The Testamentary Foundations of Commercial Arbitration

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ABSTRACT *This Article offers the first systematic treatment of the relationship between commercial arbitration and testamentary arbitration. (By testamentary arbitration, I mean an arbitration clause contained in a will requiring beneficiaries to resolve differences over the estate by means of an enforceable decision by a private party rather than judicial resolution in a probate court.) Recent scholarship and jurisprudence have questioned the enforceability of these arrangements as incompatible with the requirement of a written "agreement" between parties to the arbitration. Contrary to these views, close examination of the historical record of testamentary arbitration leading to the Federal Arbitration Act's enactment reveals a rudimentary set of doctrines not unlike those found in modern American commercial arbitration jurisprudence. These doctrines cover topics such as the allocation of authority between courts and arbitrators, as well as judicial review of arbitration awards. These findings carry important implications for both testamentary arbitration and commercial arbitration. They respond to critics alleging that testamentary arbitration cannot be sustained absent express legislative fixes in state statutes. They also support the trend, found in recent Supreme Court jurisprudence, of cross-fertilizing arbitration precedent from one field (like labor or investment arbitration) into another (like commercial arbitration).*

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I. INTRODUCTION

> [A]ll disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding . . . [who] shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes to be as binding on the parties as if it had been given in the Supreme Court of the United States.
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> Excerpt from the last will and testament of
> President George Washington[1]
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> So gross a departure from the manifest intent of the testator, cannot be the result of an honest endeavor to find that intent; and must be considered as a fraudulent exercise of a power, given for the purpose of preserving peace and preventing expensive and frivolous litigation.
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> Excerpt from Chief Justice John Marshall's opinion in *Pray v. Belt*[2]

Over the course of the twentieth century, arbitration in the United States enjoyed a meteoric ascent. The enactment of the Federal Arbitration Act ("FAA") in 1925 enhanced the enforceability of arbitration clauses in

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[1] GEORGE WASHINGTON, AUTHENTICATED COPY OF THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON OF MT. VERNON 28 (A. Jackson 1868).

[2] Pray v. Belt, 26 U.S. 670, 680 (1828).

commercial contracts.[3] Ratification of various international arbitration treaties, such as the New York Convention of 1958, provided a similar boost in the field of international arbitration.[4] More recently, a spate of Supreme Court decisions have facilitated the expansion of arbitration into previously *verboten* areas, including employment disputes, consumer disputes, and most disputes involving statutory claims under federal and state law.[5]

Consistent with this trend, testamentary arbitration represents another area of growing importance. In the prototypical case, a testator specifies in her will that any disputes over the distribution of the estate shall be resolved by arbitration.[6] Similar issues arise with respect to *inter vivos* trusts where the document establishing the trust specifies that all disputes between beneficiaries must be resolved by arbitration.[7]

The enforceability and desirability of such clauses has received increased attention among scholars and has been the subject of recent state legislation and decisional law. Some scholars have vigorously argued that such clauses are enforceable, while others see insurmountable problems due to the lack of a written agreement between the disputants.[8] Courts are similarly divided.[9] Amid this confusion, some states—such as Arizona—have expressly adopted

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[3] 9 U.S.C. § 1 (1925).

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, US SOURCE, 330 U.N.T.S. 3. *See also* 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, US Source, 575 U.N.T.S. 579; Inter-American Convention on International Commercial Arbitration (Panama Convention, Jan. 30, 1975).

[5] *See* Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013); Compucredit Corp. v. Greenwood, 132 S. Ct. 665 (2012); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995); Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

[6] *See, e.g.*, In re Estate of Heiney, No. 1 CA-CV 12-0456, 2013 WL 1846599 (Ariz. Ct. App. Apr. 20, 2013); Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013); In re Nestorovski Estate, 769 N.W.2d 720 (Mich. Ct. App. 2009); In re Calomiris, 894 A.2d 408 (D.C. 2006); Schoenberger v. Oelze, 96 P.3d 1078 (Ariz. Ct. App. 2005), *superseded by statute* Ariz. Rev. Stat. 14-10205.

[7] For a good discussion of the relevant jurisprudence, see S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157 (2012); S.I. Strong, *Empowering Settlors: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP. TR. & EST. L.J. 275 (2012).

[8] *See infra* Part I.

[9] *Compare, e.g.*, Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013), with In re Calomiris, 894 A.2d 408 (D.C. 2006).

legislation specifying that arbitration clauses in wills and trust agreements are enforceable in cases of disputes among beneficiaries regardless of whether they are in contractual privity.[10]

A central conundrum in these scholarly and doctrinal debates has centered on whether, and the extent to which, the architecture of modern commercial arbitration law can be easily transposed onto arbitrations arising from clauses in wills and other testamentary instruments. These debates presuppose that the rise of enforceable arbitration clauses in commercial contracts predated the emergence of enforceable arbitration clauses in testamentary documents and, thus, may not be readily adapted to testamentary arbitration.

In my view, these debates have the history backwards. Well before the FAA ended the "centuries of judicial hostility to arbitration agreements,"[11] courts in the United States routinely examined, and sometimes enforced, arbitration clauses in testamentary instruments similar to the one contained in George Washington's will (excerpted above). They also developed a jurisprudence governing the enforceability of awards rendered by arbitrators designated in such clauses. The enactment of the FAA—and parallel developments at the state level—did not so much end a general hostility to arbitration but, rather, helped to harmonize the law governing arbitration of commercial disputes with a nascent law governing the arbitration of testamentary disputes.

Close examination of the case law governing testamentary arbitration from 1789 (the year of the Judiciary Act's enactment) to 1925 (the year of the FAA's enactment) reveals primordial forms of many doctrines associated today with commercial arbitration. These include, for example, rules regarding allocation of the competence between arbitrators and judges to decide "gateway" issues to the enforceability of the arbitration clause as well as standards governing judicial review of the arbitrator's award. The above-quoted excerpt from Chief Justice Marshall's opinion in *Pray v. Belt* embraces an early conception of judicial review not unlike the contemporary doctrine requiring that an arbitrator's award "draw its essence from the agreement."[12]

This connectivity between the two fields is hardly surprising. Private individuals might prefer arbitration for many of the same reasons as commercial parties. Arbitrators might bring a certain expertise to decisions

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[10] *See* Heiney, *supra* note 6.

[11] Scherck v. Alberto-Culver Co., 417 U.S. 506, 510 (1974). *See also* McMahon, 482 U.S. at 225.

[12] *See* Pray, 26 U.S. 670.

about how to dispose of the testator's property. The less public, if not confidential, nature of the proceedings might appeal to the testator's interests. Additionally, the presumptive finality of the award might reduce the incidence of disputes.

The implications of this novel thesis—that modern-day commercial arbitration does not simply inform testamentary arbitration but, in several important respects, is informed by it— are profound. From the perspective of commercial arbitration, it invites greater attention to the precedents in early testamentary cases to inform current doctrine. From the perspective of testamentary arbitration, it suggests that scholars and skeptics may be overstating the incompatibility of testamentary arbitration with modern-day commercial norms.

While novel, my thesis is measured. I do not argue that commercial arbitration agreements and awards were unenforceable during the nineteenth century. Nor am I arguing that arbitration clauses in testamentary instruments were entirely enforceable during the same period. In both respects, the doctrine is far more complex than these oversimplified narratives sometimes depict.[13]

Moreover, while the doctrine governing testamentary arbitration during this era can inform our understanding of commercial arbitration, the two systems are, to be sure, not entirely analogous. As just one example (more to come later), commercial arbitration often involves sorting out the legal rights and remedies of two parties present before the decision maker. By contrast, testamentary arbitration typically involves discerning the intent of a single party—the testator—who is, by definition, unavailable. Despite these limitations, scholars and practitioners of modern-day commercial arbitration still can learn a great deal from its testamentary forbears.

This thesis unfolds in three parts. Part I reviews the literature. It then traces the history of testamentary arbitration and weaves it into an account of the development of commercial arbitration during the same era. The takeaway from Part I is that while commercial arbitration agreements (especially executory ones) were slow to achieve judicial acceptance, testamentary arbitration clauses enjoyed a healthy degree of judicial solicitude, especially during the late nineteenth century before the FAA's enactment.

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[13] For rich discussions of the history of commercial arbitration prior to the FAA's enactment, see Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J. L. ECON. & ORG. 479, 485–90 (1995); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 15–24 (1992).

Part II demonstrates how the doctrine of testamentary arbitration during this period aligns with the modern-day analogues in commercial arbitration. It identifies a series of concepts in modern-day commercial arbitration—like *kompetenz/kompetenz*, manifest disregard of the law, and others—and shows how the seeds of those doctrines were already present in the jurisprudence on testamentary arbitration well before the FAA's enactment.

Part III builds on Part II and traces the implications, and limits, of this thesis, both for commercial arbitration and testamentary arbitration, as a matter of theory and as a matter of practice. First, it encourages the greater cross-fertilization of precedents from different fields of arbitration, such as the influence of testamentary precedents on commercial decisions or the influence of commercial precedents on labor arbitration decisions. Second, it responds to the critics who argue that commercial arbitration jurisprudence cannot be easily mapped onto testamentary arbitration cases. Third, it charts a course for future research about testamentary arbitration, especially the puzzling question about the near-complete absence of jurisprudence following the Supreme Court's decision in *Pray*, and the sudden re-emergence of such jurisprudence in the late nineteenth century.

