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# The Federal Arbitration Act and Testamentary Instruments

David Horton

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# THE FEDERAL ARBITRATION ACT AND TESTAMENTARY INSTRUMENTS\*

DAVID HORTON\*\*

*The United States Supreme Court's expansion of the Federal Arbitration Act (the "FAA") has made arbitration clauses ubiquitous in consumer and employment contracts and provoked heated debate. Recently, though, arbitration clauses have become common in a different context: wills and trusts. Courts have reached wildly different conclusions about whether these provisions are enforceable under state arbitration law. However, no judge, scholar, or litigant has considered the more important question of whether the FAA governs these terms. This Article fills that gap. It first examines the statute's text and legislative history and concludes that Congress intended the FAA only to cover arbitration clauses in "contracts." Nevertheless, the Article shows that the Court has not rigidly enforced this predicate. As a matter of federal common law, the FAA applies if there is a plausible argument that the parties have agreed to arbitrate—even if the arbitration clause does not appear in a document that meets the black letter test for contractual validity. The Article then claims that this approach has opened the door for the FAA to govern testamentary arbitration clauses. Indeed, when trustees, executors, and beneficiaries accept fees or property under a will or trust, they also manifest assent to the instrument's terms. Finally, the Article analyzes how some of the most challenging features of the Court's interpretation of the FAA—including the scope of the statute, the separability doctrine, and preemption—would play out in the field of wills and trusts. By doing so, the Article seeks not only to provide guidance for courts and policymakers but also to illustrate that testamentary arbitration may not suffer from some of the flaws that make contractual arbitration so polarizing.*

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## INTRODUCTION

One of the most divisive recent issues in American civil justice has been the widespread use of arbitration clauses in consumer and employment contracts. At the center of this storm is the Federal Arbitration Act (the "FAA").<sup>1</sup> Congress passed the FAA in 1925 to make agreements to arbitrate specifically enforceable and thus provide merchants with a quicker and cheaper alternative to litigation.<sup>2</sup> But in the last three decades, the Supreme Court of the United States has dramatically expanded the statute's scope, declaring that it embodies a "liberal federal policy favoring arbitration,"<sup>3</sup> preempts state law,<sup>4</sup> and governs statutory claims.<sup>5</sup> The

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1. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2006)).

2. See, e.g., *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 3 (1923) [hereinafter *Hearing on S. 4213 and S. 4214*] ("The bill . . . aims to eliminate friction, delay, and waste, and . . . to establish and maintain business amity . . ."); GEORGE SCOTT GRAHAM, *TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION*, H.R. REP. NO. 68-96, at 2 (1924) [hereinafter *HOUSE REPORT*] (recommending that Congress pass the FAA because "there is so much agitation against the costliness and delays of litigation").

3. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Court's interpretation of the FAA has ignited an "arbitration war": "a battle over whether the United States will increasingly have a privatized system of justice."<sup>6</sup> On one side are courts and scholars who argue that arbitration facilitates access to justice<sup>7</sup> and reduces litigation costs, thus allowing businesses to lower prices and raise wages.<sup>8</sup> On the other side are those who claim that fine print dispute resolution terms deprive individuals of their rights and that the Court has allowed the FAA to run roughshod over state law.<sup>9</sup>

Recently, however, there has been a surge of interest in arbitration in a different field: wills and trusts. This movement is easy to understand. Probate is notoriously litigious.<sup>10</sup> And disputes over

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4. See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

5. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

6. Editorial, *The Arbitration War*, N.Y. TIMES, Nov. 27, 2010, at A18.

7. See, e.g., Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 401 (2009) ("[A]rbitration can provide access to adjudicatory services that are affordable, professional, expert, and enforceable."); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–64 (2001) (arguing that arbitration permits employees to resolve low-value claims that would fall through the cracks in court-based litigation).

8. See, e.g., Christopher R. Drahozal, "Unfair" *Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741; Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 582 (2003); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 698–99; Keith N. Hylton, *Agreements To Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 263 (2000); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 [hereinafter Ware, *Price of Process*]; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) [hereinafter Ware, *Adhesive Arbitration Agreements*].

9. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 332–33; David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 439–40 (2011); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 86–88 [hereinafter Schwartz, *Big Business*]; David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1250 (2009); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648–51 (2005) [hereinafter Sternlight, *Just*]; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637–41 (1996).

10. See, e.g., Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) (asserting that wills generate more lawsuits "than any other legal instrument"); Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, in *INHERITANCE AND WEALTH IN AMERICA* 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (asserting that roughly three percent of estates are litigated); John H. Langbein, *Will*

estate plans are only expected to become more common. In the next half-century, Americans will bequeath \$41 trillion—the largest intergenerational wealth transfer in history.<sup>11</sup> Testators and settlors also must divide this bounty among an increasingly fragmented group of loved ones. Forty percent of current marriages are not first marriages, and over four million households include stepchildren and stepparents.<sup>12</sup> Even when these blended families are harmonious, they are a fertile source of will contests. In addition, the number of Americans who are over eighty-five will double by 2030 and double again by 2050.<sup>13</sup> With greater longevity comes more age-related infirmities, which often are the springboard for incapacity and undue influence claims.<sup>14</sup> Thus, in an effort to prevent time-consuming and estate-depleting litigation, a rising number of testators and settlors are placing arbitration clauses in their dispositive instruments.<sup>15</sup>

The issue of whether arbitration clauses in wills and trusts are enforceable “is unresolved in almost every jurisdiction.”<sup>16</sup> Some

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*Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (book review) (“Because . . . there are millions of probates per year, one-in-a-hundred litigation patterns are very serious.”).

11. See John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate Is Still Valid: A Review of Challenges and Comments*, J. GIFT PLAN., Jan. 2003, at 11, 11 (predicting that even a severe recession will not reduce the amount of wealth bequeathed in the next half-century).

12. See ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, at 1–2 (2003), available at <http://www.census.gov/prod/2003pubs/censr-6.pdf>.

13. See WAN HE ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2005, at 6 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

14. See, e.g., Leon R. Kass, Editorial, *Lingering Longer: Who Will Care?*, WASH. POST, Sept. 29, 2005, at A23 (noting that the incidence of Alzheimer’s disease will likely triple by 2050).

15. Admittedly, I am not aware of any studies that show that testamentary arbitration clauses have become more prevalent. However, several factors strongly suggest that this is indeed the case. First, as I discuss *infra* Part I.C., reported cases involving arbitration provisions in wills and trusts have spiked in the last five years. Second, millions of low-and middle-income seniors have purchased “mill” trusts—standardized, boilerplate-laden instruments created by non-lawyers—which often contain dispute resolution provisions. See, e.g., *Estate of Swetmann*, 102 Cal. Rptr. 2d 457, 460 n.3 (Ct. App. 2000) (“In the past several years, mounting criticism has been leveled at the marketing of living trusts by nonlawyers with only cursory oversight by attorneys.”); Kathy M. Kristof, *Seniors Warned Against Fast-Talking Living Trust Sellers*, L.A. TIMES, June 15, 2000, at C4. Third, estate planners are becoming increasingly intrigued by extrajudicial dispute resolution. See *infra* text accompanying note 23.

16. Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118, 119 (2011). As a leading casebook puts it, “[t]he authorities are scarce and contradictory.” JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, & ESTATES* 608–09 (8th ed. 2009); see also Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91, 105 n.84 (noting that it has long been “unclear if parties could arbitrate ‘disputes involving the validity of a will’ ”

courts have prohibited the arbitration of incapacity and undue influence claims on public policy grounds<sup>17</sup> or because the legislature has given probate courts exclusive jurisdiction over such matters.<sup>18</sup> Other judges have nullified arbitration clauses in testamentary instruments for the simple reason that state arbitration statutes only apply to “contracts.”<sup>19</sup> On the other side of the spectrum, the American Arbitration Association has promulgated rules for wills and trusts cases,<sup>20</sup> and legislatures in Florida and Arizona have passed laws that expressly authorize probate arbitration in various contexts.<sup>21</sup> Similarly, the International Chamber of Commerce has recently created a task force to study arbitration clauses in trusts.<sup>22</sup>

The budding debate about testamentary arbitration has yet to consider the proverbial elephant in the room: the FAA.<sup>23</sup> If the

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(quoting WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 212 (1930))).

17. See, e.g., *In re Berger*, 437 N.Y.S.2d 690, 691 (App. Div. 1981).

18. See, e.g., *In re Meredith's Estate*, 266 N.W. 351, 355 (Mich. 1936); *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 267 (Pa. Super. Ct. 1992).

19. See, e.g., *Schoneberger v. Oelze*, 96 P.3d 1078, 1080 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2011), *as recognized in Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011); *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 613 (Ct. App. 2011), *opinion vacated by* 257 P.3d 1129, 1129 (Cal. 2011).

20. See generally AM. ARBITRATION ASS'N, WILLS AND TRUSTS ARBITRATION RULES (2010), available at [www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/mdaw/mdaz/~edisp/adrstg\\_004172.pdf](http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/mdaw/mdaz/~edisp/adrstg_004172.pdf) (providing rules for arbitration for wills and trusts under the AAA).

21. The coverage of these statutes varies significantly. Compare ARIZ. REV. STAT. ANN. § 14-10205 (2011) (broadly validating arbitration clauses in any “trust instrument . . . with regard to the administration or distribution of the trust”), with FLA. STAT. ANN. § 731.401(1) (West 2010) (permitting arbitration of probate matters “other than disputes o[ver] the validity of all or a part of a will or trust”).

