus on how med-mal litigants are classified, rather than on the technical arbitration procedures employed.³⁶⁵ State courts generally follow the rationale used by federal courts, which reject equal protection challenges to compulsory court-annexed med-mal arbitration using rational basis review.³⁶⁶ For example, the Supreme Court of Colorado considered med-mal litigants not to be a suspect class and applied rational basis review to an equal protection challenge.³⁶⁷ The court recognized that “[a]rbitration is favored by the law in Colorado” and ruled that “[b]y expediting the adversary process, arbitration promotes quicker settlement of cases thereby speeding up access to the courts and decreasing the costs to the parties,” both of which it deemed to be legitimate state interests.³⁶⁸

Would not the impact of the recommendation be so overpowering as to remove *de facto* the essential elements of fairness and open-mindedness which are so crucial to the total fabric of our jury system, thereby infecting it with prejudicial taint? The response to both questions remains the same. For if the trial court instructs the jury with clarity and simplicity, their true roles as the exclusive finders of fact will prevail. That the recommendation shall not be binding upon the jury . . . but shall be accorded such weight as the jury . . . chooses to ascribe to it. With the proper instructions by the court, there could be no constitutional infirmity to contaminate the purity of the jurors' prerogatives.

Halpern, 381 N.Y.S.2d at 748 (internal quotation marks omitted). However, Katz suggests that ADR procedures may not be appropriate evidence to submit to juries:

Rules on use at a later trial of testimony or information gained at an ADR proceeding sometimes raise due process concerns. Statutes allowing an arbitrator or mediator opinion to be introduced into evidence at a later trial have been upheld if there is an opportunity to cross examine the opinions' author. However, disclosure and cross examination conflict with the strong policy of confidentiality in ADR, particularly in procedures such as mediation or summary jury trials Disclosure of a result in such a case without opportunity for cross examination would arguably be a denial of due process.

See Katz, *supra* note 5, at 26 (footnote omitted); see also *infra* Part II.B.2 (examining state cases that reject laws following the admissible approach on due process grounds).

363. See *Keyes*, 750 P.2d at 352-54; *Eastin v. Broomfield*, 570 P.2d 744, 748-49 (Ariz. 1977); *McLean v. Hunter*, 486 So. 2d 816, 819 (La. Ct. App. 1986); see also *Golann, supra* note 32, at 545 (suggesting that “[t]here is little reason to believe that the admission of dispute resolution results or the testimony of ADR neutrals at trial violates the due process clause, as long as cross-examination is provided”).

364. See *supra* note 362 (discussing the importance of adequately instructing a jury on how it may use the compulsory arbitration record evidence); see also *Golann, supra* note 32, at 546-49 (discussing due process implications of admitting compulsory arbitration evidence at a subsequent trial).

365. See *id.* at 555 n.305 (describing state cases examining the equal protection issue).

366. See *supra* notes 328-40 and accompanying text.

367. *Firelock, Inc. v. Dist. Court. of 20th Judicial Dist.*, 776 P.2d 1090, 1098 (Colo. 1989).

368. *Id.* at 1099.

One recurring issue is whether equal protection is afforded by laws treating med-mal plaintiffs differently than defendants.³⁶⁹ The Supreme Judicial Court of Massachusetts examined the issue when it considered Massachusetts's statute, which had different procedural requirements for plaintiffs and defendants while participating in compulsory med-mal arbitration.³⁷⁰ The Court explained, "Discrimination between plaintiffs and defendants is not per se unconstitutional; such classifications must merely satisfy the general rationality standard to survive. The Legislature could reasonably have determined that the bulk of frivolous malpractice litigation resulted from plaintiffs who filed and prosecuted suits without having a legally sufficient claim."³⁷¹ Considering the troubled state of medicine in the late twentieth century and the insurance crises affecting doctors,³⁷² state courts are generally untroubled by compulsory med-mal arbitration procedures that favor doctor-defendants.³⁷³

Additionally, state courts tend to reject challenges to compulsory court-annexed med-mal arbitration laws based on the complaint that med-mal litigants are treated differently than all other civil litigants.³⁷⁴ Under rational basis review, classifications treating litigants differently are presumed valid as long as they are rationally related to a legitimate governmental interest. In med-mal cases, the state's interest is screening and ultimately discouraging med-mal lawsuits.³⁷⁵ Not surprisingly, state courts, which are theoretically more in tune with state politics, consider these state interests to be legitimate, primarily based on the perceived implications of the med-mal crises of the late twentieth century.³⁷⁶ Most states agree³⁷⁷ and reject equal protection challenges to compulsory court-annexed med-mal arbitration laws, despite the unequal treatment of med-mal litigants the laws call for.³⁷⁸

369. See Golann, *supra* note 32, at 552.

370. *Paro v. Longwood Hosp.*, 369 N.E.2d 985, 989 (Mass. 1977).