I. SITUATING COMMERCIAL ARBITRATION AND TESTAMENTARY ARBITRATION HISTORICALLY

This section does two things. First, it reviews the literature governing testamentary arbitration. Second, it situates the little-known history about the law governing testamentary arbitration alongside the better-known history about the law governing commercial arbitration.

A. *LITERATURE ON TESTAMENTARY ARBITRATION*

I do not write on a blank slate. The arbitration of testamentary disputes has attracted some attention in the scholarship, but none of that scholarship systematically considers the connective tissue between testamentary disputes and commercial arbitration.[14] This section reviews that scholarship to explain the original contribution of the present project.

Following some early descriptive writings about testamentary arbitration,[15] one of the first modern contributions to the topic came in an

[14] Some literature focuses more on arbitration clauses in trust agreements rather than wills, but these works often fold testamentary disputes into their discussions.

[15] Some early scholarship touched on the topic, but at a time when the doctrine was far more hostile to arbitration, and not just of testamentary disputes. *See* Blaine

article by Gary Spitko.[16] Spitko advocated the use of arbitration clauses in testamentary instruments in order to ensure that "majoritarian cultural norms" (reflected in institutions like judges and juries) did not thwart the testator's intent (which might reflect "dissident minority norms").[17] Spitko argued that arbitration freed the nonconforming testator from the grip of majoritarian cultural norms by privatizing disputes over his or her intentions.[18]

Though Spitko's "cultural minority" model did not gain much traction in the literature, it did identify two important issues that shaped subsequent debates over enforceability of such clauses. First, Spitko noted that objections to arbitration might arise from beneficiaries' lack of assent to the clause. He overcame this objection by arguing that the testator's right to devise her property as she sees fit entails a right to condition how disputes over that devise will be resolved.[19] Second, Spitko noted that objections to the validity of the devising instrument might arise. He overcame this objection by arguing that, under the doctrine of separability (under which arbitration clauses are treated as separate contracts within the contracts containing them), questions about the enforceability of the testament do not necessarily taint the arbitration clause.[20]

Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521 (1967); Arnold M. Zack, *Arbitration: Step-Child of Wills and Estates*, 11 ARB. J. 179 (1956).

[16] E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999).

[17] *Id.* at 281–94.

[18] *Id.* at 294–97.

[19] *Id.* at 297–303.

[20] *Id.* at 303–07. Spitko also notes that questions might arise about the neutrality of the arbitrator, particularly if the arbitrator's interests are closely aligned with the testator. Spitko proposes an alternative arbitration scheme under which a three-arbitrator tribunal resolves disputes, consisting of one arbitrator chosen by the testator, one by the will contestant and a third from the party appointees. *Id.* at 307–14. This argument is not especially noteworthy. Federal and state arbitration laws already contain protections against the enforcement of awards rendered by biased arbitrations. *See, e.g.* 9 U.S.C. §10(a)(1)–(2) (2015); Commonwealth Coatings Corp. v. Cont'l Casualty Co., 393 U.S. 145 (1968). Moreover, the "mandatory three-arbitrator" model raises several other workability problems. For one thing, it is hard to see how the testator will nominate the arbitrator if he or she is dead; the testator might name a specific individual in the will, but that provision carries its own pitfalls (particularly if the named individual is unable or unwilling to perform the designated duty). For another thing, three–arbitrator models often are more expensive, more time consuming and less efficient than a single arbitrator

Following Spitko, most literature focused on whether, and to what extent, arbitration clauses in testamentary instruments should be enforceable and, if so, the proper legal architecture necessary to ensure that result in light of the sorts of objections—like assent and validity—that Spitko identified. An early contribution to this stream came from a pair of attorneys who urged the incorporation of arbitration clauses in trust documents.[21] Such devices help secure a seamless distribution of property and "ensure that trust disputes do not escalate into courtroom battles entangling all parties in what is often bitter litigation."[22] They noted, however, that at the moment when binding arbitration requires the parties' voluntary participation, the legal enforceability of such clauses is, at best, questionable.[23] In their view, this doctrine rested on the archaic notion that trust instruments are not contracts, and the authors disputed this by explaining why a contractual model of trust instruments is superior.[24] Nonetheless, the authors recognized that judicial acceptance of the contract model of trusts has come slowly, and consequently, urged state legislatures to adopt laws expressly providing that arbitration clauses in trust or testamentary documents are enforceable.[25]

Shortly after the publication of this early commentary, two other scholars sounded a much more skeptical note.[26] First, Stephen Murphy identified a series of statutory and other doctrinal impediments to the enforceability of such clauses, namely the conception that arbitration is predicated upon an agreement (typically lacking in a donative instrument) and various state statutory restrictions requiring judicial resolution of testamentary and other disputes.[27] He then reviewed a series of theories—including contract theory, benefit theory and intent theory—as possible rationales for overcoming these statutory and

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model. Finally, a single arbitrator model with a private appointing authority (like the American Arbitration Association) addresses Spitko's neutrality concern while not importing the "majoritarian cultural norms" that, in Spitko's theory, might arise from a judicially appointed sole arbitrator.

[21] Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, But Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007).

[22] *Id.* at 354.

[23] *Id.* at 354–55.

[24] *Id.* at 361–64.

[25] *Id.* at 364–65.

[26] *See* Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627 (2011).

[27] *Id.* at 639–44.

doctrinal restrictions.[28] After reviewing the present statutory proposals to enhance the arbitrability of such disputes, Murphy concluded with a series of recommendations about how state legislatures might design reforms to the law governing the enforcement of such provisions, taking into account the various theoretical models he developed. These recommendations included considering arbitration vs. mediation, treating will disputes differently from trust disputes, differentiating disputes over donor capacity vs. disputes over the interpretation of the donative instrument, and enforcing arbitration clauses vs. empowering the judiciary to order arbitration.[29]

Shortly after Murphy, Erin Katzen also sounded a skeptical note.[30] Like others, Katzen acknowledged that consent presented a difficulty for arbitration in any testamentary or trust dispute: the beneficiaries generally will not have consented on a pre-dispute basis to arbitration.[31] Building on this argument, Katzen identified a further consent difficulty, namely that, where disputes arise over whether the donor consented to the terms of the testamentary or trust document, "the donor is not present to specify whether she was in her right mind, which provisions of the document she intended, or whether a third party misled or coerced her to include certain provisions."[32] Despite these problems with consent, Katzen did not write off arbitration entirely. First, she endorsed "no contest clauses" under which the contesting beneficiary is guaranteed some or all of her bequest even if her challenge fails, provided that she brings the challenge in arbitration.[33] Second, she endorsed a mixture of "default" and "mandatory" procedures to ensure that the rights of parties are protected to the extent that their consent is dubious. For example, default procedures might be embedded in state statutes and modeled upon the American Arbitration Association (AAA) Rules governing arbitration of wills and trusts.[34] Mandatory procedures, in Katzen's view, might range from certain safeguards that apply either in all cases or, at least,

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[28] *Id.* at 645–61.

[29] *Id.* at 671–79.

[30] *See* Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118 (2011).

[31] *Id.* at 121–23.

[32] *Id.* at 124.

[33] *Id.* at 125–27.

[34] *Id.* at 130–32.

in cases where a court determines that the chosen rules of dispute settlement are somehow unconscionable or unfair.[35]

In the wake of this commentary, David Horton and Stacie Strong became the first academics to give the topic sustained theoretical treatment. Horton examined whether the FAA can govern arbitration clauses in testamentary instruments.[36] While noting that the FAA explicitly applies only to "contracts" or "agreements," he invokes federal common-law to extend the FAA to any situation when the parties can plausibly be said to have agreed to arbitrate.[37] This opens the door to FAA coverage of arbitration clauses in trusts and testamentary instruments. Trustees, executors or beneficiaries accept fees or bequests pursuant to testamentary or trust instruments, which manifests an "assent" to the instrument's terms, including its arbitration clause.[38] Horton concluded his article by exploring how several core arbitration doctrines—including separability and FAA preemption—play out in the context of testamentary and donative instruments.[39]

Stacie Strong analyzed the compatibility of enforceable arbitration clauses with trust agreements.[40] Unlike Horton, Strong did not confine her analysis to U.S. arbitration law; instead, she employed a more comparative perspective, considering both trust forms and arbitration laws from other countries. Like Murphy,[41] Strong reviewed the primary theories of trusts—contractual, donative, intent, and benefit—and highlighted the basic "collision" between these theories and arbitration, namely, that several of the theories of trusts do not rest on the premise of an "agreement" between settlor, trustee, and beneficiary, whereas most dominant theories of

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[35] *Id.* at 134–35.

[36] David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1049–68 (2012).

[37] *Id.* at 1054–58.

[38] *Id.* at 1058–65. In order to accommodate the probate exception to federal jurisdiction, Horton carves out an exception for "core probate matters," which he defines to include petitions to supervise administration of the testator's estate or to invalidate a will. *Id.* at 1078.

[39] *Id.* at 1081–89.