22. Bruno W. Boesch & Alexis Murre, *Task Force on Trusts and Arbitration*, INT'L CHAMBER OF COM., <http://www.iccwbo.org/policy/arbitration/id8222/index.html> (last visited Apr. 11, 2012). I am grateful to Chris Drahozal for calling this fact to my attention.

23. The only article of which I am aware that even mentions the FAA and wills and trusts in passing is 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). Spitko eloquently argues that arbitration can shield the testamentary wishes of minorities from courts and juries imposing hegemonic norms. See *id.* at 294–95. Because he focuses exclusively on those issues, he does not analyze whether the FAA applies in the probate milieu. See *id.* at 303–04 (assuming without discussion that the FAA governs wills and trusts). Other than Professor Spitko's piece, the broader topic of arbitration in probate matters has received little attention. Cf. generally Blaine Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521 (1967) (briefly addressing the legal roadblocks to various forms of extrajudicial resolution of trusts disputes). Most recent articles on testamentary arbitration, although thoughtful contributions to the literature, (1) do not address the FAA and (2) are written by and intended for practitioners. See, e.g., Jonathan G.

statute applies to arbitration clauses in estate plans, it has the potential to transform probate dispute resolution, as it has swept through the rest of the civil justice system. This Article considers that issue and reaches two main conclusions. First, it argues that the FAA likely governs arbitration clauses in wills and trusts. To be sure, Congress almost certainly meant to limit the FAA to arbitration clauses in “contracts.” Nevertheless, in the topsy-turvy world of federal arbitration law, the blueprint written by Congress is just one factor in how the Court interprets the statute. As several Justices and scholars have noted, the Court has “abandoned all pretense of ascertaining congressional intent[,] . . . building instead, case by case, an edifice of its own creation.”<sup>24</sup> To further its pro-arbitration agenda, the Court has not required that an arbitration clause be embedded in a document that satisfies the black letter test for contractual validity. Instead, the Court has predicated the FAA’s applicability on the mere fact that the parties can plausibly be said to have agreed to arbitrate. Because estate plans create a network of consensual, contract-like relationships, some testamentary arbitration clauses trigger the FAA.

Second, the Article argues that the FAA should be less objectionable in probate than it is in the consumer and employment settings. Critics argue that the Court’s interpretation of the FAA suffers from two main flaws: (1) it permits corporations to deprive individuals of their rights on a non-consensual basis, and (2) it has all

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Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure*, In *Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 261–62 (2008); 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, 354 (2007); cf. Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 641 (2011) (briefly noting that the FAA does not apply to testamentary instruments because “only an arbitration provision in a *contract* is enforceable”).

24. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646–51 (1985) (Stevens, J., dissenting) (accusing the Court of having effectively rewritten the statute). In addition, many scholars have challenged the Court’s conclusion that the FAA preempts state law. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 145 (1992); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 127–30 (2006); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 792 (2002); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 23–25 (2004).

but precluded states from regulating arbitration.<sup>25</sup> Several factors diminish these concerns in the context of wills and trusts. For one, differences between adhesion contracts (which usually go unread) and testamentary instruments (which stem from a more robust form of assent) make testamentary arbitration more palatable. Moreover, there are significant holes in the FAA's coverage of estate-related matters, leaving ample room for state regulation. For instance, the Judiciary Act of 1789 does not give federal courts jurisdiction over "core probate" issues—petitions to administer an estate or nullify a will.<sup>26</sup> Thus, reading the FAA to encompass these cases would be perverse: it would not only extend federal power into a sphere that has long been the exclusive province of the states, but it would mean that the FAA creates federal arbitration law that federal courts cannot enforce. As a result, the FAA does not govern these disputes. Likewise, the FAA's controversial separability doctrine—the fiction that arbitration clauses are their own, independent contracts nestled within broader "container" contracts—applies in a diluted form to estate plans. These limits on the FAA give states an opportunity to develop their own probate arbitration principles.

The Article proceeds in three parts. Part I traces the evolution of testamentary arbitration. It reveals that courts have long disagreed about whether arbitration clauses in wills and trusts are enforceable. It then shows that the majority of recent cases have invalidated testamentary arbitration clauses, creating serious tension between state and federal arbitration law. Part II examines whether the FAA applies to arbitration clauses in estate plans. It analyzes the FAA's text and legislative history and concludes that Congress intended to limit the statute to arbitration clauses in "contracts." However, Part II then explains why, as a matter of federal common law, the FAA now governs arbitration clauses in wills and trusts. Finally, Part III considers how several challenging aspects of the Court's reading of the FAA—including the scope of the agreement to arbitrate, the boundaries of the statute, the separability doctrine, and preemption—would function in the testamentary milieu. By doing so, it illustrates that the statute can be imported into probate in a way that ameliorates some of its flaws.

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25. See *supra* notes 9, 24 and accompanying text.

26. See Ch. 20, § 13, 1 Stat. 80 (1789); *Sutton v. English*, 246 U.S. 199, 205 (1918); see also *infra* Part III.B (discussing the so-called "probate exception" to federal subject matter jurisdiction in greater detail).



## I. TESTAMENTARY ARBITRATION

Although scholars have lavished sustained attention on contractual arbitration, they have all but ignored testamentary arbitration. This Part traces the evolution of arbitration in probate. It shows that courts have struggled with how to conceptualize arbitration clauses in wills and trusts, leading to a rash of conflicting approaches. It then argues that this ambivalence about arbitration clauses in estate plans is on a collision course with the Court's expansive reading of the FAA.

A. *Testamentary Arbitration Before the FAA*

American courts inherited a deep suspicion of arbitration. Ancient English precedent allowed parties to retract their consent to arbitrate (the "revocability" doctrine)<sup>27</sup> and nullified arbitration clauses as improper efforts to divest courts of their jurisdiction (the "ouster" doctrine).<sup>28</sup> For the most part, from the nation's founding until the early twentieth century, these anti-arbitration measures also prevailed in the United States.<sup>29</sup> At the same time, though, merchants often voluntarily engaged in extrajudicial dispute resolution, citing its speed and informality.<sup>30</sup>

During this period, there were also glimmers of recognition that arbitration could be useful in a different context: probate. For

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27. See, e.g., *Vynior's Case*, (1609) 77 Eng. Rep. 597 (K.B.) 599–601; 8 Co. Rep. 81 b, 82 a–83 b (holding that parties could withdraw their consent to arbitrate at any time before the arbitrator ruled).

28. See, e.g., *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.) 532; 1 Wils. K.B. 129 (finding that "the agreement of the parties cannot oust this Court").

29. See, e.g., *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."); *Farmer v. Bd. of Trade*, 78 Mo. App. 557, 566 (Ct. App. 1899) ("It is well known that parties can not by agreement to arbitrate future differences, oust the courts of jurisdiction."); *Butler v. Greene*, 68 N.W. 496, 498 (Neb. 1896) ("It is elementary law that a submission [to arbitration] may be revoked before the award . . ."); *Wright v. Susquehanna Mut. Fire Ins. Co.*, 20 A. 716, 717 (Pa. 1885) ("It is not in the power of the parties thus to oust the courts of their general jurisdiction."). However, some jurisdictions were more hospitable to arbitration. For instance, as early as 1645, the Connecticut General Assembly authorized courts to refer matters to arbitration so "unnecessary tryalls by Jury . . . might be prevented." Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 452 (1984) (quoting 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 117 (J. Hammond Trumbull ed., 1850)).

30. See, e.g., JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* vii–ix (1918) (noting that there was an active arbitration practice in nineteenth-century New York that worked in conjunction with the Chamber of Commerce).

example, George Washington included a broad arbitration clause in his will:

[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.<sup>31</sup>

Likewise, heirs and beneficiaries sometimes agreed to submit existing differences to referees or umpires.<sup>32</sup> In fact, beginning in the late nineteenth century, the Alabama Probate Code authorized private dispute resolution,<sup>33</sup> and a Kansas statute validated arbitration in “matter[s] arising in the settlement of the estates of deceased parties.”<sup>34</sup>

Arguably, individuals embroiled in probate had even greater need for arbitration than businessmen with commercial disputes. For testators, arbitration minimized the collateral damage from will contests. These suits were notorious for “wast[ing] vast estates, by protracted and extravagant litigation.”<sup>35</sup> Moreover, they were usually grounded on allegations of incapacity and undue influence: intrusive claims that exposed a testator's foibles and intimate life in open

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31. George Washington, *Last Will and Testament*, REDISCOVERING GEORGE WASHINGTON, [http://www.pbs.org/georgewashington/collection/other\\_last\\_will.html](http://www.pbs.org/georgewashington/collection/other_last_will.html) (last visited Apr. 11, 2012).

32. See, e.g., *Tallman v. Tallman*, 59 Mass. (1 Cush.) 325, 325–26 (1850) (explaining that decedent's sons “submitted to arbitration all matters and things whatsoever arising out of the will and estate of . . . [their father]” (internal quotation marks omitted)); *Dandridge v. Lyon*, Wythe 123, 124 (Va. High Ct. Ch. 1791), available at 1791 WL 261, at \*1 (noting that feuding beneficiaries “submitted the controversy between them to the arbitrament of three men, consenting that their award should be made the judgement of the court”).