371. *Id.* at 989 (citation omitted).

372. See *supra* Part I.B.2.

373. *Paro*, 369 N.E.2d at 989; see also Golann, *supra* note 32, at 552 & n.288.

374. In fact, it has been pointed out that compulsory court-annexed med-mal arbitration laws create other classifications. For a useful summary of these classifications, see *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1173 n.15 (5th Cir. 1979).

375. See *supra* note 339 and accompanying text; see also *infra* notes 417-19 and accompanying text.

376. See, e.g., *Prendergast v. Nelson*, 256 N.W.2d 657, 668-69 (Neb. 1977) ("The classification does have a reasonable basis. The Legislature acted to meet a crisis situation We are dealing with the fundamental right to adequate medical care. To provide this type of care, the Legislature has found it necessary to try to eliminate nonmeritorious malpractice claims and to limit the amount of the recovery in those claims found to have merit. To attempt to meet a crisis, the Legislature is free to experiment and to innovate and to do so at will, or even 'at the whim.'" (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

377. However, not all states accept the med-mal crises as warranting legislative interference with the traditional med-mal cause of action. See *Boucher v. Sayeed*, 459 A.2d 87, 91-93 (R.I. 1983); see also *infra* notes 417-19 and accompanying text.

378. See *Woods*, 591 F.2d at 1170 n.11 (listing state cases that rejected equal protection challenges); see also *Karnezis, supra* note 341, § 11(a) (listing cases from Arizona,

Finally, state courts tend to reject otherwise uncommon constitutional challenges to compulsory med-mal ADR laws. For example, the Supreme Court of Guam, located in a U.S. territory, declined to declare Guam's compulsory med-mal arbitration statute unconstitutional³⁷⁹ based on separation of powers concerns.³⁸⁰ State courts usually find that

there is no usurpation of judicial authority here because not only are the petitioners afforded a judicial review of the determination of the panel, they are entitled to a trial de novo in a court. . . . [Courts have] often held that *quasi*-judicial authority may constitutionally be delegated to commissions and administrative agencies.³⁸¹

Several other state courts have rejected similar charges—loosely grouped as separation of powers concerns.³⁸² In any event, whether on right to jury trial, due process, equal protection, or even unique state constitutional challenges like separation of powers concerns, compulsory court-annexed med-mal arbitration laws are generally upheld in state courts.

B. *Compulsory Court-Annexed Med-Mal Arbitration Is Unconstitutional*

Part II.B.1 examines federal cases that have declared compulsory court-annexed med-mal arbitration laws unconstitutional. Part II.B.2 examines state cases that have held similarly.

1. Federal Cases Rejecting Compulsory Med-Mal Arbitration Laws

Few federal courts have sustained constitutional challenges to compulsory med-mal arbitration laws. Those that have did so on right to jury trial grounds. For example, the Ninth Circuit affirmed a district court ruling considering Guam's compulsory med-mal arbitration statute to be inconsistent with the statute's express provision for a right to jury trial.³⁸³ Although this decision was rooted in statutory construction rationale,³⁸⁴ the

Delaware, Florida, Indiana, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Jersey, New York, Ohio, and Wisconsin).

379. The Guam equivalent of constitutional is "organic." According to the Supreme Court of Guam, "[t]he Organic Act serves the function of a constitution for Guam. . . . Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution." *Villagomez-Palissou v. Superior Court*, 2004 Guam 13 ¶ 10 (citations and internal quotation marks omitted).

380. *Id.* ¶¶ 17-18.

381. *State ex rel. Strykowski v. Wilkie*, 261 N.W.2d 434, 448 (Wis. 1978).

382. *See Golann, supra* note 32, at 529-31 (describing state constitutional separation of powers provisions); *see also Strykowski*, 261 N.W.2d at 448-49 (rejecting the claim that Wisconsin's compulsory med-mal review panel statute was an impermissible delegation of judicial authority).

383. *Awa v. Guam Mem'l Hosp. Auth.*, 726 F.2d 594, 596 (9th Cir. 1984) ("The Act is inconsistent and unintelligible because it requires mandatory screening and arbitration while it preserves the statutory right to a jury trial. We cannot apply such inconsistent provisions.").