[40] *See* Strong, *Arbitration of Trust Disputes*, *supra* note 7. In a separate article, Strong explores some of these same themes but focuses, instead, on drafting enforceable clauses. She examines the AAA and ICC model clauses in depth, compares their attributes, and identifies additional features that can enhance these clauses' enforceability and efficacy. *See* Strong, *Empowering Settlors*, *supra* note 7, at 309–24.

[41] *See* Murphy, *supra* note 26.

arbitration presuppose the existence of an agreement between the parties.[42] After reviewing examples of legislation that favored mandatory arbitration of trust disputes, Strong identified several prerequisites for enforcing such clauses in common-law regimes. Such prerequisites included: the lack of any "jurisdictional ouster" argument; an operable clause that can be effectively performed; a clause that can adequately bind parties other than the settlor; proper representation of the parties' interests in the arbitration; and the lack of a "non-arbitrability" doctrine in the jurisdiction.[43]

In sum, the literature is surprisingly sparse. Some scholarship addresses the enforceability of arbitration clauses in testamentary documents. Little of that scholarship, with the exception of the recent contributions by Strong and Horton, has much theoretical grist. While compelling, Horton and Strong's scholarship does not offer a model for thinking about issues of the relationship between testamentary arbitration and commercial arbitration. The next section picks up where the existing literature leaves off and offers links between the two areas of the law.

B. *The Historical Parallels Between Testamentary Arbitration And Commercial Arbitration*

The introduction sets forth the paradigmatic case involving testamentary instruments: a will contains a provision specifying that any disputes over the distribution of the decedent's estate shall be resolved by an arbitrator or arbitral panel (sometimes the will's executor is identified as the arbitrator). If such a dispute arises—whether among the beneficiaries or between the beneficiaries and the executor(s)—can they be bound by the arbitration clause in the will?[44] As with commercial arbitration, the law in this area has evolved substantially since the Founding.[45] This section examines the parallels in development between the two fields.

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[42] *See* Strong, *Arbitration of Trust Disputes*, *supra* note 7, at 1174–81.

[43] *See generally id.* at 1196–1236.

[44] Consequently, I put to the side "submission agreements" between beneficiaries, or between beneficiaries and executor(s), after the testator has died. *See, e.g.,* Turk v. Turk, 3 Ga. 422 (1847). These agreements fit more comfortably within the conventional paradigm of arbitration; thus, do not implicate the unique issues presented by arbitrating death.

[45] Other scholars have extensively documented the rich history of commercial arbitration in the United States, and this paper does not engage directly in that debate. For representative accounts, *see generally* IMRE SZALAI, OUTSOURCING JUSTICE (2013); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 39–49 (2009); Benson, *supra* note 13; MACNEIL, *supra* note 13.

1. *English Roots*

The law governing the enforceability of arbitration clauses in wills enjoys a rich historical pedigree.[46] Examples of such clauses date at least to the seventeenth century in England.[47] In *Philips v. Bury*, an English court confronted a clause in a will providing that "any differences will be resolved by an arbitrator whose decision shall be final."[48] The court held that the arbitration provision in that case technically was enforceable but stressed that the provision could not impair the ability of any litigant to dispute the distribution of the estate in court.[49] Consequently, as a practical matter, decisions like *Philips* emasculated arbitration provisions in wills.[50]

This early English skepticism about testamentary arbitration paralleled a similar skepticism about commercial arbitration, especially executory agreements. Typical in this regard was *Kill v. Hollister*, where the court refused to enforce an arbitration clause in an insurance contract on the ground that "the agreement of the parties cannot oust this court" of jurisdiction.[51] Building on the English practice, commercial arbitration followed a similar course during the colonial era in the United States. Although arbitration thrived among merchants in the American colonies, executory arbitration agreements remained unenforceable.[52]

2. *Early American Decisions*

Reported decisions by courts in the United States reflected dubiousness about arbitration of testamentary disputes. Exemplary of this view was the

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[46] For a helpful historical roadmap, *see generally* Arnold M. Zack, *Arbitration: Step-Child of Wills and Estates*, 11 ARB. J. 179 (1956).

[47] *Id.* at 179.

[48] *Id.*

[49] *Id.*

[50] This appears to contrast with the relatively more sympathetic view that English law took with respect to arbitration clauses in trust agreements. *See* Janin, *supra* note 15, at 522–24.

[51] Kill v. Hollister, 95 Eng. Rep. 532 (K.B. 1746).

[52] According to one commentator, "[f]rom whatever source they derived the practice, the colonists engaged in extensive arbitration throughout the period of English Rule." William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193, 198 (1956).

U.S. Supreme Court's 1828 decision in *Pray v. Belt.*[53] The clause in the will at issue in *Pray* provided as follows:

> Whereas my will is lengthy, and it is possible I may have committed some error or errors, I do therefore authorize and empower as fully as I could do myself, if living, a majority of my acting executors, my wife having voice as executrix, to decide all cases, in case of any dispute or contention: whatever they may determine is my intention *shall be final and conclusive*, without any resort to a Court of Justice.[54]

A dispute arose among legatees over a distribution of a portion of the estate, and the executors decided the matter adverse to one of the legatees, who then commenced an action in federal court. The circuit court found in favor of the objecting legatees, and the executors appealed, arguing, among other things, that their decision pursuant to the arbitration clause was conclusive.

Writing for a unanimous Court, Chief Justice John Marshall disagreed. He reasoned that the judicial role in constructing a will is to give effect to the testator's intent. While a testator might vest in arbitrators the power to resolve disputes over the distribution of the estate, that power is not completely immune from judicial review. That vesting of authority did not, Marshall reasoned, "include the power of altering the will."[55] Nor would it authorize the arbitrators to deviate from the intent of the testator. Consequently, Marshall concluded, "[i]f an unreasonable use be made of the power, one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of Courts of Justice to decide on the rights of the parties ought to be exercised."[56]

Much like Chief Justice Marshall in *Pray*, American courts were especially reluctant to enforce arbitration agreements in commercial contracts.[57] A leading proponent of this view was Justice Joseph Story who wrote that an arbitration agreement is not specifically enforceable because it "is essentially, in its very nature, an agreement which must rest in the good

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[53] Pray, 26 U.S. 670.

[54] *Id.* at 672–73.

[55] *Id.* at 680.

[56] *Id.*

[57] BORN, *supra* note 45, at 44–45.

faith and honor of the parties, and like an agreement to paint a picture, to carve a statute or to write a book . . . must be left to the conscience of the parties or to such remedy in damages for the breach thereof, as the law has provided."[58] The Supreme Court (while Joseph Story was a Justice) sounded a similar skepticism holding, for example, in an 1836 decision, that an arbitration agreement unlawfully sought to "oust" a court of jurisdiction, and thus could not be invoked to prevent a civil action.[59] In other words, arbitration agreements might be effective as long as parties voluntarily abided by them, and private commercial sanctions might provide a powerful incentive to do so. But if they were breached, a party's damages could, at most, be nominal monetary relief; specific performance—that is, a power to compel arbitration—was unavailable.[60]

In contrast to agreements, commercial arbitration awards enjoyed relatively greater judicial approbation during this era, but practice varied across states. As Bruce Benson has explained, cases about the enforceability of awards first emerged when non-legal sanctions—by, for example, commercial or merchant industries—provided "insufficient inducements" to persuade award debtors to satisfy the award.[61] Early nineteenth century American courts scrutinized arbitration awards closely, declaring that they could be set aside for errors of law, fact or minor procedural defects.[62]

3. The Ascendancy of Testamentary Arbitration in the Late Nineteenth Century

While Chief Justice Marshall's decision in *Pray* dealt a blow to the use of arbitration clauses in testamentary instruments, his underlying reasoning

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[58] Tobey v. County of Bristol, 23 F. Cas. 1313, 1321–22 (C.C.D. Mass. 1845). *See also* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 670, at 676 (13th ed. 1886) ("The regular administration of justice might be impeded or interfered with by such stipulations if they were specifically enforced. And at all events courts of justice are presumed to be better capable of administering and enforcing the rights of the parties than any mere private arbitrators, as well from their superior knowledge as from their superior means of sifting the controversy to the very bottom.").

[59] Hobart v. Drogan, 35 U.S. 108 (1836).

[60] MACNEIL, *supra* note 13.

[61] Benson, *supra* note 13.