33. *Holdsomebeck v. Fancher*, 20 So. 519, 520 (Ala. 1896) (“[T]he probate court . . . has authority to refer all matters of controversy . . . to arbitration, if in the opinion of the court, the interests of the parties can be best subserved thereby, and the parties, or their attorneys, consent thereto . . .” (citation omitted)); see also Stephen Duane Davis II & Alfred L. Brophy, “*The Most Solemn Act of My Life*”: Family, Property, Will, and Trust in the Antebellum South, 62 ALA. L. REV. 757, 791–92 (2011) (finding an arbitration clause in a will from Greene County, Alabama, in 1843).

34. *Anderson v. Beebe*, 22 Kan. 768, 770 (1879). Although the statute was not arbitration-specific, it broadly stated “that all persons who shall have any controversy or controversies may arbitrate them.” *Id.* (citation omitted).

35. *Donegan v. Wade*, 70 Ala. 501, 505 (1881).

court.<sup>36</sup> Arbitration's speed and privacy made it an attractive substitute. Arbitration also allowed heirs and beneficiaries to opt out of court-supervised estate administration, which had long been despised for its inefficiency.<sup>37</sup>

However, arbitration clauses in probate matters raised unique issues. For one, although the streamlined, informal nature of arbitration is well-suited to *in personam* disputes between merchants, probate hearings are often *in rem*. For instance, when a court finds that a will is enforceable, it generates an order that attaches to the estate and is "binding on the whole world."<sup>38</sup> Probate courts thus must comply with onerous notice requirements and give all affected individuals a chance to be heard.<sup>39</sup> Some judges concluded that this made testamentary arbitration untenable. For instance, in *Carpenter v. Bailey*,<sup>40</sup> the Supreme Court of California struck down an agreement by a group of beneficiaries to arbitrate a will contest, declaring that "[a] few individuals, claiming to be the heirs, cannot by stipulation, determine such controversy."<sup>41</sup>

On the other hand, even in states that followed the ouster doctrine, it was often unclear whether a will or trust included an "arbitration" clause at all. As a prosaic estate planning technique, testators or settlors often gave executors or trustees tremendous

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36. See, e.g., *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898) ("[A]fter the death of a testator, unexpected difficulties arise, . . . contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial . . ."); *Rudd v. Searles*, 160 N.E. 882, 886 (Mass. 1928) ("To most persons such exposure to publicity of their own personality is distasteful, if not abhorrent.").

37. See, e.g., *Casstevens v. Casstevens*, 81 N.E. 709, 712 (Ill. 1907) (noting that an intestate decedent's heirs had opted out of intestacy and chosen to have an arbitrator distribute his property "for the purpose of saving the expenses of court proceeding"); *CHARLES DICKENS, BLEAK HOUSE* 3 (1853) (describing a probate case that had "drone[d] on" for generations and "become so complicated, that no man alive knows what it means").

38. *Carpenter v. Bailey*, 60 P. 162, 163 (Cal. 1900).

39. See, e.g., *Fort v. Battle*, 21 Miss. (13 S. & M.) 133, 139 (High Ct. Err. & App. 1849) (describing some of these notice requirements).

40. 60 P. 162 (Cal. 1900).

41. *Id.* at 163; see also *Fort*, 21 Miss. (13 S. & M.) at 140 (invalidating arbitration award because of "[t]he want of the requisite notice"); *Miller v. Moore*, 7 Serg. & Rawle 164, 166 (Pa. 1821) (nullifying arbitration award because not all parties were represented in the proceeding). But see *Anderson v. Beebe*, 22 Kan. 768, 770 (1879) (rejecting the argument that probate matters "can only be adjudicated in the probate court"); *In re Johnson*, 127 N.W. 133, 137 (Neb. 1910) (enforcing submission to arbitration even though the "validity of the will offered for probate was in dispute").

flexibility to invest, manage, divide, or distribute their property.<sup>42</sup> Some testators or settlors went a step further and entrusted the executor or trustee with settling any conflict about their wishes. Although these terms overrode the jurisdiction of the courts, most judges upheld them.<sup>43</sup> For instance, in *Pray v. Belt*,<sup>44</sup> the Supreme Court of the United States held that a testator properly allowed his executors to decide “whatever they determine[d] was his] intention . . . without any resort to a Court of Justice.”<sup>45</sup> The Court noted that the clause “preserv[ed] peace and prevent[ed] expensive and frivolous litigation.”<sup>46</sup>

Similarly, some judges conceptualized arbitration clauses in wills and trusts as testamentary conditions. Testators or settlors sometimes attach strings to gifts, allowing beneficiaries to inherit only if they marry within a particular religious faith or meet other benchmarks.<sup>47</sup> Likewise, testators or settlors often attempt to ensure fidelity to their wishes through no-contest clauses, which disinherit anyone who brings litigation relating to the estate.<sup>48</sup> To some judges, there was no difference between these provisos and a requirement that a

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42. See, e.g., Beck's Appeal, 9 A. 942, 943 (Pa. 1887) (describing a clause that gave the executor “‘full and unlimited power and authority to appropriate or dispose’ of it ‘to such objects, persons, or institutions as in his discretion shall be best and proper’ ”); *In re McAllister's Estate*, 15 Pa. D. 430, 430 (Orphans' Ct. 1906) (containing a clause that specified that executors “shall divide among my children as they may deem best, and I wish, in this division, that my executors should have arbitrary power, as they know my reasons”).

43. Courts generally construed these provisions to contain the implicit limitation that the executors wield their decision-making power reasonably and in good faith. See, e.g., *Am. Bd. of Comm'rs of Foreign Missions v. Ferry*, 15 F. 696, 700 (C.C.W.D. Mich. 1883); *Talladega Coll. v. Callanan*, 197 N.W. 635, 637 (Iowa 1924).

44. 26 U.S. (1 Pet.) 670 (1828).

45. *Id.* at 679 (quoting the testator's will).

46. *Id.* at 680; *McAllister's*, 15 Pa. D. at 430 (upholding clause that allowed executors to divide the testator's personal estate among his children “as they may deem best” and added his wish that they should have arbitrary power, “as they know [his] reasons”). But see *In re Reilly's Estate*, 49 A. 939, 940–41 (Pa. 1901) (invalidating a similar provision because “[a] testator may not deny to his legatees the right of appeal to the regularly constituted courts”).

47. See, e.g., *Maddox v. Maddox's Adm'r*, 52 Va. (6 Gratt.) 804, 804 (1854) (stating in the facts that testator required his niece to remain single or marry only a member of the Society of Friends); Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1332–35 (2011) (explaining the Roman origins of conditional bequests).

48. See Anonymous, (1674) 86 Eng. Rep. 910 (C.B.) 910; 2 Mod. 7, 7 (enforcing clause that provided “[i]f A. molest B. by suit or otherwise, he shall lose what is devised to him, and it shall go to B”). See generally Gerry W. Beyer, Rob G. Dickinson & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225 (1998) (tracing the history of no-contest clauses).

beneficiary arbitrate her legal claims. Thus, several courts held that a testator or settlor's right to mandate arbitration flowed naturally from his power to "annex conditions . . . to his bequests."<sup>49</sup>

In sum, by the end of the nineteenth century, there was little consensus about how to treat arbitration of probate matters. As the Article discusses next, the passage and expansion of the FAA would soon transform arbitration law. But rather than clarifying the status of testamentary arbitration, these events magnified the uncertainty about the topic.

### B. *The FAA*

As the twentieth century began, commercial arbitration became more common. A few states whittled away at the revocability and ouster doctrines, preventing parties from retracting their assent to arbitrate in certain circumstances<sup>50</sup> and authorizing arbitrators to resolve discrete factual issues, such as the value of an object or the amount of damages caused by an injury.<sup>51</sup> However, these rules varied significantly by jurisdiction. Thus, pro-arbitration lobbyists set their sights on Washington and attempted to persuade lawmakers to enact a federal statute that would make arbitration clauses "universally enforceable."<sup>52</sup>

In 1925, Congress passed the FAA.<sup>53</sup> The statute's core provision, section 2, abolishes the ouster and revocability doctrines by making arbitration clauses presumptively valid:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy . . . shall be valid,

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49. *Wait v. Huntington*, 40 Conn. 9, 11 (1873); *see also* *Moore v. Harper*, 27 W. Va. 362, 374 (1886) (enforcing arbitration clause in will because "[t]he testator has full dominion over his property with the absolute right . . . to do with and dispose of it in any manner or to whomever his will or caprice may suggest").

50. For instance, some courts required "good cause" for the revocation. *See* *Poppers v. Knight*, 69 Ill. App. 578, 579 (1897). Some made submissions irrevocable if they were founded on separate consideration. *See* *Everhart v. Flynn*, 6 Pa. D. 131, 132 (Ct. Com. Pl. 1896). Finally, another court deemed parties to have waived the right to revoke after the arbitrator ruled. *See* *Conn. Fire Ins. Co. v. O'Fallon*, 69 N.W. 118, 119 (Neb. 1896).

51. *See, e.g.*, Comment, *Arbitration Contracts*, 33 YALE L.J. 90, 92 (1923).

52. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 279 (1995); *see also* MACNEIL, *supra* note 24, at 41–45 (tracing the history of the FAA).

53. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)).

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>54</sup>

The FAA's initial impact was minimal. For starters, it did not seem to be a declaration of substantive law. Instead, it appeared to be a procedural statute enacted under Congress's Article III power to control federal courts.<sup>55</sup> As a result, the overwhelming consensus was that the FAA neither applied in state court nor preempted state law. Until the 1960s, litigants virtually never attempted to invoke the statute in state court,<sup>56</sup> and state judges and lawmakers felt free to adopt specific anti-arbitration rules that echoed the ouster and revocability doctrines.<sup>57</sup> Courts also exempted many cases from arbitration. Under what became known as the non-arbitrability doctrine, judges denied motions to compel arbitration of antitrust,<sup>58</sup> securities,<sup>59</sup> pension,<sup>60</sup> and patent disputes,<sup>61</sup> and refused to grant preclusive effect to arbitrators' rulings on claims under civil rights

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54. 9 U.S.C. § 2 (2006).