384. The court construed the statute so as not "to make mere surplusage of any statutory provision." *Awa*, 726 F.2d at 597 (citing *United States v. Marubeni Am. Corp.*, 611 F.2d

court considered compulsory med-mal arbitration procedures to be irreconcilable with the right to jury trial because "any party dissatisfied with the result could relitigate all of the issues before a jury. The settling of malpractice claims would then become more costly and less efficient, which is contrary to the Guam legislature's interest in 'optimum efficiency.'"³⁸⁵ Although Guam's quasi-constitutional structure is unique, likely causing this opinion to have little influence in other jurisdictions, the Ninth Circuit's concern with "optimum efficiency" is noteworthy; state courts have seized on this concern and examined it in relation to the compulsory nature of med-mal arbitration processes.³⁸⁶

Interestingly, the United States District Court for the District of Kansas considered med-mal claimants to constitute a class deserving heightened scrutiny review under the Equal Protection Clause.³⁸⁷ The court concluded that "[m]edical malpractice victims generally have no control over the inception of their afflictions or illnesses and even less choice concerning the medical mis-, mal-, or nonfeasance practiced on them. Moreover, victims of medical malpractice are relegated to a position of political powerlessness"³⁸⁸ Thus, the court concluded, "the classifications involved in this case are sensitive, and . . . the rights at issue are sufficiently important to require that the restrictions on those rights be subjected to a more exacting form of scrutiny than the mere rational basis test."³⁸⁹ Although aberrational,³⁹⁰ the court's reasoning suggests that rational basis review may not be the automatic standard that should be applied in equal protection challenges to compulsory court-annexed med-mal arbitration laws.

Finally, it is noteworthy that federal courts refuse to enforce a compulsory court-annexed med-mal arbitration law when a state's highest

763, 767 (9th Cir. 1980); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 673 (9th Cir. 1978)).

385. *Id.* at 597.

386. *See, e.g., infra* note 403 and accompanying text.

387. *Coburn v. Agustin*, 627 F. Supp. 983, 995 (D. Kan. 1985).

388. *Id.* at 994.

389. *Id.* at 995. In this case, the court declared Kansas's statute abolishing the collateral source rule for successful med-mal claimants unconstitutional on equal protection grounds. The court applied "heightened scrutiny" because of the vulnerability of med-mal claimants and the importance of the collateral source rule—individuals' ability to obtain full recovery for their injuries. Whether the court would have applied heightened scrutiny under an equal protection challenge to Kansas's compulsory med-mal ADR statute is unclear. Nevertheless, the court remained skeptical of such legislation:

[E]xtending of special litigation benefits to the medical profession will do little to protect the public health. "On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the malpractice type if the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim."

Id. (quoting *Graley v. Satayatham*, 343 N.E.2d 832, 838 (Ohio C.P. 1976)). Additionally, the court recognized that "the propaganda campaign mounted to obtain the [medical malpractice] legislation was overstated." *Id.* at 996.

390. Most federal and state courts apply the rational basis standard of review in equal protection challenges. *See supra* notes 333, 366 and accompanying text.

court has declared it unconstitutional.³⁹¹ Federal courts' reluctance to declare states' compulsory court-annexed med-mal arbitration laws unconstitutional³⁹² suggests that challengers should focus their efforts in state courts.

2. State Cases Rejecting Compulsory Med-Mal Arbitration Laws

State courts sometimes declare compulsory court-annexed med-mal arbitration laws unconstitutional on right to jury trial grounds.³⁹³ Employing the reasonableness standard,³⁹⁴ state courts rule that a law violates a plaintiff's right to jury trial when the law unreasonably burdens that right.³⁹⁵ For example, in *Wright v. Central Du Page Hospital Association*, the Supreme Court of Illinois ruled that Illinois's compulsory med-mal arbitration law violated a plaintiff's state right to jury trial because the delegation of judicial decision-making functions to a court-annexed panel caused the right to jury trial not to remain "inviolable," as required by the Illinois constitution.³⁹⁶ Interestingly, some courts analyze the state's justification for passing a compulsory med-mal arbitration law when considering whether the law unreasonably burdens plaintiffs' right to jury trial.³⁹⁷ Courts have rejected "weeding out" frivolous claims and improving court backlogs as possible justifications for compulsory med-mal

391. See, e.g., *Firich v. Am. Cystoscope Makers, Inc.*, 635 F.2d 259, 260-61 (3d Cir. 1980).

392. See *supra* Part II.A.1.

393. See, e.g., *Keyes v. Humana Hosp. of Alaska, Inc.*, 750 P.2d 343, 360-61 (Alaska 1988) (Burke, J., dissenting) (describing provisions allowing admissibility of ADR results without the opportunity to cross-examine the ADR panel members at trial as violating the state right to jury trial); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736, 741 (Ill. 1976) (striking down Illinois' compulsory arbitration system on right to jury trial grounds); *Mattos v. Thompson*, 421 A.2d 190, 195 (Pa. 1980) (finding a Pennsylvania compulsory med-mal ADR statute to violate the petitioner's state right to jury trial because the procedures imposed unreasonable delay and barriers which practically denied the right altogether); see also *Karnezis, supra* note 341, § 10(b) (listing state cases declaring compulsory med-mal ADR laws unconstitutional on right to jury trial grounds).