[62] *See generally* Gross v. Zorger, 3 Yeates 521 (Pa. 1803); Williams v. Paschall, 4 U.S. 284 (Pa. 1803); Mansfield v. Doughty, 3 Mass. 398 (1807); Monseit v. Post, 4 Mass. 832 (1808).

actually planted the seeds for a future resurgence of the device. Marshall's emphasis on the testator's intent suggested that, in most cases where arbitrators genuinely sought to give effect to that intent, their awards *could* be enforced. Indeed, by the late nineteenth century and early twentieth century, several state courts appeared to give effect to such provisions precisely because doing so gave effect to the testator's intent.[63]

Courts enforcing these testamentary arbitration clauses adopted different theories. Some derived a theory of enforceability from property rules: the property holder had the absolute right to control the disposition of her property, and this necessarily entailed a corollary power to control the manner for resolving disputes over the transfer of that property.[64] Other courts derived a theory of enforceability from contract rules: they analogized the testamentary transfer of property to an agreement under which the beneficiary took the property subject to certain conditions, which might include assent to a dispute resolution mechanism.[65]

Not all states, however, took so sanguine a view of arbitration clauses in testamentary documents. Some courts declined to enforce such clauses on the ground that they unlawfully attempted to deprive the court of jurisdiction over a dispute.[66] Others relied instead on the view that property disputes involved the determination of rights "binding on the whole world," and thus could not be resolved by stipulated acceptance of a private arbitrator's decision.[67]

The shifting and varied judicial views on testamentary arbitration tracked similar trends in commercial arbitration. By the late nineteenth century, judicial hostility toward specific enforcement of arbitration agreements eroded, albeit in a nonsystematic manner and with variations across the states.[68] As Bruce Benson has documented, courts in Pennsylvania and Virginia began to break down the rule against specific enforcement of executory arbitration agreements as early as the 1850's, but these states were

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[63] Grant v. Stephens, 200 S.W. 893 (Tex. Civ. App. 1917); Couts v. Holland, 107 S.W. 913 (Tex. Civ. App. 1908); Am. Bd. Of Comm'rs of Foreign Missions v. Ferry, 15 F. 696 (C.C.W.D. Mich. 1883).

[64] *See, e.g.*, In re Phillips's Estate, 10 Pa. C.C. 374 (1891).

[65] *See, e.g.*, Moore v. Harper, 27 W. Va. 362 (1886).

[66] *See, e.g.*, Taylor v. McClave, 15 A.2d 213 (N.J. Ch. 1940).

[67] *See, e.g.*, Carpenter v. Bailey, 60 P. 162 (Cal. 1900).

[68] MACNEIL, *supra* note 13 at 21. (In the especially colorful words of Ian Macneil, "Before World War I, American arbitration law was, apart from state statutes, the common law of Nowhere." (footnote omitted.)).

outliers.[69] Other states, like New York and Illinois, continued to apply the rule against specific enforcement into the early twentieth century.[70] Federal courts likewise remained hostile: as late as 1898, the Third Circuit invoked the concept of jurisdictional ouster to refuse to enforce an executory arbitration agreement.[71]

The erosion in judicial hostility toward arbitration agreements charted a similar shift in judicial attitudes toward the enforcement of arbitration awards. The shift had already begun to occur in the middle of the nineteenth century, albeit in a non-systematic fashion and with variation among the states. Virginia courts again took the lead, followed soon thereafter by the Supreme Court of the United States.[72] By 1854, the Court could already declare that "[i]f an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set aside for error, either in law or in fact."[73] By the end the nineteenth century, commercial arbitration awards enjoyed a greater currency.[74]

In sum, United States courts in the late nineteenth and early twentieth centuries took a nuanced and complex view on testamentary arbitration. While early decisions displayed a skepticism akin to that expressed in the early English jurisprudence, those same decisions laid the intellectual foundations for future decisions that were decidedly more supportive of arbitration. Judicial solicitude toward arbitration was hardly uniform, and courts considering these clauses—and the resulting awards—employed a variety of theories. Those theories provided the architecture for doctrines in testamentary arbitration that bear striking parallels to those found in modern commercial arbitration doctrine. The next section examines those parallels.

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[69] Drogan, 35 U.S. 108; Snodgrass v. Gavit, 28 Pa. 221 (1857); Condon v. Southside R.R. Co., 14 Va. 302 (Gratt. 1858) (Note Steve Ware's article on Voluntary Arbitration, *supra* note 15, takes issue with these characterizations).

[70] *See* Drogan, 35 U.S. 108; Snodgrass, 28 Pa. 221; Condon, 14 Va. 302.

[71] Mitchell v. Dougherty, 90 F. 639 (3d Cir. 1898).

[72] *See* Doolittle v. Malcolm, 35 Va. 608 (Va. 1837); Hobson v. McArthur, 41 U.S. 182 (1842).

[73] Burchell v. Marsh, 58 U.S. 344, 349 (1854).

[74] MACNEIL, *supra* note 13, at 19.

II. ALIGNING HISTORICAL CONCEPTS FROM TESTAMENTARY ARBITRATION WITH MODERN CONCEPTS OF COMMERCIAL ARBITRATION

The preceding section identified the parallels in the historical evolution of testamentary and commercial arbitration. This section demonstrates how those early testamentary cases contain the seeds of several doctrines akin to those found in modern commercial arbitration jurisprudence. Specifically, this section explores five topics: (A) the doctrine of *kompetenz/kompentenz*, (B) the doctrine of separability, (C) general principles governing judicial review of arbitral awards, (D) vacatur on grounds of a biased arbitrator and (E) nonstatutory grounds of review, such as manifest disregard of the law.

A. *Kompetenz/Kompetenz*

Stripped to its essence, the doctrine of *kompetenz/kompetenz* provides that an arbitrator has jurisdiction to determine her own jurisdiction.[75] Though seemingly tautological, the doctrine is essential to the proper functioning of any arbitral system. The arbitrator draws her authority from the contractual agreement of the parties. Despite the source of this authority, cases regularly arise that challenge the enforceability of the arbitration clause such as, for example, some generally applicable contract defense or some pathological element in the clause.[76] In these cases, the arbitrator will sometimes conclude that the defense is valid and, thus, the arbitration clause is unenforceable. This conclusion presents a logical conundrum: if the arbitrator derives her power from the arbitration clause, but then concludes that the arbitration clause is unenforceable, how can her award (so concluding) have any force? The doctrine of *kompetenz/kompentenz* solves this conundrum by providing that the arbitrator has the power to rule on challenges to her own jurisdiction.

In the United States, the FAA does not contain a specific provision addressing this issue. Instead, the rule emerged through an amalgam of case law and contractual practice. The seminal decision is typically seen to be the Supreme Court's 1995 decision in *First Options*.[77] There, the Court held that courts, rather than arbitrators, presumptively have the power to rule on challenges to the arbitration clauses. However, if the agreement contains

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[75] *See, e.g.*, William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan: *What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996).

[76] *See generally* BORN, *supra* note 45, at 563–766.

[77] *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); *See also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010).

clear and unmistakable evidence that the parties intended for the arbitrators to rule on such matters, then courts must defer to that contractual allocation of authority. As a matter of practice, most sets of arbitral rules attempt to allocate decisions of this sort to arbitrators, and United States courts, relying on *First Options*, generally have found these allocations sufficient.[78]

Despite its relatively recent pedigree in modern commercial arbitration law, the doctrine of *kompetenz/kompetenz* in the United States finds vestiges in the older, pre-FAA decisions on testamentary arbitration. The California Supreme Court's decision in *Carpenter v. Bailey* supplies good evidence.[79] While the factual background is a bit murky, it appears that a dispute arose among competing claimants to the estate of C.W. Carpenter (a class of beneficiaries named in the will and a class of heirs contesting the will's validity.) Some or all of the competing class members signed an arbitration agreement, designating an individual with the power to decide "what, under all the circumstances of the case, is a reasonable, just and equitable amount of said estate to be set over to said contestants in full for all claims of each and every of them." The idea, at the bottom, was that if the arbitrator found in favor of the heirs, the beneficiaries would pay them in order to induce them to abandon their contest of the will. The designated arbitrator rendered an award, apparently in favor of the heirs (its contents are not apparent from the opinion), who sought to show that the beneficiaries had never performed their payment obligation under the award and, thus, were estopped from insisting upon probate of the will. The heirs in *Carpenter* argued that the probate of the will was also a matter for the arbitrators, not the court. The California Supreme Court disagreed, declaring that:

> [T]he matter of the contest cannot be submitted to arbitration. The matter of the probate of a will is a proceeding *in rem, binding* on the whole world. A few individuals, claiming to be the heirs, cannot by stipulation determine such controversy.
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> ... To determine what would be just, reasonable and equitable, the referee must pass upon the validity of the will. If valid, it would be unjust and grossly inequitable to give the contestants anything. If the will was found to be invalid,

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[78] *See, e.g.*, Crawford Professional Drugs, Inc. v. CVS Caremark Corp., 748 F. 3d 249 (5th Cir. 2014); *See generally* RESTATEMENT (THIRD) U.S. LAW OF INT'L COMMERCIAL ARBITRATION 40-7 (Tentative Draft No. 2, 2012).

[79] Carpenter v. Bailey, 60 P. 162 (Cal. 1900).

> the contestants, if they were the heirs and the only heirs of Carpenter, should have had all of it, and in such case it was absurd to provide that the proponents should pay them for their claim out of their own property.[80]

The California Supreme Court's opinion reveals an awareness of rudimentary concepts of kompetenz/kompetenz, albeit one not entirely in harmony with *First Options*. Whereas the Supreme Court in *First Options* created merely a default rule allocating to the court the power to resolve challenges to the arbitration clause (one that could be overcome by clear and unmistakable evidence of the parties' intent to reallocate authority over that decision to the arbitrator), *Carpenter* suggests there is an indissoluble core of challenges—namely issues pertaining to the probate of a will—that cannot be reallocated to the arbitrator regardless of the testator's intent.