55. For example, the Report of the House Judiciary Committee flatly declared that "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure . . . and not one of substantive law." HOUSE REPORT, *supra* note 2, at 1. Similarly, in a brief lodged in the congressional record, Julius Henry Cohen, the author of the FAA, declared that "[t]here is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 40 (1924) [hereinafter *Joint Hearings on S. 1005 and H.R. 646*]. On the other hand, Congress also invoked its Commerce Clause power to pass the statute. See HOUSE REPORT, *supra* note 2, at 1 ("The remedy is founded also upon the [f]ederal control over interstate commerce . . ."). The issue of whether this means that lawmakers intended the FAA to apply in state court or simply saw the Commerce Clause as an additional source of authority for enacting a procedural statute to govern federal courts remains fiercely contested. Compare Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 128 (2002) (arguing that Congress intended the FAA to rise and fall with the Commerce power but noting that the Commerce power was much more limited in 1925), with Schwartz, *supra* note 24, at 23 (arguing that there is "nothing anomalous about Congress enacting a procedural or remedial statute, as opposed to substantive law, pursuant to its . . . commerce power").

56. See MACNEIL, *supra* note 24, at 127–28.

57. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (citing CAL. CORP. CODE § 31512 (West 1971)) (exempting franchise agreements from mandatory arbitration); *Barnhart v. Civil Serv. Emp. Ins. Co.*, 398 P.2d 873, 874–75 (Utah 1965) (citing UTAH CODE ANN. § 78-31-1 (LexisNexis 1953)) (invalidating agreements to submit future disputes to arbitration).

58. See, e.g., *Applied Digital Tech., Inc. v. Cont'l Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Am. Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968).

59. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435 (1953).

60. See, e.g., *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 277 (E.D. Pa. 1977).

61. See, e.g., *Hanes Corp. v. Millard*, 531 F.2d 585, 593 (D.C. Cir. 1976).

statutes.<sup>62</sup> They did so because they believed that Congress could not have meant to relegate important public law matters to arbitration, which they saw as an inferior forum that “cannot provide an adequate substitute for a judicial proceeding.”<sup>63</sup>

However, in the last half of the twentieth century, the Court began to expand the FAA. First, in 1967, the Court articulated the separability doctrine in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>64</sup> Under this rule, “arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded.”<sup>65</sup> That is, every contract that contains an arbitration clause is, in fact, two contracts: (1) the overarching “container” contract, and (2) the arbitration clause, which is its own independent contract. The rule comes into play when a party alleges that a contract that includes an arbitration clause is invalid under a defense such as fraud, duress, or unconscionability.<sup>66</sup> If the party seeks to overturn the container contract, the free-standing agreement to arbitrate kicks in, and an arbitrator (not a judge) must resolve the matter.<sup>67</sup> As a result, even if there are clear indications that the container contract is invalid, the case goes to arbitration. Only if the party argues that the arbitration clause itself is unenforceable can a court decide the issue.<sup>68</sup>

Then, in the 1980s, the Court began to revolutionize federal arbitration law. Seeking a salve for the so-called “litigation explosion,” it announced that the statute expresses “a liberal federal

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62. See, e.g., *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 736–37 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974); *Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 547–48 (9th Cir. 1983).

63. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 222–23 (1985).

64. 388 U.S. 395, 402–04 (1967).

65. *Id.* at 402.

66. As I will discuss later, the separability doctrine (apparently) does not apply when a party alleges that she never actually entered into the container contract (as opposed to arguing that the container contract is invalid under a defense to enforcement). See *infra* text accompanying notes 183–85.

67. *Prima Paint*, 388 U.S. at 402–04; see also *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 629 (6th Cir. 2004) (“[M]utual mistake . . . amounts to an attack on the underlying liability, and only derivatively on the obligation to arbitrate.”).

68. For instance, in *Prima Paint*, Flood & Conklin (“F&C”) entered into a consulting agreement (the “container contract”) with Prima Paint that contained an arbitration clause. *Prima Paint*, 388 U.S. at 397–98. Prima Paint then alleged that the container contract was invalid because F&C had fraudulently misrepresented that it was solvent and could perform its consulting obligations. *Id.* at 398. Because Prima Paint’s fraud claim did not specifically challenge the validity of the arbitration clause, the Court compelled arbitration. *Id.* at 402 (“[W]here no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the [container] contract itself was induced by fraud.”).

policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>69</sup> In its widely reviled opinion in *Southland v. Keating*,<sup>70</sup> the Court held that the FAA applies in state court and preempts state law.<sup>71</sup> As the Court’s membership evolved, it became clear that few sitting Justices believed that *Southland* was correct.<sup>72</sup> Nevertheless, citing the importance of stare decisis in the domain of statutory interpretation, the Court continued to find that the FAA trumped state law.<sup>73</sup> Because the FAA makes traditional contract defenses—“grounds . . . for the revocation of *any* contract”—the sole means to nullify an arbitration clause, the Court explained that the statute overrides any state rule “that takes its meaning precisely from the fact that a contract to

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69. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); cf. *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989) (calling the FAA “therapy for the ailment of the crowded docket”). For a description of the concern about the “litigation explosion,” see generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

70. 465 U.S. 1 (1984).

71. *Id.* at 15–16. The California Franchise Investment Act states that “[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.” CAL. CORP. CODE § 31512 (West 2006). The Supreme Court of California held that this anti-waiver provision bars arbitration clauses in franchise agreements. See *Keating v. Superior Court*, 645 P.2d 1192, 1198–99 (Cal. 1982), *rev’d in part sub nom.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In addition, the state high court determined that the FAA did not preempt the Franchise Investment Act because the state law did not stem from hostility toward arbitration. See *id.* at 1202–03. The Supreme Court of the United States reversed, relying heavily on the fact that Congress passed the FAA by invoking the Commerce Clause, which “normally creates rules that are enforceable in state as well as federal courts.” *Southland*, 465 U.S. at 12. For criticism of *Southland*, see Carrington & Haagen, *supra* note 9, at 380 (arguing that “the opinion of the Court was an extraordinarily disingenuous manipulation” of the FAA’s legislative history); Schwartz, *supra* note 24, at 5 (calling the case “an embarrassment to a Court whose majority is supposed to be leading a federalism revival, if not a federalism revolution”). But see Drahozal, *supra* note 55, at 105–07 (agreeing that Chief Justice Burger’s analysis is unsatisfactory but defending its conclusion by analyzing the FAA’s legislative history in greater detail).

72. Justices Scalia and Thomas replaced Chief Justice Burger and Justice Marshall, both of whom had voted with the *Southland* majority. Staunch federalists, Justices Scalia and Thomas opposed the expansion of the FAA at the expense of state law. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting) (“*Southland* clearly misconstrued the Federal Arbitration Act.”); *id.* at 286 (Thomas, J., dissenting) (“The statute that Congress enacted actually applies only in federal courts.”); see also Schwartz, *supra* note 24, at 6 (“[I]t may be that no Justice on th[e] Court believes *Southland* was correctly decided.”).

73. See, e.g., *Allied-Bruce*, 513 U.S. at 284 (O’Connor, J., concurring) (calling *Southland* “wrong” but agreeing to follow it because of stare decisis).



arbitrate is at issue.”<sup>74</sup> For instance, the Court found that the FAA eclipsed state laws that barred arbitration clauses in wage disputes<sup>75</sup> or required drafters to give conspicuous notice on the first page of a contract that it included an arbitration clause.<sup>76</sup>

The Court also scaled back the non-arbitrability doctrine. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>77</sup> the Court compelled arbitration of complex antitrust claims, explaining that arbitration was equal to litigation:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>78</sup>

The Court did not abolish the non-arbitrability doctrine; indeed, it opined that judges could deny arbitration if a plaintiff proved either that she could not vindicate her statutory rights in the arbitral forum<sup>79</sup> or that there was an “inherent conflict” between the FAA and another federal statute.<sup>80</sup> But in subsequent cases, the Court quickly dismissed any assertion that seemed too close to a frontal assault on the efficacy of arbitration as a dispute resolution mechanism. According to the Court, these “generalized attacks on arbitration”<sup>81</sup> were hopelessly anachronistic: “We are well past the time [of] judicial suspicion of the desirability of arbitration . . . .”<sup>82</sup>

In an effort to capitalize on the Court’s jurisprudence, businesses from all corners of the economy placed arbitration clauses in their

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74. *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (“[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”).

75. *Id.* at 489–90.

76. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

77. 473 U.S. 614 (1985).

78. *Id.* at 628.

79. *See id.* at 637 (“[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”).

80. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

81. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (citing as precedent the cases that shifted away from judicial suspicion on the desirability of arbitration).