394. See *supra* notes 306-07 and accompanying text.

395. See, e.g., *Mattos*, 421 A.2d at 195 ("[T]he lengthy delay occasioned by the arbitration system therein does in fact burden the right of a jury trial with 'onerous conditions, restrictions or regulations which . . . make the right practically unavailable.' Nor can we agree that the actual operation of the Act's arbitration 'procedure is reasonably designed to effectuate the desired objective' of affording 'the plaintiff a swifter adjudication of his claim, at a minimal cost.'" (quoting *Parker v. Children's Hosp. of Phila.*, 394 A.2d 932, 939 (Pa. 1978); *Application of Smith*, 112 A.2d 625, 629 (Pa. 1955))).

396. See *Wright*, 347 N.E.2d at 739-41 (examining Illinois' separation of powers issues together with Illinois' right to jury trial issues, and concluding that "[b]ecause we have held that these statutes providing for medical review panels are unconstitutional [on separation of powers grounds], it follows that the procedure prescribed therein as the prerequisite to jury trial is an impermissible restriction on the right of trial by jury guaranteed by . . . the Illinois Constitution").

397. See *Golann, supra* note 32, at 515-21.

arbitration.³⁹⁸ As one commentator noted, "This kind of social justification for ADR—a need for change in the monetary result of adjudication—is troubling under the Seventh Amendment . . . [and] should not be used to justify changes in the substantive results of the jury system."³⁹⁹

Particularly helpful in right to jury trial challenges is statistical evidence showing that claimants face unreasonable litigation delays or costs under the compulsory arbitration law. For example, in *Parker v. Children's Hospital of Philadelphia*,⁴⁰⁰ the Pennsylvania Supreme Court upheld Pennsylvania's compulsory med-mal arbitration law, but noted the existence of "statistics which would indicate that the present performance of [the compulsory arbitration] procedure has been far from impressive in demonstrating its capacity to provide an expeditious disposition of these cases."⁴⁰¹ Three years later, in *Mattos v. Thompson*, the court relied on more fully developed statistics, which portrayed "the failure of the [law] to provide an efficacious alternative dispute-resolution procedure," when it struck down the law as a violation of Pennsylvania's guaranteed right to jury trial.⁴⁰² Since "[s]uch [unreasonable] delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system," the court sustained the right to jury trial challenge.⁴⁰³

Other state courts declare compulsory med-mal ADR laws unconstitutional on due process grounds.⁴⁰⁴ The main due process concern "is that engaging in [arbitration] can impose such serious burdens of delay, expense, and stress on disputants as to constitute an unreasonable burden on access to adjudication."⁴⁰⁵ In most cases when a due process challenge is successful, the law is declared to be valid in theory, but unconstitutional in

398. See, e.g., *Wright*, 347 N.E.2d at 739-40 (rejecting the argument, raised in amici briefs, that the Illinois law was a reasonable response to the perceived med-mal insurance crises).

399. Golann, *supra* note 32, at 520 n.135 (noting also that "[a]nother disadvantage of the . . . reasonableness standard is that it requires a court to assess the importance of various social goals at a particular point in time, weighing them against the very different values inherent in the right to trial by jury").

400. 394 A.2d 932.

401. *Id.* at 940.

402. *Mattos v. Thompson*, 421 A.2d 190, 194 (Pa. 1980).

403. *Id.* at 195. *But see id.* at 198-99 (Roberts, J., dissenting) (considering a recent legislative adjustment to the statute, allowing for expedited procedures and referral back to court after delayed arbitration, to alleviate the statute's constitutional problems). Interestingly, the Third Circuit noted, in dicta, that Pennsylvania's compulsory med-mal system was "woefully" inadequate and analyzed claim statistics from the program over a three-year period. See *Edelson v. Soricelli*, 610 F.2d 131, 135-36 (3d Cir. 1979).

404. See *Aldana v. Holub*, 381 So. 2d 231, 238 (Fla. 1980) (finding the Florida statute to be an unconstitutional violation of due process because it "has proven [to be] arbitrary and capricious in operation"); *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979) (en banc) (striking down a Missouri compulsory court-annexed med-mal ADR law on access to court grounds); *Jiron v. Mahlab*, 659 P.2d 311, 313-14 (N.M. 1983) (finding an as-applied due process violation because plaintiffs were denied their access to court under the New Mexico statute).