A related feature of *First Options* was its rule on arbitrability. Whereas the Supreme Court in *First Options* declined to presume that the parties intended to arbitrate the validity of the arbitration agreement, absent clear and unmistakable evidence of their intent to do so, the Court was quite willing to entertain a more pro-arbitration presumption regarding the scope of an otherwise valid clause. The Court presumed that the parties intended for the arbitrator to decide whether a particular merits dispute is arbitrable.[81]

Pre-FAA testamentary arbitration decisions reflect a similar presumption favoring a broad scope to the arbitration clause. The Texas decision in *Couts v. Holland* supplies a good example. *Couts* involved the construction of a will providing that a group of executors acting as "trustees" should resolve questions of its interpretation.[82] Couts' widow challenged the trustees' authority to resolve such questions, and the Texas Court of Civil Appeals rejected her challenge. It explained that:

> We think the intent of the testator is clear that, wherever there was doubt as to the meaning of the instrument, that doubt was to be settled by the executors and by no one else. The power to determine what the will means, in its every part and provision involves, as well, the power to decide

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[80] *Id.* at 163.

[81] First Options, 514 U.S. at 944–45; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 at 626 (1985) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

[82] Couts v. Holland, 107 S.W. 913 (Tex. Civ. App.1908).

> what property it operates upon as it does the power to decide just what disposition is intended to be made of property clearly within its operation. A doubtful question of construction may as easily arise in the one case as in the other.[83]

This passage from *Couts* bears close similarities to the ideas underpinning *First Options*. Just as the Court in *First Options* presumed the parties' mutual intention to confer on the arbitrator a broad authority to decide what claims were arbitrable, so too does the Texas court in *Couts* confer onto the arbitrator the power to determine the meaning of the will *"whenever"* there was doubt as to the meaning of such instrument. Of course, nothing in the will in *Couts* affirmatively expressed the testator's intent in this regard (just as the contract in *First Options* did not contain such an expression of mutual intent.) Instead, the courts in both cases infer that intent from the overall design of the arbitration provisions.

Though the court in *Couts* was not explicit about the underlying policies that favored this presumption, *First Options* was, and its reasoning applies equally in the testamentary context: questions as to scope "arise when the parties have a contract that provides for arbitration of some issues. And given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."[84] That same holds true in the context of testamentary arbitration: by providing for arbitration of some disputes arising out of the will, it is reasonable to presume that the testator, in the interest of efficiency, would want *all* disputes resolved by the same mechanism, *unless he expressly provided otherwise*.

B. *Separability*

Closely related to the doctrine of kompetenz/kompetenz is the doctrine of separability. Put simply, the doctrine of separability provides that an arbitration clause, contained within a larger contract, should, legally, be treated as constituting a separate contract.

While some countries embed this doctrine in positive statutory law, the FAA does not contain an unambiguous statement of the separability principle. Instead, the principle, at least as a matter of federal law, emerged

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[83] *Id.* at 915.

[84] First Options, 514 U.S. at 944–45.

from case law. Central to its development was the Supreme Court's decision in *Prima Paint.*[85] There, the Court distinguished between the substantive contract and the arbitration provision contained in it and treated the two as distinct agreements. This conception of the arbitration clauses as a "contract within the contract" permitted a presumptive allocation of authority. The arbitrator would henceforth decide challenges to the substantive agreement, whereas challenges to the arbitration clause would presumptively be subject to determination by the court.[86] Decisions since *Prima Paint* have repeatedly reaffirmed this principle.[87]

As noted in Part I, Gary Spitko identified the lack of a separate "agreement" as one of the intellectual challenges confronting testamentary arbitration.[88] Although beneficiaries to a will generally do not enter into a formal separate agreement,[89] testamentary arbitration developed other means of constructing rudimentary forms of the separability doctrine.

The contract theory, as discussed above, supplied the intellectual architecture. *Moore v. Harper* serves as a good example. *Moore* involved an arbitration provision contained in a will. A dispute arose among the beneficiaries as to the question of whether the will's arbitration provision could bind them. Concluding that it could, the court explained that beneficiaries in a will took the benefit on the conditions set forth by the

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[85] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[86] The presumptive allocation of power was subsequently subject to several modifications. For one thing, as noted above, First Options allowed parties to reallocate to the arbitrator the authority to resolve challenges to the arbitration agreement. First Options, 514 U.S. at 944-45. For another thing, courts still decide challenges to the formation (as opposed to the validity) of the underlying contract. *See* Granite Rock Co. v. Int'l Bhd. Of Teamsters, 561 U.S. 287 (2010). Some authority suggests that if the underlying contract was procured by fraud, as opposed to fraudulently induced, this matter would be for the court. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 239–40 (Kluwer 1994). Finally, in some instances, the factual basis for an attack on the underlying contract (like duress) might involve the exact same factual basis as an attack on the arbitration agreement.

[87] *See* Nitro-Life Technologies, L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

[88] *See supra* text accompanying notes 16–18.

[89] There are, however, exceptional cases where beneficiaries enter into agreements, following the testator's death, under which they agree to resolve disputes among themselves by arbitration. *See, e.g.,* In re Nestorovski Estate, 769 N.W.2d 720 (Mich. Ct. App. 2009).

testator, just as if they had "contracted for" that benefit.[90] The conditions, just like a contract, were generally enforceable subject only to an examination of their compatibility with the "public policy" of the forum.[91] Justice Snyder makes the analogy explicit in the following passage:

> No authorities have been referred to, nor have I deemed it necessary to look for precedents, as the question seems to me to be so entirely analogous to contracts and other writings, in which provision is made for their interpretation. . . . I can see no reason why the same rule should not apply to a will. Of course a will is not an agreement between two or more contracting parties, but it is certainly no less binding upon the parties who take a benefit under it than if they had contracted with the testator for that benefit.[92]

The *Moore* Court analogized the "bindingness" of a contract and the "bindingness" of a will that obligates beneficiaries to take property subject to certain conditions. While courts like *Moore* did not expressly use terms like "separability," their reasoning suggested that the beneficiaries could be "bound" to the arbitration clause by their conduct (that is, laying a claim to the property described in the will) irrespective of whether that claim in fact proved valid. This is similar to binding a party to arbitrate a dispute under a modern-day commercial contract (perhaps through acceptance by conduct) irrespective of whether the obligations set forth in the contract prove to be valid and binding.

C. *Award Enforcement – Generally*

The FAA sets forth a mechanism whereby awards can be confirmed subject to a limited set of exceptions. Those exceptions include:

(1) where the award was procured by corruption, fraud, or undue means;

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[90] Moore v. Harper, 27 W. Va. 362, 374 (1886) ("Of course, a will is not an agreement between two or more contracting parties, but it is certainly no less binding upon the parties who take a benefit than if they had contracted with the testator for that benefit."); Ferry, 15 F. 696.

[91] *See* Wait v. Huntington, 40 Conn. 9, 11 (1873).

[92] Harper, 27 W. Va. at 373–74.

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[93]

Prior to the FAA's enactment, various state statutes authorized their courts to enforce awards subject to certain exceptions.[94] Where statutory standards were lacking (as was the case in the federal system and some state systems), courts developed common-law grounds for reviewing arbitral awards.

Testamentary arbitration jurisprudence embraced a similar approach. As noted above, *Pray* implied the existence of such judicially created standards: while the Court held that the award in that case was unenforceable due to an erroneous construction of the will, *Pray*'s reasoning suggested that, absent such errors, the award could have been enforced. Later courts expounded on that idea and articulated standards closely resembling those eventually codified in the FAA. The 1883 federal district court's decision in *Ferry* supplies a good example:

> If the arbitrator refuses to act, awards upon a matter not submitted, makes an incomplete determination, or commits a gross mistake or error of judgment, evincing partiality, corruption or prejudice, transcends his authority or violates some statutory requirement on which the dissatisfied party had a right to rely, or commits some other like error, courts of equity may interfere and correct the error, and, in proper cases, and upon good cause shown, restrain all further abuse of the granted powers.[95]

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[93] 9 U.S.C. § 10 (2015).

[94] Indeed, one of those statutes—from New York—supplied the model for the FAA. *See* MACNEIL, *supra* note 13, at 34–47.

[95] *See* Ferry, 15 F. 700.

Other courts expressed similar views.[96]

While the judicially articulated standards governing review of testamentary arbitration awards resemble those later codified in the FAA, they are not identical in every respect. To a degree, the two standards are common. For example, both the FAA and the *Ferry* standards envision review in cases of partiality or corruption of the arbitrator. Similarly, the FAA standards permit vacatur in cases where the arbitrator "exceeds his power," and the *Ferry* standards likewise permit vacatur in cases where the arbitrator "transcends his authority."

In other respects, though, the two standards differ. Sometimes, the FAA standards sweep more broadly: they envision vacatur in cases of certain procedural rulings (like failure to postpone the hearing or failure to hear evidence); whereas the *Ferry* standards do not. Elsewhere, the *Ferry* standards sweep more broadly: they envision review in cases where the arbitrator "commits a gross mistake or error of judgment;" whereas the FAA does not contain such a ground (at least explicitly – more on this point later).

One distinctive feature of the *Ferry* standard should be noted. The *Ferry* standard envisions that courts have the power to enjoin arbitration where the arbitrator has acted in some impermissible manner ("in proper cases, and upon good cause shown, restrain all further abuse of the granted powers."). The FAA does not expressly authorize such use of injunctive relief, a topic that has bedeviled some courts and commentators in modern commercial practice.[97]

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[96] *See* Harper, 27 W. Va. at 374.