82. *Mitsubishi*, 473 U.S. at 626–27.

consumer and employment agreements.<sup>83</sup> Many companies also unilaterally grafted arbitration clauses into their existing contracts by mailing non-descript “bill stuffers” to their customers.<sup>84</sup> These modifications often stated that they became effective unless a consumer closed her account within thirty days.<sup>85</sup> Critics began to protest that because adherents neither read nor understood fine print dispute resolution terms, “mandatory arbitration is nonconsensual.”<sup>86</sup> As one judge put it, “[t]he reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic.”<sup>87</sup>

In addition, mass arbitration revived the debate about standard form contracts.<sup>88</sup> Some courts and scholars argued that arbitration clauses in adhesion contracts are efficient.<sup>89</sup> This constituency claimed that arbitration reduces litigation costs and that competition prompts drafters to pass these savings on to customers and employees.<sup>90</sup> In fact, the theory proceeds, because litigation is usually a remote possibility at the time of contracting, most adherents would choose to have a small amount of extra money in their pockets rather than

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83. See, e.g., Mark Curriden, *A Weapon Against Liability: Fine Print Often Removes Jury Resolution as Option for Complaints*, DALL. MORNING NEWS, May 7, 2000, at 25A, available at 2000 WLNR 9445249 (citing American Bar Association estimates that more than one thousand major companies insert arbitration clauses in their contracts).

84. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623 (2010) (describing how Bank of America and Wells Fargo unilaterally added an arbitration clause in over twenty-five million customer agreements in 1992).

85. See *id.* at 624–26.

86. Schwartz, *Big Business*, *supra* note 9, at 58 (“[I]f an arbitration clause has been inserted in a contract of adhesion on a ‘take-it-or-leave-it’ basis, it is difficult to characterize it as the product of ‘consent,’ ‘agreement’ or ‘bargaining.’”); Sternlight, *Just*, *supra* note 9, at 1649.

87. *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

88. For an overview of the pre-arbitration literature on adhesion contracts, see Horton, *supra* note 84, at 615–19.

89. See sources cited *supra* note 8.

90. See, e.g., *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008) (“As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices.”); Ware, *Price of Process*, *supra* note 8, at 89 (“[A]rbitration lowers the prices (and interest rates) consumers pay because competition forces businesses to pass their cost-savings on to consumers.”); Ware, *Adhesive Arbitration Agreements*, *supra* note 8, at 255 (“[W]hatever lowers costs to businesses tends over time to lower prices to consumers.”).

retain the right to pursue claims before a judge.<sup>91</sup> Yet others on the bench and in the academy were not persuaded. In particular, these skeptics noted that consumers and employees systematically underestimate the cost of waiving procedural rights *ex ante*, casting doubt on whether the law should credit their seeming consent to remedy-stripping arbitration provisions.<sup>92</sup> Moreover, this group noted that if arbitration clauses are not “salient”—do not actually affect adherents’ choices about products, services, and jobs—then adherents will not be able to force drafters to offer optimal dispute resolution terms.<sup>93</sup> Instead, no matter what most consumers and employees actually prefer, companies will engage in a race to the bottom, slashing procedural entitlements in order to one-up each other on the higher-profile issues of price or wages.<sup>94</sup>

For the most part, the Court has refused to engage in this debate.<sup>95</sup> To this day, it continues to describe arbitration—even when imposed through adhesion contracts—as “a matter of consent, not coercion.”<sup>96</sup> This sweeping claim allows the Court to rigorously enforce arbitration clauses in all contexts, from deals between sophisticated entities to collective bargaining agreements to consumer and employment contracts. But as discussed next, the Court’s robust pro-arbitration policy has never extended into a related form of private ordering: the realm of wills and trusts.

### C. Testamentary Arbitration After the FAA

Although the FAA was relatively dormant for the first four decades of its existence, it changed the way that arbitration was perceived. For instance, even long before the statute applied in state

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91. Cf. Drahozal, *supra* note 8, at 749 (noting that adherents may be “willing to give up the right to bring high-dollar but rare claims before a jury in exchange for the ability to pursue low-dollar but more common claims in arbitration”).

92. See Horton, *supra* note 84, at 648.

93. See, e.g., Ting v. AT&T, 182 F. Supp. 2d 902, 931 n.16 (N.D. Cal. 2002) (noting that “while lower costs can produce lower charges, they can also produce higher profits”), *aff’d in part, rev’d in part*, 319 F.3d 1126 (9th Cir. 2003); cf. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1225 (2003) (explaining why non-salient terms may be inefficient).

94. See, e.g., Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 760–61 (2011) (describing how the market pushes companies to offer one-sided procedural terms and price reductions/wage increases).

95. Cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (opining that a forum selection clause printed on the back of a cruise ship ticket benefitted both contracting parties by lowering litigation costs and therefore “reduc[ing] fares”).

96. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

courts, state judges began to announce that “[i]f there ever was public policy against agreements to arbitrate, it has disappeared.”<sup>97</sup> Yet this newfound acceptance of arbitration was limited to the commercial context. In fact, ironically, the FAA’s passage coincided with a period of distrust of arbitration in probate matters.

For example, in *Campbell v. Detroit Trust Co. (In re Meredith’s Estate)*,<sup>98</sup> decided in 1936, the Michigan Supreme Court struck down a contract to arbitrate a will contest.<sup>99</sup> The testator signed a will and then a codicil, naming different executors. These two executors agreed to have a third party decide whether the testator possessed sufficient mental capacity to create the codicil.<sup>100</sup> Yet under state law, executors, who are not beneficiaries, lack standing to challenge the validity of a will.<sup>101</sup> The state high court cited this legal nuance to justify its refusal to enforce the arbitration contract, noting that the executors have “no pecuniary interest in the estate.”<sup>102</sup> But the court also went on, reasoning that two individuals could not conspire to arbitrate a matter that was in rem and thus would affect “[t]he rights of all concerned or interested in the estate.”<sup>103</sup> Finally, noting that the legislature had entrusted the judiciary with determining whether to admit a will to probate, the court employed the rhetoric of the ouster doctrine: “No stipulation . . . can oust the jurisdiction of the probate court, permit the probate judge to abdicate his jurisdiction and power, or delegate it to a third person . . . .”<sup>104</sup>

The *Meredith’s Estate* decision was controversial. It provoked a vigorous dissent by Justice Sharpe, who protested that “courts favor arbitration and will recognize this type of agreement when not contrary to public policy.”<sup>105</sup> Likewise, a year later, a Note in the *Harvard Law Review* urged courts to read the opinion for the narrow proposition that executors lack the authority to submit will contests to

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97. *Rueda v. Union Pac. R.R. Co.*, 175 P.2d 778, 790 (Or. 1946).

98. 266 N.W. 351 (Mich. 1936).

99. *Id.* at 352–53.

100. *Id.* at 352.

101. *Id.* at 355.

102. *Id.*

103. *Id.* at 356. The codicil merely appointed a new executor rather than altering the disposition of the testator’s property among the beneficiaries. *See id.* at 352. Thus, it is unclear why the court felt that all potentially affected parties were not before the arbitrator.

104. *Id.* at 357.

105. *Id.* at 359 (Sharpe, J., dissenting).

arbitration, "rather than authority for the broad rule that there can be no arbitration in probate proceedings."<sup>106</sup>

Nevertheless, in 1968, a New York appellate court reached the same conclusion as *Meredith's Estate*.<sup>107</sup> Four beneficiaries agreed to submit all issues relating to the probate of the testator's will to an "ecclesiastical tribunal" made up of three rabbis.<sup>108</sup> The court reasoned that this procedure denied the rights of the testator's creditors and other heirs.<sup>109</sup> In addition, it explained that arbitration would have been improper even if all parties had been represented. As the court saw it, because state law tasks probate judges with determining "the testamentary capacity of the decedent, the genuineness of the will, and the validity of its execution, . . . any attempt to arbitrate such issue[s] is against public policy."<sup>110</sup> Long after the FAA's enactment, the ouster doctrine was alive and well in probate.

Remarkably, even as the Supreme Court began to interpret the FAA broadly, state courts continued to express skepticism about testamentary arbitration. For instance, in its watershed 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>111</sup> the Court expanded the domain of contractual arbitration by requiring the plaintiff to arbitrate his Age Discrimination in Employment Act claim.<sup>112</sup> The plaintiff alleged that he could not effectively pursue his rights in the extrajudicial forum, citing its limited discovery, lack of written opinions and equitable relief, and potentially biased decision makers.<sup>113</sup> The Court rejected these arguments as "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."<sup>114</sup> But this pro-arbitration approach did not apply to testamentary arbitration. Indeed, just a year after

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106. Recent Case, *Validity of Executors' Stipulation To Arbitrate Mental Capacity*, 50 HARV. L. REV. 537, 537 (1937). Despite these criticisms, the New York Supreme Court soon opined in a one-paragraph decision that "the distribution of a decedent's estate . . . would not constitute an arbitrable controversy." *Swislocki v. Spiewak*, 75 N.Y.S.2d 147, 147 (App. Div. 1947).

107. *In re Will of Jacobovitz*, 295 N.Y.S.2d 527, 531 (Sur. Ct. 1968).

108. *Id.* at 528-29.

109. *Id.* at 530.

110. *Id.* at 530-31; see also *In re Berger*, 437 N.Y.S.2d 690, 692 (App. Div. 1981) (citing the language from the *Jacobovitz* decision to support the conclusion that the probate cannot be subject to arbitration because it is contrary to public policy).

111. 500 U.S. 20 (1991).

112. *Id.* at 35.

113. *Id.* at 30-32.

114. *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 480 U.S. 477, 481 (1989)).