405. Golann, *supra* note 32, at 541.

its application.⁴⁰⁶ For example, in *Aldana v. Holub*,⁴⁰⁷ the Supreme Court of Florida found that “although the parties were not barred from court,” because they often had to wait over ten months to participate in the compulsory arbitration, “they were prevented, on what the [lower] court called an ‘arbitrary and capricious’ basis, from obtaining the benefits of ADR.”⁴⁰⁸

Some state courts sustain due process challenges because compulsory med-mal arbitration laws impair plaintiffs’ ability to secure personal jurisdiction over alleged tortfeasors or necessary witnesses.⁴⁰⁹ For example, noting that “[t]he institution of the [New Mexico] Medical Review Commission as a forum for screening medical malpractice claims appears to work well in most instances,”⁴¹⁰ the Supreme Court of New Mexico nevertheless held that “where the requirement of first going before the Medical Review Commission causes undue delay prejudicing a plaintiff by the loss of witnesses or parties, the plaintiff is unconstitutionally deprived of his right of access to the courts.”⁴¹¹ Similarly, state courts are likely to strike down laws following the admissibility approach if arbitration “requirements . . . are so poorly designed or implemented as to eliminate claims on a random or irrational basis [because such laws] offend due process principles.”⁴¹² Although often not explicitly stated, courts striking down laws following the admissible approach⁴¹³ likely recognize the inherent procedural unfairness of using ADR merely to dissuade injured patients from bringing lawsuits.⁴¹⁴

Finally, a few state courts, such as an Ohio court of common pleas in *Simon v. St. Elizabeth Medical Center*, have looked favorably on equal protection challenges to compulsory court-annexed med-mal arbitration laws.⁴¹⁵ Most equal protection challenges are considered within the rational basis review paradigm, thus turning on whether the court

406. See *id.* at 542; see also *Wright v. Cent. Du Page Hosp. Ass’n*, 347 N.E.2d 736, 741 (Ill. 1976) (declaring Illinois’ statute unconstitutional, but also noting that “we do not imply that a valid pretrial panel procedure cannot be devised”).

407. 381 So. 2d at 231.

408. Golann, *supra* note 32, at 543 (quoting *Aldana*, 381 So. 2d at 235).

409. See *Jiron*, 659 P.2d at 313; *State ex rel. Cardinal Glennon Mem’l Hosp. for Children*, 583 S.W.2d at 110 (“[D]elay, by abridging the right to file suit and have summons issued promptly, necessarily destroyed the remedies which depended on obtaining personal service on defendants.”).

410. *Jiron*, 659 P.2d at 312.

411. *Id.* at 313. The court considered the right of access to the courts to be an integral component of the constitutional guarantee of due process. *Id.* at 312 (“The right of access to the courts is one aspect of the right to petition. A person should not be deprived of the right of access to the courts without due process of law.” (citation omitted)).

412. Golann, *supra* note 32, at 549. Golann notes that laws “authorizing admission of the outcome of a process at trial, but barring cross-examination of the ADR neutral, also pose serious due process issues.” *Id.*

413. See, e.g., *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903, 908-09 (Ohio C.P. 1976).

414. See *supra* note 362.

415. See, e.g., *Simon*, 355 N.E.2d at 908; *Boucher v. Sayeed*, 459 A.2d 87, 88 (R.I. 1983); *Hoem v. State*, 756 P.2d 780, 783-84 (Wyo. 1988).

recognizes a legitimate state interest in making med-mal classifications.⁴¹⁶ While federal and state courts often recognize a state's interest in discouraging med-mal lawsuits,⁴¹⁷ not all courts recognize the interest as "legitimate" for equal protection review purposes.⁴¹⁸ In perhaps the most explicit rejection of a state's interest in reducing med-mal lawsuits, a state court in Ohio suggested,

There obviously is no compelling governmental interest unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution.⁴¹⁹

Interestingly, the Ohio Court of Common Pleas recognized that its decision could be characterized as judicial overreaching and thus emphasized that its decision was grounded in constitutional reasoning.⁴²⁰ Some state courts, such as the Rhode Island Supreme Court in *Boucher v. Sayeed*, reject the theory that a med-mal crisis exists at all and thus require evidence showing that the state's compulsory med-mal arbitration law is in fact necessary.⁴²¹ In any event, whether or not a state court recognizes the existence of a med-mal crisis,⁴²² the argument that reducing med-mal lawsuits is not a legitimate state interest has sometimes been successful.⁴²³

Furthermore, even assuming that a court recognizes the existence of a med-mal crisis and that regulating med-mal lawsuits is a legitimate state interest, a state's compulsory med-mal arbitration system must be rationally related to that interest.⁴²⁴ At least one court has ruled that compulsory

416. See *supra* notes 333, 366 and accompanying text.

417. See *supra* notes 339, 368 and accompanying text.

418. See, e.g., *Boucher*, 459 A.2d at 91 (declaring Rhode Island's compulsory med-mal arbitration law unconstitutional on equal protection grounds).

419. *Simon*, 355 N.E.2d at 911 (internal quotation marks omitted).

420. *Id.* ("Courts, of course, may not invalidate legislation merely because it is perceived as unwise. Here there is a transgression of a basic constitutional principle forbidding unequal and special treatment for a class with no general beneficiary [sic] reason apparent." (internal quotation marks omitted)).