[97] *See* Elizabeth Phillips, *Injunctions Pending Arbitration: Do the Courts Really Have Jurisdiction*, 1991 J. DISP. RESOL. 381, 381 (1991) (noting the division among courts and commentators concerning whether courts may order injunctive relief pending arbitration); Caz Hashemi, *Preliminary Injunctions Pending Arbitration Under the Federal Arbitration Act: Judicial Misinterpretation, Judicial Intervention, and Confusion*, 75 WASH. U.L.Q. 985, 985 (1997) (noting the many divided court cases on the issue of court-ordered preliminary injunctions pending arbitration, as well as the extensive scholarship arguing support for court-ordered injunctive relief in pending arbitration cases); Anahit Tagvoryan, *Secret in One District Is No Secret in Another: The Case of Merrill Lynch and Preliminary Injunctions under the FAA*, 6 PEPP. DISP. RESOL. L.J. 147, 164–65 (2006). For a helpful breakdown of court decisions by circuit, see NOAH SISKIND GITTERMAN, PETER SHERWIN, DANIELLA M. RUDY, & JEAN CLEMENTE, PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION: MANAGING, RESOLVING, AND AVOIDING CROSS-BORDER BUSINESS REGULATORY DISPUTES ch. 22, pt. IV (2007), *available at* http://www.proskauerguide.com/arbitration/22/IV.

D. *Neutrality Of Decision Maker*

Apart from the general parallels in standards governing award enforceability, commercial and testamentary arbitration reveal similar synergies with respect to their rules governing arbitrator bias. Section 10(a)(2) of the FAA provides that an award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them."[98] The precise meaning of this provision has frustrated courts ever since the FAA's enactment.

Central to the debate is the Supreme Court's decision in *Commonwealth Coatings*.[99] There, the Supreme Court held that a commercial arbitration award should be vacated where the chair of a three-member tribunal had an undisclosed relationship with one of the parties. Specifically, the chair of the tribunal had provided consulting services to one of the parties. Although he had not provided such services for the year preceding the arbitration, some of those services concerned the very project that was the subject of the dispute. The chair did not disclose this relationship to the parties, although no evidence positively suggested that the relationship had affected the outcome (which was unanimous).

While a clear majority of the Supreme Court agreed that the award needed to be vacated under these circumstances, the justices disagreed over the nature of the error warranting this result. Some took the view, articulated by Justice Black, that the very nature of the relationship (disclosed or not) cast sufficient doubt on the neutrality of the arbitrator, whom he likened to a judge in terms of his ethical obligations.[100] Others took the view, articulated by Justice White, that the critical error was the arbitrator's failure to disclose the relationship.[101] (The dissenting justices believed that vacatur was inappropriate because there was no indication that the chair's past relationship influenced the proceedings or otherwise worked an actual prejudice on the parties).[102] Since *Commonwealth Coatings*, lower courts have grappled with the precise reach of the Court's holding, and the dominant view in both the case law and the commentary seems to have

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[98] 9 U.S.C. § 10(a)(2) (2015).

[99] Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968).

[100] *Id.* at 147–50.

[101] *Id.* at 151–52.

[102] *Id.* at 152–55.

vindicated Justice White's focus on the need for disclosure rather than Justice Black's stricter rules on certain categorically disqualifying relationships.[103]

Long before *Commonwealth Coatings* (or, for that matter, the FAA), courts in testamentary arbitrations grappled with similar issues and reached results largely parallel to those articulated by Justice White. A central theme throughout these cases was what a court should do about a decision by an arbitrator who was also a legatee. Since the legatee/arbitrator might well benefit personally from the results of his award, did this create an insurmountable conflict of interest obligating the court to refuse enforcement?

Much like Justice White, early courts considering testamentary arbitration concluded that the answer turned on whether the testator was aware of the conflict when he designated the legatee also to serve as an arbitrator. An early example of this reasoning appeared in the Connecticut Supreme Court's decision in *Wait*.[104] *Wait* involved the construction of a will providing that, if questions arose as to its meaning, the distribution of the estate "shall be made to such person and associations as my executors shall determine to be my intended legatees and devisees." The will provided further that the executors' determination shall be "binding upon all persons interested." Interestingly, the executors sought the advice of the Connecticut courts on whether their award could be binding. In finding that it could, the state's highest court explained that:

> The testator ... was fully aware of the relation in which these gentlemen stand to his estate, and he was willing to entrust them with the power under consideration, their interest notwithstanding. We do not feel authorized to make a disqualification which the testator did not see fit to make. Where however an executor is directly interested he may properly excuse himself from acting upon the matter thus affecting his interests.[105]

Wait was not an isolated instance unique to Connecticut. Other courts, including federal ones, reached similar conclusions. Exemplary in this regard

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[103] *See generally* Andrew M. Campbell, *Construction and Application of 10(a)(1)-(3) of Federal Arbitration Act*, 141 A.L.R. Fed. 1 (1997 & supp.) (collecting cases).

[104] Wait v. Huntington, 40 Conn. 9 (1873).

[105] *Id.* at 12.

was the *Ferry* decision from Michigan. There, the court drew expressly on *Pray* to find a similar conflict not fatal to the award:

> It is enough to say that it has never been understood as an inhibition upon the rights of individuals to select their own tribunals provided they do so with a full knowledge of all the facts, for the adjustment and determination of such controversies as they may choose to submit to arbitrament. ... But the [*Pray*] court did not adjudge that an interested party could not, under any circumstances, act as an umpire. The decision is that he cannot do so in an *unforeseen contingency* not within the scope of the testator's intentions.[106]

By 1916, only a few years before the FAA's enactment, a treatise on the law of wills could confidently declare: "The fact that such umpire is interested in the residue of the estate which may be increased or diminished by his decisions does not disqualify him to act."[107]

These authorities suggest that Justice White may have had the better of the argument in *Commonwealth Coatings*. The emphasis on the testator's known intent at the time he or she designated an arbitrator with a vested interest in the estate suggests that the relationship between bias and the enforceability of the award should train on considerations of disclosure (identified by Justice White), rather than the categorical approach (articulated by Justice Black). To be sure, there must be undisputed evidence that the testator was fully aware of the arbitrator's interests at the time of his or her designation. But once aware, that interest (unless circumstances changed) would not supply a basis for refusing to enforce the award. By analogy, under commercial practice, if an arbitrator disclosed a potential conflict of interest – and none of the parties objected to the conflict – then that relationship likewise could not supply a basis for vacatur. But if the conflict were undisclosed, then a sufficiently serious one, such as that at issue in *Commonwealth Coatings*, could supply a basis for vacatur.

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[106] *See* Ferry, 15 F. at 701 (emphasis added). *See also* Talladega Coll., 197 N.W. 635, 637–38 (1924) ("There is also respectable authority to the effect that the residuary legatee is not thereby disqualified from exercising this function. [Ferry]. The reason for this holding is that the testator had a right to do as he would with his own, and that he had equally the right to name the same person as residuary legatee, as executor and as arbiter.").

[107] G.W. THOMPSON, THE LAW OF WILLS 379 (6th ed. 1916).

E. *Award Enforcement – Non-statutory Grounds*

One of the hotly debated questions in modern commercial arbitration practice is the extent to which the FAA permits a court to review the substance of the award.[108] Facially, the FAA would appear to set forth the exclusive grounds for vacatur of an award. Section 9 of the FAA authorizes the prevailing party to apply for confirmation of the award after it is rendered and provides that "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title."[109] United States courts, though, have never strictly adhered to Section 9's commands. Instead, they have developed a variety of non-statutory grounds upon which awards can be vacated. These include, among others, where the arbitrator's award (a) manifestly disregarded the law or (b) failed to draw its essence from the agreement.

These doctrines have presented a host of nettlesome problems for courts and scholars of commercial arbitration. Are they compatible with the FAA, which suggests that its grounds for vacating an award are exclusive? Even if they are compatible, what are the precise standards for each of these doctrines? Are they distinct grounds? Here too, early testamentary arbitration jurisprudence is revealing and instructive.

Manifest Disregard: Most common among these is the manifest disregard of the law doctrine. Under the most conventional form of the doctrine, an award may be set aside if the arbitrator was aware of the applicable law and consciously refused to apply it. Though the continuing vitality of that doctrine has fallen into some doubt, it continues to be applied in some jurisdictions.[110]

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[108] *See* BORN, *supra* note 45 at 2638 n. 452 (collecting commentary).

[109] 9 U.S.C. § 9 (2015).

[110] Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n. 3 (2010) (stating that the Court does not decide whether the doctrine of manifest disregard survives its decision in Hall Street as a separate basis for review in addition to FAA § 10 grounds); *See also*, circuit split on whether the doctrine of manifest disregard survives Hall Street: Stolt-Nielsen v. AnimalFeeds Int'l Corp., 584 F.3d 85, 94 (2d Cir. 2008), *cert granted*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (agreeing that "'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating awards"); Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of Hall Street.").