*Gilmer*, a Pennsylvania appellate court held that public policy forbade an arbitrator from deciding whether a settlor had testamentary capacity.<sup>115</sup> In stark contrast to *Gilmer*, the court reasoned that arbitration was inferior to litigation:

[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. And as this Court has recognized, [a]rbitrators have no obligation to the court to give their reasons for an award.<sup>116</sup>

Recently, the latent tension between the FAA and probate arbitration has produced a rash of inconsistent decisions. In 2009, a Michigan appellate court overruled *Meredith's Estate* (a decision by its own supreme court) by holding that an arbitrator properly nullified a will on the grounds of undue influence and incapacity.<sup>117</sup> The court was not troubled by the in rem nature of the proceeding because all known beneficiaries had taken part in the arbitration.<sup>118</sup> In addition, the court observed that attitudes toward alternative dispute resolution had changed dramatically in the seventy-five years since *Meredith's Estate*.<sup>119</sup> Although the court did not discuss the FAA, it cited several leading United States Supreme Court cases and reasoned that “[w]hile our legal system may have had only a lukewarm tolerance for arbitration in the past, it now embraces arbitration as an expeditious, inexpensive, and fair means of dispute resolution.”<sup>120</sup> Even the dissent “agree[d] that the Michigan Supreme Court would overrule *Meredith* if faced with this precise issue today,” but it merely objected that the lower appellate court should not do so on its own.<sup>121</sup>

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115. *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263, 267 (Pa. Super. Ct. 1992).

116. *Id.* (internal quotation marks omitted).

117. *In re Nestorovski Estate*, 769 N.W.2d 720, 732 (Mich. Ct. App. 2009).

118. *Id.* As noted above, it is unclear that this fact truly distinguishes *Meredith's Estate*, where the only parties who had a real stake in the case—the executors—were also the parties who agreed to arbitrate it. *See supra* text accompanying notes 100–02.

119. *Nestorovski*, 769 N.W.2d at 720–31.

120. *Id.* at 729 (quoting *Hetrick v. Friedman*, 602 N.W.2d 603, 607 (Mich. Ct. App. 1999)).

121. *Id.* at 737 (Saad, C.J., dissenting). Likewise, courts in other jurisdictions have permitted arbitration in matters revolving around trust administration. *See, e.g., In re Kalikow*, 872 N.Y.S.2d 511, 513 (App. Div. 2009) (compelling arbitration of contract

But at the opposite pole, several courts have refused to enforce arbitration clauses in disputes related to the management (rather than the validity) of an estate plan.<sup>122</sup> The rationale in these decisions is simple: state arbitration statutes make arbitration clauses enforceable in “contracts,” and testamentary instruments are “not contracts.”<sup>123</sup> For instance, in *Schoneberger v. Oelze*,<sup>124</sup> the Arizona Court of Appeals drew a bright line between trusts and contracts:

Arbitration rests on an exchange of promises. Parties to a contract may decide to exchange promises to substitute an arbitral for a judicial forum . . . . In contrast, a trust does not rest on an exchange of promises. A trust merely requires a trustor to transfer a beneficial interest in property to a trustee who, under the trust instrument . . . holds that interest for the beneficiary. The undertaking between trustor and trustee does not stem from the premise of mutual assent to an exchange of promises and is not properly characterized as contractual.<sup>125</sup>

Similarly, in *Rachal v. Reitz*,<sup>126</sup> an en banc panel of the Texas Court of Appeals refused to compel arbitration of a breach of trust claim.<sup>127</sup> The court explained that trusts, unlike contracts, do not

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dispute relating to estate); *In re Shalik*, No. 340361, 2006 WL 2944658, at \*2 (N.Y. Sur. Ct. Oct. 13, 2006) (same).

122. See *Schoneberger v. Oelze*, 96 P.3d 1078, 1080 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (Supp. 2011), *as recognized in* *Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011) (invalidating arbitration clause in suit for breach of trust); *In re Calomiris*, 894 A.2d 408, 408 (D.C. 2006) (nullifying arbitration clause in “dispute over administration of the trust”); *Rachal v. Reitz*, 347 S.W.3d 305, 311–12 (Tex. App. 2011) (en banc) (refusing to enforce arbitration clause in petition to compel trustee to account). In addition, a California appellate court recently struck down an arbitration clause in a dispute over trustee removal. See *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 615 (Ct. App. 2011). However, the Supreme Court of California recently granted review of the opinion. See 257 P.3d 1129, 1129 (Cal. Aug. 10, 2011).

123. *Schoneberger*, 96 P.3d at 1082; see also *Diaz*, 125 Cal. Rptr. at 612–13 (noting that the California Arbitration Act “requires the existence of a contract” and “there is no evidence that the beneficiaries gave either their consent or consideration to achieve the status of beneficiary”); *Rachal*, 347 S.W.3d at 311 (“[T]his type of trust is not a contract.”).

124. 96 P.3d 1078 (Ariz. Ct. App. 2004).

125. *Id.* at 1083 (internal citations and quotation marks omitted). In 2008, the Arizona legislature apparently overruled *Schoneberger*. See ARIZ. REV. STAT. ANN. § 14-10205 (Supp. 2011) (authorizing arbitration of trust matters).

126. 347 S.W.3d 305 (Tex. App. 2011) (en banc).

127. *Id.* at 311–12.

require consideration and “can be created without the beneficiary’s participation.”<sup>128</sup>

But none of these courts has considered whether the FAA, rather than a state arbitration statute, governs arbitration clauses in wills and trusts. If the FAA applies to estate plans, then the “national policy favoring arbitration”<sup>129</sup> could transform probate dispute resolution. The Article turns now to that question.

## II. THE FAA AND TESTAMENTARY INSTRUMENTS

Section 2, the FAA’s centerpiece, states that a “written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>130</sup> Thus, section 2 seems to make arbitration clauses enforceable as a matter of federal law if three conditions are met. First, there must be a “contract.” Second, within this “contract” must be an arbitration clause (“[a] written provision . . . to settle by arbitration a controversy”) that does not violate contract law (“grounds . . . for the revocation of any contract”). Third, the arbitration clause must be part of “a transaction involving commerce.”

This Part argues that some arbitration clauses in wills and trusts satisfy these criteria. First, although Congress likely intended to limit the FAA to arbitration clauses in “contract[s],” the Supreme Court has interpreted this phrase loosely. As a matter of federal common law, the FAA hinges on whether the parties have agreed to arbitrate, not whether there is a “contract” in which the arbitration clause appears. In turn, wills and trusts are capable of giving rise to agreements to arbitrate; indeed, no one can be bound to the terms of a testamentary instrument against his wishes. Second, despite the fact the FAA requires arbitration clauses to comply with “grounds . . . for the revocation of any contract,” this prong does not bar testamentary arbitration. Rather, it merely requires courts to decide whether

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128. *Id.* at 311. Justice Murphy’s dissent noted that the Texas arbitration statute does not apply only to “contracts” but rather governs “written *agreement*[s] to arbitrate.” *Id.* at 313 (Murphy, J., dissenting) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (West 2011)). Because the term “agreement” is broader than “contract,” Justice Murphy reasoned that the trust should have fallen within the statute. *Id.* at 313–15. The concept of testamentary agreements to arbitrate in the context of the FAA is discussed *infra* Part II.A.2.b.

129. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

130. 9 U.S.C. § 2 (2006).



testamentary agreements to arbitrate violate traditional contract rules. Third, because estate plans are the catalyst for a massive amount of wealth to be managed and distributed, they are “transaction[s] involving commerce.”

To be clear, this Section does not argue that testamentary arbitration clauses inexorably fall under the FAA. Indeed, a subsequent section explores the limits of probate arbitration. The argument here is simply that arbitration provisions in wills and trusts are not categorically incompatible with the statute.

#### A. “Contract”

The Court often declares that “arbitration is a matter of contract.”<sup>131</sup> The FAA’s text seems to bear out that statement. Section 2 makes arbitration clauses in “contract[s]” presumptively valid.<sup>132</sup> Also, the arbitration clause (the “written provision . . . to settle by arbitration a controversy”) cannot violate traditional contract law (“grounds . . . for the revocation of any contract”).<sup>133</sup> And as the first subpart of this section reveals, the FAA’s legislative history elucidates that Congress considered—but did not pass—a draft of the statute that would have applied to “transactions”: a broader term than “contract[s].”<sup>134</sup> Congress’ decision to narrow the FAA suggests that it expected courts to take the statute’s reference to “contract[s]” at face value.

Yet the Court has also described the statute as facilitating goals that do not require an arbitration clause to be moored within a “contract” or to be a “contract” itself. For instance, the Court often justifies its decisions on the ground that arbitration leads to “streamlined proceedings and expeditious results”<sup>135</sup>; values that have

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131. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

132. 9 U.S.C. § 2.

133. *Id.* This language covers pre-dispute arbitration clauses. Section 2 also refers separately to post-dispute submissions to arbitration as “an agreement in writing to submit to arbitration an existing controversy.” *Id.* Like pre-dispute arbitration clauses, these post-dispute submissions must comply with “such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

134. *See infra* notes 141–42.

135. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985); *see also Concepcion*, 131 S. Ct. at 1749 (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”); *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (“A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results.”)

nothing to do with contract law. In fact, as the second part of this Section illuminates, the Court permits arbitration to occur if the parties have agreed to arbitrate—no matter whether their agreement appears in a “contract.” In turn, this leniency about “contract[s]” and the similarity between contracts and estate plans has laid the foundation for probate arbitration under the FAA.