421. See, e.g., *Boucher*, 459 A.2d at 93 (recognizing that med-mal crises have, in the past, existed, but holding that "[a]bsent a crisis [at the time the legislation was passed] to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants"); *Hoem v. State*, 756 P.2d 780, 783 (Wyo. 1988) ("[W]e note the absence in the record of any evidence demonstrating the existence of such a crisis in Wyoming or elsewhere. More importantly, we note the absence in the record of any evidence that the 'crisis,' if in fact it exists, is in any way connected with medical malpractice claims.").

422. Compare *Simon*, 355 N.E.2d at 911-12 (declaring the state's interest illegitimate despite its recognition that a med-mal crisis existed), with *Boucher*, 459 A.2d at 92-93 (declaring the state's interest illegitimate because it considered no med-mal crises to have existed at the time the law was passed).

423. See *Katz*, *supra* note 5, at 27.

424. See, e.g., *Hoem*, 756 P.2d at 783. The Wyoming Supreme Court explained,

court-annexed med-mal arbitration is not rationally related to a legitimate state interest; the Wyoming Supreme Court explained,

We cannot condone the legislature's use of the law to protect one class of people from financial difficulties while it dilutes the rights under the constitution of another class of people. Every profession confronts financial distress at some time, and that does not justify depriving others of the equal protection guaranteed by the constitution.⁴²⁵

While the court recognized that its reasoning is not followed in most states,⁴²⁶ its decision reflects the fact that absolute deference to legislative purpose is not necessary, even when using rational basis review.⁴²⁷ Interestingly, it has even been suggested that the inadmissible approach is unconstitutional despite a legislature's finding that it was necessary; one judge thought that a compulsory arbitration process that is nonbinding is inherently wasteful and an impermissible burden on med-mal claimants.⁴²⁸

Assuming, however, for the purposes of this opinion, that an insurance crisis does exist in Wyoming and that it is related to medical malpractice litigation, we must determine whether the legislation enacted is rationally related to its stated purpose. There is no question that the legislature has a legitimate interest in protecting the health of the citizens of Wyoming as well as the economic and social stability of the state. The question is whether the legislation at issue constitutes a reasonable and effective means of doing so. We maintain that it does not. It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health.

Id.

425. *Id.* at 784.

426. *Id.* ("In holding as we do that the act denies equal protection of the law in violation of the constitution, we are cognizant that the majority of states have upheld similar provisions.")

427. Perhaps *Hoem* can be explained by the fact that the court did not apply the traditional rational basis standard of equal protection review. *Id.* at 782 (outlining applicable equal protection standards in Wyoming without mentioning the rational basis review doctrine). In any event, there appears to be room for a low level of deference to legislative purpose, even within the traditional rational basis review paradigm. *See Wright, supra* note 333, at 117-18 ("Arguably, some divergence in the precise verbal formulation of an essentially uniform 'low-level scrutiny' test is inevitable, and no great significance should be attributed to minor terminological differences. In practice, however, the diversity among ostensibly 'low-level scrutiny' formulations leads to great diversity in the degree of judicial deference accorded to the legislative classification, and to great diversity of result on the equal protection challenge itself.")

428. *See, e.g., Hoem*, 756 P.2d at 784 (Thomas, J., concurring). Judge Richard Thomas explained,

The Wyoming Medical Review Panel Act serves only as an impediment to pursuing a claim for medical malpractice, providing no recourse to anyone. The ultimate product, which is not binding on any participant, is a decision reached in a proceeding, which is to be held in confidence. The process delays, for a minimum of 120 days, the right of the claimant to file a civil action, and there is no limit upon the period to which the proceeding may be extended for good cause.

It almost seems that the Medical Review Panel Act process becomes an end in itself. . . . Legislation that apparently furthers only an academic interest does not serve to accomplish any goal, never mind a legitimate state interest.

Id. at 785.

Cases declaring compulsory court-annexed med-mal arbitration laws unconstitutional are uncommon.⁴²⁹ Nevertheless, the argument that compulsory med-mal arbitration violates the constitutional guarantees of a jury trial, due process, and equal protection of the laws has been successful in some state courts.⁴³⁰ Particularly helpful in challenges to compulsory court-annexed med-mal arbitration is evidence, in the form of studies and statistics, showing that the compulsory arbitration system caused excessive delays⁴³¹ or significantly altered the trial by jury system.⁴³² In light of the dubious link between med-mal lawsuits and the modern med-mal insurance crises,⁴³³ not to mention studies showing that the deleterious effects of the modern med-mal insurance crises have stabilized,⁴³⁴ the state interest in continuing to administer compulsory court-annexed med-mal arbitration is vulnerable to challenge.