Modern commercial arbitration jurisprudence traces this doctrine to the Supreme Court's 1953 decision in *Wilko v. Swan*.[111] That decision, marking the high-point in the Supreme Court's non-arbitrability jurisprudence, held that claims under the 1933 Securities Act were not arbitrable. Among the reasons cited by the Court was the fact that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[112] In expressing this view, *Wilko* captured a common-law doctrine that predated the FAA's enactment, albeit with subtly different requirements.[113]

Testamentary arbitration decisions prior to the FAA's enactment likewise reveal a rudimentary form of the manifest disregard doctrine. *Ferry*, described above, supplies a good example. There, the federal district court explained:

> The rule, as we conceive it is, when an arbitrator honestly and in good faith exercises his power and passes upon a doubtful question, either of law or of fact, his decision will not be revised by a court, notwithstanding the court, whose interposition is invoked, may think his decision erroneous. As a rule, the courts will not interpose to correct a mere mistake in the judgment of an arbitrator. But if the arbitrator . . . commits a gross mistake or error of judgment, evincing partiality, corruption or prejudice . . . courts of equity may interfere and correct the error and, in proper cases, and upon good cause shown, restrain all further abuses of the granted powers.[114]

A few decades later, in language similar to that employed by the court in *Ferry*, Thompson's treatise on the law of wills surveyed the extant case law and declared that:

> Where, however, such umpire renders a decision involving a clear abuse of his power, or where he commits a gross mistake or error of judgment evincing partiality, corruption

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[111] Wilko v. Swan, 346 U.S. 427 (1953).

[112] *Id.* at 436–37.

[113] Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 557 (2005).

[114] *See* Ferry, 15 F. at 700.

> or prejudice, the court will interfere and decide whether the construction adopted by the umpire is correct.[115]

The formulations from *Ferry* and the Thompson treatise present an interesting contrast to the conventional understanding of the manifest disregard doctrine. Though the phrase "gross mistake" might seem to imply some analogy to the doctrine, the rest of the sentence suggests two critical differences. First, depending on how one reads the clause, the mistake might, like the "error of judgment," be one that "evinc[es] partiality, corruption or prejudice." Read this way, the suggestion would be that bare legal error does not suffice but, instead, must be tied into some fact casting doubt on the arbitrator's objectivity. (Of course, if this reading is correct, one is left to wonder what work manifest disregard really does since arbitrator bias already supplied a ground for vacating award). In this regard, the Thompson treatise lends some support to the idea, expressed most clearly by the Court in the modern-day *Hall Street* case, that manifest disregard is best understood not as an independent ground but, instead, an encapsulation of other grounds for vacatur.[116]

Assuming, though, that manifest disregard does have some independent significance, the second telling feature of Thompson's formulation concerns its impact. According to Thompson, the *effect* of an arbitrator's manifest disregard of the law is *not* automatic vacatur of the award (as it would be in

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[115] THOMPSON, *supra* note 107, at 379–80.

[116] Mattel, Inc., 552 U.S. at 585 (2008) ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the §10 ground collectively, rather than adding to them. Or, as some courts have thought, 'manifest disregard' may have been shorthand for §10(a)(3) or §10(a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'"); *See* Frazier v. CitiFinancial Corp., L.L.C., 604 F.3d 1313, 1323 (11th Cir. 2010) (agreeing with the Fifth Circuit's decision in Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 350-55 (5th Cir. 2009), which relied upon "Hall Street's 'unequivocal' holding that the statutory grounds listed in § 10 are the exclusive means for vacatur, and held that 'manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA'."). *See* Stolt-Nielsen v. AnimalFeeds Int'l Corp., 584 F.3d 85, 94 (2d Cir. 2008), *cert granted,* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (equating manifest disregard to § 10(a)(4) by stating that "arbitrators have thereby 'exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." (citing 9 U.S.C. § 10(a)(4))); Comedy Club Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (citing Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 997 (9th Cir. 2003) (concluding that the manifest disregard ground for vacatur survives the Hall Street decision because it is part of § 10(a)(4))).

modern jurisprudence). Instead, the effect of the error is that the court intervenes and decides whether the arbitrator's construction of the will is correct. In other words, the arbitrator might still have reached the correct result, notwithstanding his or her error, in which case the court would still confirm the award. What a finding of manifest disregard does, then, is liberate the court from the deference that it would otherwise show the award.[117] If correct, this could have profound implications for modern-day understanding of the manifest disregard doctrine.

Essence of the agreement: The Supreme Court has held that awards can be set aside where the arbitrator dispenses his own brand of justice and fails to render an award that "draws its essence from the contract."[118] Conventional narrative traces this doctrine to the *Steelworkers Trilogy*. These three cases all concerned labor arbitration, and one (*Enterprise Wheel*) specifically addressed the relationship between arbitrators and courts. While reaffirming that courts should not review the merits of an arbitrator's decision, the Supreme Court observed that:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it *draws its essence from the collective bargaining agreement*. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[119]

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[117] In this regard, it functions like a finding in a 2254 habeas proceeding–a federal court's determination on habeas that a state court unreasonably applied settled Supreme Court precedent or unreasonably found the facts to entitle the federal court to undertake a de novo review of the incarcerated prisoner's underlying constitutional claim. 28 U.S.C. § 2254(d) (2012); KRISTINE M. FOX, FED. JUDICIAL CTR., CAPITAL § 2254 HABEAS CASES: A POCKET GUIDE FOR JUDGES 14–15 (2012); Panetti v. Quarterman, 551 U.S. 930, 953–54 (2007).

[118] United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.").

[119] *Id.*

Though developed in the context of labor arbitration, the doctrine has been transposed in some cases into commercial arbitration, including in cases where a few courts have held that an award should be vacated because the arbitrators manifestly disregarded the contract.[120]

In testamentary arbitration, vestiges of the doctrine can be seen as early as Chief Justice Marshall's opinion in *Pray*. Chief Justice Marshall hints at this concept in several places of his opinion, including the quote given at the beginning of this Article.[121] Elsewhere, he notes:

> If an unreasonable use be made of the power, one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of Courts of Justice to decide on the right of parties ought to be exercised.[122]

Pray was, moreover, more than an isolated occurrence. Later courts, up to the time of the FAA's enactment repeatedly invoked *Pray*'s mantra and, in some cases, relied upon it to refuse confirmation of an award. Both federal and state courts repeatedly stressed this point in the late nineteenth and early twentieth centuries, invoking *Pray* in some cases.[123] Exemplary in this regard

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[120] Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064, 2068 (2013) (extending Misco doctrine to commercial case); Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 237 (4th Cir. 2006) (holding the arbitration award was in manifest disregard of the contract); E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 58 (2000) (confirming the Misco doctrine and concluding that a public policy exception to enforcing an award did not exist in this employment case); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) (labor arbitration); W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757 (1983) (labor arbitration); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728 (1981) (labor arbitration); Alexander v. Gardner-Denver, 415 U.S. 36, 53–54 (1974) (holding that an arbitrator's authority relates only to questions of contractual rights, and parties may still have independent statutory rights not prevented by the arbitration award); Steelworkers Trilogy (Steelworkers, 363 U.S. at 597; United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583–84 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567–68 (1960))(holding that courts should uphold an arbitrator's award unless the "essence" of the award was not derived from the contract).

[121] *See* Pray, 26 U.S. 670.

[122] *Id.* at 680.

[123] Wait v. Huntington, 40 Conn. at 11. ("In the improbable contingency of a clear abuse of the power, such abuse would undoubtedly be restrained and corrected, for the power of the executors is not so absolute and unlimited as to be beyond the control of the court. So too, in order to give jurisdiction to the executors, there must be a bona fide question. Under the name and pretense of construction they may not arbitrarily transfer the testator's gifts from the real and proper objects of his bounty. Subject to these and the like qualifications, we think the testator may safely be indulged in the enlarged control

is the Texas Appellate Court's decision in *Grant*. There, the Court, building upon *Pray*, articulated a standard quite similar to the "essence of the agreement" standard later set forth in the *Steelworkers* Trilogy:

> Since we do not feel justified in holding that the conclusion reached by the executors and trustees upon this point was not *fairly and honestly made*, and reasonably *to be predicated upon the terms of the will taken as a whole*, it follows that we are not authorized, under the authorities, to overrule their decision. Of course, if the decision made by the trustees evidenced a gross departure from the manifest intent of the testator as disclosed in the will, then it could not be said that such decision was the result of an honest endeavor to find that intent, as held in [*Pray*]. But we do not find such a conclusion to exist here, and are of the opinion that said conclusion reached by the trustees, upon a question involving the proper construction of the terms used by the testator, is one reasonably reached and deduced from the language used.[124]

Other courts applied a comparable standard.[125]

These synergies between the non-statutory grounds for judicial review of modern-day awards and the pre-FAA testamentary decisions raise interesting questions about the proper construction of the FAA. The Court

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over his property which he exercises through the clause in question."); *See* Ferry, 15 F. at 699–700 ("Such provisions do not vest such umpires with authority to ignore the testator's intentions as expressed in the will, and substitute his own wishes. 'Clauses of this description [says CJ Marshall in Pray] have always received such judicial construction as would comport with the reasonable intention of the testator.' ...Such gross departure from the manifest intent of the testator would be considered by the courts as evidence of a fraudulent exercise of the power conferred.").

[124] Grant v. Stephens, 200 S.W. 893, 896 (Tex. Civ. App. 1918).