### 1. Congressional Intent

Congress likely did not intend for the FAA to govern arbitration clauses in wills and trusts. For one, the statute’s legislative history repeatedly underscores the link between arbitration and contracts. To cite just a few examples, the Report of the House Judiciary Subcommittee describes arbitration clauses as “purely matters of contract” and states that the FAA seeks to place arbitration clauses “upon the same footing as other contracts.”<sup>136</sup> Likewise, the words “merchant” or “businessman” appear on nearly every page of the congressional record, reinforcing the fact that the FAA was designed primarily to govern commercial contracts.<sup>137</sup>

Conversely, probate arbitration arises only tangentially in the legislative history. For instance, during the 1923 Senate Judiciary Subcommittee hearing on the statute, Senator Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, testified:

Arbitration is the time-honored method for the disposition of all business disputes and controversies and was recognized as such by the Father of our Country when he made his last will and testament—the largest single contract he had ever made, the disposition of all his earthly belongings by means of a single document . . . . Fully realizing the wisdom of all of his ways, is not then Congress merely striving to emulate the example of

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(internal quotation marks omitted)); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (citing “arbitration’s essential virtue of resolving disputes straightaway”).

136. HOUSE REPORT, *supra* note 2, at 1; *see also* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (describing arbitration under the FAA as “peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like”).

137. *See, e.g.*, Schwartz, *Big Business*, *supra* note 9, at 77 (“The FAA’s legislative history is filled with statements that the purpose of the Act was to settle disputes between ‘businessmen.’ ”); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1148 (2002) (“The legislative history is inundated with references to businessmen or merchants.”).

George Washington by giving our land a law which will make written agreements voluntarily entered into valid, enforceable [sic], and irrevocable?<sup>138</sup>

Even though Bernheimer refers to wills as “contract[s],” it would be far-fetched to interpret his statement as anything other than rhetorical puffery. Indeed, he mentions George Washington merely to drive home the point that arbitration has a venerable history.<sup>139</sup> And there is no other express support in the legislative record for applying the FAA to wills and trusts.

The FAA’s drafting history also suggests that it governs “contracts.” This analysis begins with a seemingly contrary point: as initially written, the statute probably *did* apply to testamentary instruments. Recall that section 2 covers arbitration clauses in “[1] any maritime transaction or [2] a contract evidencing a transaction involving commerce.”<sup>140</sup> The version of section 2 that Congress debated in 1923 contained an additional component. It covered arbitration clauses in “any [1] contract or [2] maritime transaction or [3] *transaction involving commerce*.”<sup>141</sup>

Arguably, some estate plans—those that involved testators or settlors, executors or trustees, and beneficiaries from different states—would have fallen into this third category. First, they would have been “transactions.” Courts had defined that word to be “broader than ‘contract,’ ” explaining that a “[c]ontract is a transaction, but a transaction is not necessarily a contract.”<sup>142</sup> Indeed, “transaction” was a term of art that included the “management of any matter”<sup>143</sup> and would have included a testator or settlor’s property use

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138. *Hearing on S. 4213 and S. 4214*, *supra* note 2, at 3.

139. *Id.*

140. 9 U.S.C. § 2 (2006).

141. *Hearing on S. 4213 and S. 4214*, *supra* note 2, at 2 (emphasis added). The statute’s legislative history contains other references to this three-part structure. For example, Senator Sterling began the 1923 Senate Judiciary Subcommittee hearings by describing the bill that became the FAA as applying to “contracts, maritime transactions, or commerce among the [s]tates.” *Id.* at 1. A year later, during the Joint Hearings before the Senate and House Judiciary Subcommittees, Senator Sterling likewise described the proposed statute as validating “contracts, maritime transactions, or commerce among the [s]tate[s].” *Joint Hearings on S. 1005 and H.R. 646*, *supra* note 55, at 1.

142. *Metro. Cas. Ins. Co. of N.Y. v. Lehigh Valley R.R. Co.*, 109 A. 743, 744 (N.J. Ct. Err. & App. 1920). Indeed, the draft statute itself made that distinction, purporting to cover “transaction[s]” that were not “contracts.” *Joint Hearings on S. 1005 and H.R. 646*, *supra* note 55, at 1.

143. *Courtney v. Courtney*, 129 N.W. 52, 53 (Iowa 1910) (internal quotation marks omitted); *cf.* *Anderson v. Caulk*, 5 S.W.2d 816, 821 (Tex. App. 1928) (quoting *Webster’s*

and distribution decisions. Second, estate plans with parties from different states might have “involve[d] commerce” as the phrase was then understood. Admittedly, in the early 1920s, Congress’s Commerce Clause power was a shadow of what it is today.<sup>144</sup> For instance, in 1913, the Court had determined that insurance policies were not “articles of commerce”—even when they were brokered across jurisdictional lines—because “[t]hey are not commodities to be shipped or forwarded from one State to another, and then put up for sale.”<sup>145</sup> But a decade later, the Court undercut that logic by upholding federal regulation of grain futures.<sup>146</sup> These futures were not commercial goods; rather, like wills and trusts, they were legal instruments that set forth rights and duties relating to property. Because Congress was aware of its rising Commerce power, it could have viewed estate plans that featured parties from different states as “transactions involving commerce” in 1923.<sup>147</sup>

This point matters because, in 1924, before Congress passed the FAA, it changed “any contract or maritime transaction or transaction involving commerce” to “any maritime transaction or *a contract evidencing a transaction involving commerce*.”<sup>148</sup> Congress thus deleted the independent category of “transactions involving commerce.” It did so for two reasons. First, the original version of section 2 purported to regulate “any contract”—even “contract[s]” that did not “involve commerce.”<sup>149</sup> As several courts noted later, that would have been impermissible: “Congress ha[s] no power to legislate with respect to the validity of contracts” that lack a nexus to interstate commerce.<sup>150</sup> Combining “any contract” and “transactions involving

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*Dictionary* for proposition that “transaction” means “[t]he doing or performance of any business; management of any affair; performance”).

144. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (voiding federal statute that prohibited the interstate shipment of goods made by child labor on the grounds that manufacturing “is a matter of local regulation”).

145. *N.Y. Life Ins. Co. v. Deer Lodge Cnty.*, 231 U.S. 495, 503 (1913) (quoting *Paul v. Virginia*, 75 U.S. 168, 183 (1868)).

146. See *Bd. of Trade v. Olsen*, 262 U.S. 1, 36–37 (1923). The Court foreshadowed the explosive growth of the Commerce Clause during the New Deal by explaining that it would “not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.” *Id.* at 37 (quoting *Stafford v. Wallace*, 258 U.S. 495, 521 (1922)).

147. The House Report on the FAA implies as much, stating that federal “control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.” HOUSE REPORT, *supra* note 2, at 1.

148. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 279 (1995).

149. See *id.*

150. *Agostini Bros. Bldg. Corp. v. United States*, 142 F.2d 854, 856 (4th Cir. 1944); see also *Int’l Union United Furniture Workers of Am. v. Colonial Hardwood Flooring Co.*,

commerce” remedied this flaw. Second, the amendment’s sponsor, Senator Walsh, wanted to narrow the statute’s ambit. Senator Walsh had long opposed the expansion of federal jurisdiction, which at the time was perceived to favor corporate interests.<sup>151</sup> By eliminating “any contract,” he ensured that the FAA would not apply when federal courts were sitting in diversity and dealing with a contract that did not involve interstate commerce.<sup>152</sup>

More importantly, the Walsh amendment also clarifies that, in 1925, Congress likely believed that the FAA excluded wills and trusts. Indeed, the only “transactions” that fall under the revised statute must either (1) relate to admiralty or (2) be “contract[s].” The fact that Congress narrowed the FAA to exclude all other “transactions”—and by extension testamentary instruments—suggests that it expected courts to interpret the word “contract” literally. Nevertheless, as explained next, the Court has done precisely the opposite.

## 2. Federal Common Law

As even some Justices have admitted, the Court has expanded the FAA beyond what Congress envisioned in order to reap arbitration’s benefits.<sup>153</sup> One way the Court has done so is by

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168 F.2d 33, 37 (4th Cir. 1948) (“This was doubtless done in recognition of the lack of power in Congress to legislate generally with respect to the validity of contracts.”). The Court later endorsed this analysis. See *Allied-Bruce*, 513 U.S. at 279 (explaining that lawmakers could have “thought the words ‘any contract’ standing alone went beyond [their] constitutional authority”).

151. See Schwartz, *supra* note 24, at 21–22 (describing Senator Walsh as a “progressive politician and former plaintiffs’ lawyer” who “consistently supported legislation to curtail federal diversity jurisdiction”).

152. The Walsh amendment is critical to the debate over whether Congress intended the FAA to preempt state law. David Schwartz has argued that section 2’s original language, including its bare reference to “any contract,” reveals that the statute was a procedural law that would only apply in federal court. See *id.* at 22 n.109. After all, Congress could regulate “any contract” in federal court under its Article III powers but not in state court under the Commerce Clause. Although the Walsh amendment then deleted “any contract,” Schwartz argues that Walsh’s changes—given his political orientation—could only have been understood as an effort to further narrow the FAA. See *id.* at 22. On the other hand, Christopher Drahozal has noted that Congress may not have read the Walsh amendment as a substantive change. See Drahozal, *supra* note 55, at 143 n.243 (noting that Senator Sterling said that the amendment offers “a little different phraseology, but the purport is just the same as the language in the original bill” (quoting 66 CONG. REC. 2761 (1925))). Without wading into this debate, for this Article’s purposes the relevant point is that the Walsh amendment very well may have changed the FAA’s coverage by excluding “transactions involving commerce” that are not “contracts” (such as testamentary instruments).