III. COMPULSORY COURT-ANNEXED MED-MAL ARBITRATION LAWS SHOULD BE DECLARED UNCONSTITUTIONAL OR REPEALED

A. Compulsory Court-Annexed Med-Mal Arbitration Imposes Significant Risks of Unreasonably Burdening Claimants' Rights to Jury Trial and Due Process

The *Mattos* and *Wright* cases reflect appropriate treatment of right to jury trial complaints.⁴³⁵ Compulsory court-annexed med-mal arbitration laws should be struck down because it is unreasonable to make litigants jump through onerous procedural hoops before being afforded their right to jury trial. In *Mattos* and *Wright*, it was particularly notable that the arbitration process was not administered efficiently, thus causing claims to be kept from the jury for unreasonably long periods.⁴³⁶ Each state with a compulsory med-mal arbitration system should monitor the time it takes parties to go through the process. If a state's system produces excessive delays,⁴³⁷ litigants should emphasize such evidence when contesting compulsory court-annexed med-mal arbitration laws on right to jury trial grounds.

The fact that the arbitration process is nonbinding helps alleviate right to jury trial concerns, but is not determinative for due process considerations.

429. Compare *supra* Part II.A, with *supra* Part II.B.

430. See *supra* Part II.B.

431. See *supra* note 402 and accompanying text.

432. See *supra* notes 363-64.

433. See *supra* notes 20, 188-92 and accompanying text.

434. See generally Marc A. Rodwin et al., *Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence*, 25 *Health Affairs* 750 (2006).

435. See generally *supra* Part II.B.2.

436. See *supra* note 395 and accompanying text.

437. See, e.g., Sakayan, *supra* note 216, at 687-88 (suggesting that "screening panels are a failure" at insuring prompt resolution of malpractice claims and offering data that shows excessive delays exist in several states).

Of course, arbitration has proven to be a productive alternative to litigation, and few would argue that the process itself is inherently unfair.⁴³⁸ Rather, forcing parties to undergo two independent evaluations of a med-mal dispute is wasteful and may lead to bad faith participation. For example, unless fee shifting provisions apply,⁴³⁹ there is no incentive for defendants to reveal their best evidence or arguments during arbitration.⁴⁴⁰ It is not hard to imagine a compulsory arbitration panel, composed partly of physicians and sympathetic attorneys, that elicits a full case from an injured plaintiff, while allowing a physician defendant to rest on the presumption that malpractice did not occur.⁴⁴¹ This scenario would weaken the plaintiff's negotiating power, thereby encouraging the defendant to proceed to trial based on the strategic advantage he gained from arbitration; such a situation would actually lead to more med-mal litigation. Procedural due process is violated when one party is forced to reveal its litigation strategy to the other party before litigation has even begun.

Furthermore, the admissibility approach compromises the right to jury trial and due process. Despite the argument that admission of an arbitration result at trial does not change the jury's role as the final arbiter of factual issues,⁴⁴² introduction of evidence that a party already arbitrated a med-mal dispute and decided to proceed to litigation despite an unfavorable arbitration ruling will likely prejudice a jury in favor of the non-losing party. Since the arbitration proceedings are generally informal, and thus evidence used in arbitration is not automatically admissible at trial, there seems to be little reason for admitting the arbitration record at trial other than to punish the losing party. Particularly troubling are laws that allow admission of the arbitration record to shift burdens of proof and persuasion at trial.⁴⁴³ These laws are unreasonable and cannot be reconciled with state constitutions that require jury trial to be retained as "inviolable."⁴⁴⁴ Due process is also violated by the admissible approach because introducing evidence that a defendant was found not liable by a court-annexed arbitration panel can be prejudicial, unreasonably impairing the quality of the adjudicative process.⁴⁴⁵

438. See generally *supra* Part I.A (describing the institutionalization of arbitration in the U.S. civil justice system).

439. See *supra* note 278.

440. See Katz, *supra* note 5, at 33 ("[T]he non-binding nature of [compulsory ADR] presents great temptation to strategically withhold crucial evidence and argument." (quoting Hume v. M & C Mgmt., 129 F.R.D. 506, 508 (N.D. Ohio 1990))).

441. See generally Dauer & Becker, *supra* note 20, at 1:47-48 (discussing implications of using attorneys or physicians as third-party neutrals).

442. See *supra* note 349 and accompanying text.

443. See *supra* note 350 and accompanying text.

444. See *supra* notes 342, 396 and accompanying text.

445. See *supra* note 318.

B. *Equal Protection Challenges Should Be Considered*

Equal protection challenges to compulsory court-annexed med-mal arbitration laws have merit. While rational basis review is the correct standard of review,⁴⁴⁶ courts have been too willing to recognize a legitimate state interest justifying the laws. A national med-mal insurance crisis existed in the 1970s, which continued into the 1980s and 1990s.⁴⁴⁷ But courts must examine compulsory court-annexed med-mal arbitration laws in the context of a state's medical industry at the time a law is challenged. For example, in *Boucher*, the Rhode Island Supreme Court struck down Rhode Island's compulsory med-mal arbitration law because it saw no evidence that a pressing insurance crisis existed in Rhode Island at the time the law was challenged.⁴⁴⁸ Of course, judges must not let personal ideology overrule sound constitutional interpretation⁴⁴⁹ and whether or not a court thinks tort reform is needed in the first place should not factor into a judicial decision. Perhaps the *Simon* court succumbed to this temptation.⁴⁵⁰ Nevertheless, one of the judiciary's roles in the U.S. political system is to ensure that outdated laws that no longer serve a legitimate state interest are Stricken.