[125] Talladega Coll. v. Callanan, 197 N.W. 635, 637 (Sup. Ct. Iowa 1924) (The one qualification which is put by many of the authorities upon the exercise of such power by the executors is that it must be in good faith. This necessarily means that the question raised must present a fair dispute. The decision may not be arbitrary. It may not contradict the clear provision of the will. In other words, the power may not be abused.); Couts v. Holland, 107 S.W. 913, 915 (Tex. Ct. App. 1908) ("Can we say that this decision of the tribunal to which the testator himself saw fit to commit the authoritative interpretation of his will was obviously and wholly without foundation? We have concluded that we cannot.").

has routinely suggested that Congress enacts statutes against the background of common-law understandings and therefore, will not be lightly understood as derogating from the common-law.[126] The pre-FAA testamentary decisions suggest that each of these doctrines enjoyed some support before the FAA's enactment and, thus, form part of the corpus of common-law understandings against which Congress enacted statutes. While the Supreme Court has at times suggested that the FAA's grounds are exclusive and even hinted that some of these doctrines (like manifest disregard) might not supply an independent standard, the testamentary arbitration decisions offer some evidence to the contrary.

While provocative, the point should not be overstated. The pre-FAA testamentary jurisprudence presents only a limited supply of decisions. Moreover, as noted in Part I, the common-law sentiments expressed by federal and state courts were far from uniform. Finally, any argument in this regard would potentially have to take into account the fact that the FAA only regulated arbitration agreements contained in contracts "involving commerce."[127] Consequently, decisions involving purely local disputes arguably only have limited value in assessing the common-law background against which Congress adopted the statute.

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[126] *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (Court reasoned that "Congress is understood to legislate against a background of common-law" in the adjudicatory context, specifically stating, "[t]hus, where a common-law principle is well established, as are the rules of preclusion, the courts may take it as given that Congress has legislated with an expectation that the [common-law adjudicatory] principle[s] will apply except 'when a statutory purpose to the contrary is evident.'"). *See* Briscoe v. LaHue, 460 U.S. 325, 330 (1983) (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981)) ("It is by now well settled that the tort liability created by §1983 cannot be understood in a historical vacuum...One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."). *See* Adam Bain & Ugo Coella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 513 (2004) ("...the guiding rule of construction is that, absent an express definition of a particular statutory term, Congress intends to adopt the same meaning of terms that was recognized at common law at the time of the statute's enactment."); *Id.* at 527 ("With respect to Congressional intent in enacting legislation, Congress is presumed to know the state of the common law at the time it enacts a statute. Therefore, Congress intends to endorse the common law rule unless Congress demonstrates a contrary intent.").

[127] 9 U.S.C. § 1 (2015); *See also* Circuit City Stores, Inc., v. Adams, 532 U.S. 105, 118 (2001).

III. IMPLICATIONS FOR THEORY AND PRACTICE OF TESTAMENTARY AND COMMERCIAL ARBITRATION

The foregoing analysis of the common ground between testamentary arbitration prior to the FAA's enactment and modern commercial arbitration has several implications. First, it cuts against criticism that testamentary arbitration, absent express statutory authorization, should not be enforced. Second, it encourages the further cross-fertilization of arbitration precedent from different fields, including resort to precedents from testamentary arbitration to inform commercial arbitration questions (and *visa versa*). Third, it calls for deeper research into unanswered questions about the history of testamentary arbitration. This final section traces each of these implications.

First, the historical connective tissue between testamentary arbitration and commercial arbitration should serve to silence skeptics that believe the former to be unenforceable absent express statutory authorization. The above-described scholarship of Katzen and Murphy evinced skepticism toward testamentary arbitration due to perceived incompatibilities between that form of dispute resolution and modern commercial arbitration statutes, particularly the lack of an agreement.[128] Yet this study demonstrates that, already in the nineteenth century, courts had developed sophisticated analogies between testamentary arbitration and commercial arbitration to overcome these sorts of objections based on the lack of consent or a written agreement. While statutory fixes may offer the benefit of clarity, they are not strictly necessary. By the nineteenth century, courts had engrafted commercial arbitration doctrines onto testamentary arbitration, including devices for managing the tricky issue of consent, without the need for statutory fixes. Contemporary courts recognizing this compatibility have the better argument.[129]

Second, the foregoing analysis encourages further cross-fertilization of arbitration precedents from different fields. For several decades, United States courts have struggled with uneasy questions about the extent to which arbitration decisions involving one field (such as employment arbitration) may inform interpretive questions involving arbitration in other fields (like

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[128] *See* Katzen, *supra* note 30; Murphy, *supra* note 26.

[129] Kyser v. Kasson Township, 769 N.W.2d 720 (Mich. Ct. App. 2009).

international arbitration).[130] These questions arise due to two related forces. First, unlike many other countries, the United States has a single arbitration act that, with little exception, does not differentiate among forms of arbitration. (By contrast, many foreign countries have at least two arbitration statutes – one governing international arbitration and one governing domestic arbitration). Second, unlike some other countries, the United States takes a fairly liberal view about the arbitrability of disputes. For example, it permits the enforcement of arbitration agreements in employment and consumer contracts, fields that are much more heavily regulated in some other countries.[131]

The net effect of these two forces is to create situations in which courts (and parties) cite decisions involving one field of arbitration in a case involving another. The Supreme Court's very recent decision in *BG Group v. Argentina* supplies an especially apt example. In terms of the field, that case arose in the context of an investment arbitration between British investors and the Republic of Argentina.[132] As a matter of statutory interpretation, though, it concerned whether, and to what extent, United States courts in post-award proceedings should defer to the arbitrator's determination of jurisdiction – a question as likely to arise in domestic employment arbitration as in international investment arbitration. In resolving this matter, the Supreme Court drew heavily on precedents, both ones involving foreign arbitration and ones involving domestic arbitration, to decide the interpretive question.

The analysis of testamentary arbitration in Part II encourages these sorts of resorts to other fields of arbitration to inform unresolved questions of commercial arbitration and, more generally, the sort of cross-fertilization of precedents from different arbitration fields that Justice Whittaker sought to undertake in the *Steelworkers Trilogy*. For example, the jurisprudence on arbitrator neutrality in the area of testamentary arbitration may help to inform nettlesome questions under Section 10 of the FAA regarding the sorts of arbitrator conflicts that might result in set aside of the award. Similarly, the sentiments expressed in Chief Justice Marshall's opinion in *Pray* regarding an arbitrator's decision that deviated from the testator's intent, may help to

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[130] Example of early move in this regard was Justice Whittaker's dissent in Steelworkers Trilogy that sought to invoke commercial cases to resolve questions before the Court. *See* MACNEIL, *supra* note 13, at 57.

[131] *See* BORN, *supra* note 45 at 766–840.

[132] BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198, 1203 (2014). For background on investment arbitration, see Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. 232 (1995).

inform the meaning of vacatur grounds predicated on a finding that an arbitrator "exceeded his powers" or that the award "failed to draw its essence from the contract."

Third, the analysis in Part II charts a course for future research into unresolved questions about testamentary arbitration. Some of those questions are doctrinal—for example, is there an indivisible core of challenges to the jurisdiction of an arbitral tribunal that may not be reallocated from courts? The New Jersey Chancery Court in *Taylor* highlighted the fact that a will, unlike a contract, for example, confers property rights against the world.[133] Consequently, when issues arise about the validity of the right-conferring document, can those questions ever be accorded to an arbitrator, even where the testator has expressed a clear and unambiguous intent to do so? And if the answer is "no," what implications does this hold for decisions, like *First Options*, that contemplate the possibility that parties may reallocate questions about the validity of the arbitration agreement to the arbitrator (in lieu of a pre-dispute judicial determination).

Other questions are historical. For example, given the historical reticence of English courts to enforce arbitration clauses in testamentary documents, why precisely did individuals like George Washington and Pray/Belt choose to insert them into their wills? Does it reveal something about norms of litigiousness during the late eighteenth century, such as that disappointed beneficiaries simply would not litigate and would willingly accept an arbitrator's decision (regardless of its enforceability)? Similarly, one of the most mystifying features of the primary materials in this area is the complete dearth of reported decisions between Chief Justice Marshall's 1828 decision in *Pray* and the Connecticut high court's 1873 decision in *Wait*. What explanation for this lacuna? Is it simply deference to *Pray* even though state supreme courts would be free to ignore the decision in cases falling outside federal court jurisdiction? Or did *Wait* intersect with the grudging emergence of commercial arbitration in the post-Civil War era? If the latter is true, it enhances the importance of continued study of testamentary arbitration as part of the forces that led to the modern acceptance of executory commercial agreements.

IV. CONCLUSION

Testamentary arbitration offers an important, but under-explored field, one that can both inform commercial arbitration and be informed by it. Close examination of the historical precedents, prior to the FAA's enactment,

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[133] *See* Taylor v. McClave, 15 A.2d 213 (N.J. Ch. 1940)

reveal early forms of doctrines that later developed in the jurisprudence governing commercial cases falling under the FAA. Not only does this historical examination offer important lessons for the extent to which courts can engraft modern arbitration statutes onto testamentary disputes, it also lends support to the growing trend in Supreme Court jurisprudence to borrow precedents from one field of arbitration (like investment or consumer) to inform the development of doctrines in other fields (like labor or employment). Future research can both test the limits of this cross-fertilized jurisprudence and shed light on the gaps in the historical record.