Recent studies show that the magnitude of medical insurance crises may have been overblown.⁴⁵¹ Furthermore, the connection between med-mal litigation and the rise in insurance premiums is tenuous,⁴⁵² while the deterrent and retributive functions of the med-mal cause of action are well established.⁴⁵³ It is likely legislators minimize these factors when responding to constituents' interests, particularly in cases where the medical lobby has significant sway. Thus, judges should be mindful that the goal of reducing the number of med-mal lawsuits, although particularly pressing in the late twentieth century, may not be a legitimate state interest today.⁴⁵⁴

C. *States Should Encourage Voluntary ADR in Med-Mal Disputes*

The theory that compulsory ADR—i.e., ADR forced on parties concurrent with or soon after the filing of a lawsuit—can be effective is

446. See *supra* note 333 and accompanying text.

447. See *supra* Part I.B.2.

448. See *supra* note 418 and accompanying text.

449. Often such an allegation is called "Lochnerizing." See *Lochner v. New York*, 198 U.S. 45 (1905); see also Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. Rev. 859, 861 (2005) (describing the case as "the symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law").

450. See *supra* notes 419-20 and accompanying text.

451. See *supra* note 434; see also Kreindler, *supra* note 205 ("Republican Sen. Parley Hellewell told ADRWorld.com that his decision to support the bill last year was 'wrong,' and he acknowledged that a primary concern raised during debate over the measure—that malpractice lawsuits are damaging the state's health care system—is not a real problem. 'Doctors are not leaving the state or quitting their practices' because of malpractice suits as some had warned, he said.").

452. See *supra* note 20 and accompanying text.

453. See *supra* notes 163-68 and accompanying text.

454. See *supra* note 424.

misplaced. Filing a complaint, thereby initiating litigation, usually indicates that after considering all the possible ways to resolve a dispute, the plaintiff is committed to devoting time and resources to litigating the dispute.⁴⁵⁵ In most cases, the time for “facilitative” ADR, the process of bringing the parties together to talk about their differences, has passed. Indeed, data from the federal pilot programs initiated pursuant to the Civil Justice Reform Act suggest that compulsory ADR techniques “are not a panacea for perceived problems of cost and delay” inherent in the normal process of litigation.⁴⁵⁶ Furthermore, med-mal disputes are highly personal and emotionally charged affairs, thus complicating ADR implementation.⁴⁵⁷

A better approach is to encourage the parties to voluntarily use ADR as soon as a med-mal dispute becomes apparent. A Harvard Medical Practice Study showed that “[c]laimants often felt it appropriate to file a medical malpractice action not just because injury or death occurred, but because the health care providers did not respond with sufficiently obvious and meaningful concern.”⁴⁵⁸ Constitutional objections aside, compulsory med-mal arbitration simply comes too late in the process to be effective. Fortunately, hospitals and physicians are including ADR in their conflict management strategies with greater frequency, and the results have been positive.⁴⁵⁹

CONCLUSION

Although ADR has a beneficial role to play in med-mal disputes, compulsory arbitration is not the answer. Compulsory court-annexed med-mal arbitration laws can be challenged on constitutional grounds, but such challenges have tended to be rejected in both federal and state courts.⁴⁶⁰ Nevertheless, some courts have been receptive to arguments that compulsory court-annexed med-mal arbitration violates constitutional rights to jury trial, due process, and equal protection.⁴⁶¹ Courts considering similar challenges should recognize that compulsory med-mal arbitration laws pose unreasonable risks of depriving litigants of a meaningful day in court and the right to have an unbiased jury trial. Furthermore, courts should examine states’ justifications for passing such laws in the context of today’s society. Compulsory ADR to resolve medical disputes is misplaced.

455. See Katz, *supra* note 5, at 6 (“[C]ompulsory ADR usually takes place after a lawsuit is filed. The parties believe that they have exhausted all possibility of bilateral discussion.”).

456. James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 20* (1996).

457. See Dauer & Becker, *supra* note 20, at 1:11-17 (discussing the nature of conflicts and strains in med-mal disputes).

458. *Id.* at 1:14.

459. See *supra* note 207 and accompanying text.

460. See *supra* Part II.A.

461. See *supra* Part II.B.

Notes & Observations