153. See *supra* note 24 and accompanying text.

adopting a soft-focus view of the statute's contract-related elements.<sup>154</sup> This Section explains why the Court's approach has set the stage for testamentary arbitration. It makes two main points. First, rather than insisting that an arbitration clause appear in a "contract," federal common law predicates the FAA's applicability on the narrower issue of whether the parties have agreed to arbitrate. Second, testamentary instruments create reciprocal consensual relationships and thus can give rise to agreements to arbitrate.

*a. Underlying "Contract"*

Recall that several courts applying state law have refused to compel arbitration of claims brought by beneficiaries against trustees because testamentary instruments are "not contracts."<sup>155</sup> These cases focus on the formalistic differences between estate plans and contracts: the fact that beneficiaries offer neither "consent [n]or consideration to achieve the status of beneficiary."<sup>156</sup> However, these decisions straddle a major fissure between state and federal arbitration law. In stark contrast to state arbitration statutes, the FAA as interpreted by the Court does not require that an arbitration clause appear in an overarching contract.

Consider the separability doctrine. As noted, the separability rule transforms arbitration clauses into their own freestanding mini-contracts within larger container contracts.<sup>157</sup> If a party alleges that the arbitration clause is invalid under a defense such as fraud, duress, or unconscionability, the court decides the matter.<sup>158</sup> However, subject to qualifications discussed below, if a party merely challenges the enforceability of the container contract, the arbitrator resolves the claim.<sup>159</sup> In the latter circumstance, the case proceeds to arbitration without regard to whether there actually is a valid contract in which the arbitration clause is embedded. In fact, the Court recently offered a textual explanation for this result, observing that section 2 "states

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154. For a thoughtful, broader critique of the Court's application of contract principles in the arbitration context, see Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 132–33 (2012) (calling the Court's views "so alien to actual contract law as to defy the recurring assurances that arbitration is fundamentally about contracts or contract law").

155. *E.g.*, *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 613 (Ct. App. 2011), *vacated*, 257 P.3d 1129, 1129 (Cal. 2011).

156. *Id.*

157. *See supra* text accompanying notes 66–68.

158. *See supra* text accompanying notes 66–68.

159. *See supra* text accompanying notes 66–68.

that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained."<sup>160</sup>

*Buckeye Check Cashing, Inc. v. Cardegna*<sup>161</sup> vividly illustrates this point. The plaintiffs took out payday loans that included an arbitration clause. Later, they sued the lender, accusing it of charging usurious interest rates.<sup>162</sup> If the plaintiffs were correct, the loans were illegal and therefore void ab initio (they never actually came into existence).<sup>163</sup> Seizing on this fact, the plaintiffs argued that mandating arbitration would violate section 2, which governs arbitration clauses in "contracts," not failed, phantom agreements.<sup>164</sup> The Court disagreed, reasoning that "[w]e do not read 'contract' so narrowly."<sup>165</sup> As the Court explained, section 2's reference to "contract[s]" includes "putative" contracts "that later prove to be void."<sup>166</sup> Thus, without first establishing that the arbitration clause was anchored in a contract, the Court ordered arbitration.

Moreover, even outside of the separability doctrine, lower federal courts have not insisted that an arbitration clause appear in a contract. For example, in *Patterson v. Tenet Healthcare, Inc.*,<sup>167</sup> the Eighth Circuit compelled arbitration of an employee's civil rights

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160. *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (quoting 9 U.S.C. § 2 (2006)). This reading of section 2 conveniently ignores the savings clause, which states that the arbitration clause must be consistent with traditional contract law ("such grounds as exist at law or in equity for the revocation of any contract"). *Id.* at 2777 n.1. That omission allows the Court to sidestep the fact that under black letter law—and therefore under the plain language of section 2—contracts and their terms rise and fall together. Indeed, if a contract is invalid, all of its provisions are also invalid. *See, e.g.,* *Lemire v. Haley*, 19 A.2d 436, 439 (N.H. 1941) ("By great prevalence of authority an invalid or unenforceable part of an entire contract bars any recovery on the other part of the contract."). In an influential and insightful article, Alan Rau has defended the separability doctrine on the grounds that it is "facile to assume *a priori* that defects in the main agreement must vitiate the arbitration clause." Alan Scott Rau, *Everything You Really Need To Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 27 (2003). But this "facile . . . assum[ption]" is a dead-on description of orthodox contract law—which section 2 expressly requires courts to apply. *See, e.g.,* Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 123, 127 (2007) ("My research revealed no cases in which courts held that a misrepresentation [or duress] only prevented enforcement of some of the contract's terms.").

161. 546 U.S. 440 (2006).

162. *Id.* at 442.

163. *Id.* at 443.

164. Brief for Respondent at 2–3, *Buckeye*, 546 U.S. 440 (No. 04-1264), 2005 WL 2376814, at \*2.

165. *Buckeye*, 546 U.S. at 448.

166. *Id.*

167. 113 F.3d 832 (8th Cir. 1997).

claim against her former employer.<sup>168</sup> The court did so even though the arbitration clause the employer sought to invoke appeared in an employee handbook, which was not a contract under state law.<sup>169</sup> In fact, the handbook expressly provided that it was “not intended to constitute a legal contract” and that “no written statement or agreement in this handbook concerning employment is binding.”<sup>170</sup> The court looked past these obstacles and concluded that “the arbitration clause stands alone.”<sup>171</sup>

Similarly, in *Metro East Center for Conditioning & Health v. Qwest Communications*,<sup>172</sup> Qwest, a telephone carrier, placed an arbitration clause in its tariff with the Federal Communications Commission (“FCC”). Qwest sought to compel arbitration of a dispute with Metro East.<sup>173</sup> The district court denied the motion, reasoning that tariffs—regulatory filings to which customers never affirmatively agree—are not contracts.<sup>174</sup> The Seventh Circuit reversed, reasoning that the FAA simply requires “an offer and acceptance that produces a legally binding document.”<sup>175</sup> According to the Seventh Circuit, tariffs result from such a process:

The tariff is an offer that the customer accepts by using the product . . . . Metro East supposes that to form an “agreement” with Qwest it must engage in individual negotiation, clause by clause. A tariff is a take-it-or-leave-it proposition and thus not an “agreement” by these lights. Yet we have held that form contracts, offered on a take-it-or-leave-it basis, are agreements for purposes of the [FAA].<sup>176</sup>

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168. *Id.* at 835.

169. *See id.* (“Under Missouri law, employee handbooks generally are not considered contracts, because they normally lack the traditional prerequisites of a contract.”).

170. *Id.*

171. *Id.*; *cf. Ex parte Beasley*, 712 So. 2d 338, 341 (Ala. 1998) (reaching the opposite conclusion where a handbook contained an arbitration clause but an employee signed a separate acknowledgement form that did not contain an arbitration clause).

172. 294 F.3d 924 (7th Cir. 2002).

173. *Id.* at 926.

174. *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l*, 182 F. Supp. 2d 726, 729 (S.D. Ill. 2002) (“In this case, there was no contract between Qwest and Metro East. The arbitration clause at issue is contained in a tariff filed with the FCC. The unilateral and nonnegotiable nature of a tariff filed with the FCC negates any contention that a tariff constitutes an ‘agreement’ between parties.”).

175. *Metro E.*, 294 F.3d at 926.

176. *Id.* (citations omitted). Oddly, the Seventh Circuit framed the issue as whether the tariff satisfied section 3 of the FAA, not section 2. *See id.* Section 3 states that federal district courts must grant a stay of litigation “[i]f any suit or proceeding be brought . . . upon any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3 (2006). Section 3 thus uses the broader term “agreement,” not



Because Metro East had used Qwest's services, the court determined that Metro East had agreed to arbitrate.<sup>177</sup>

Finally, the Supreme Court's 2010 decision in *Rent-A-Center West, Inc. v. Jackson*<sup>178</sup> reveals another way in which the FAA does not require that an arbitration clause appear in a separate "contract." In that case, Rent-A-Center made employees sign a freestanding document entitled "Mutual Agreement to Arbitrate Claims."<sup>179</sup> The Court held that this "arbitration agreement and nothing more"<sup>180</sup> fell under section 2.<sup>181</sup> Similarly, other judges have also enforced bare contracts to arbitrate even though there is no independent document in which the arbitration clause appears.<sup>182</sup>

Accordingly, the fact that state law insists that an arbitration clause appear in a "contract" is irrelevant for the purposes of the FAA. As discussed below, the test for whether the FAA applies is looser and fuzzier: whether the parties have agreed to arbitrate. And wills and trusts are as capable of giving rise to agreements to arbitrate as illegal loans, non-binding employment handbooks, and FCC tariffs.

#### b. *Agreement To Arbitrate*

What explains separability cases like *Buckeye*, in which courts compel arbitration despite the fact that there may be no "contract" in which the arbitration clause appears? Leading arbitration scholars argue that the separability doctrine hinges on a relatively straightforward concept: "the existence of an agreement to arbitrate."<sup>183</sup> According to this view, the Court's binary, bright-line

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the narrower term "contract." Cf. 9 U.S.C. § 2 (purporting to make arbitration clauses in "contract[s]" enforceable). Yet given the fact that the court also referred to tariffs as "a species of contract," it appears that this nuance did not affect the outcome. *Metro E.*, 294 F.3d at 926.

177. *Metro E.*, 294 F.3d at 926.

178. 130 S. Ct. 2772 (2010).

179. *Id.* at 2775.

180. *Id.* at 2781–82 (Stevens, J., dissenting).

181. *Id.* at 2777–80 (majority opinion). The Mutual Agreement to Arbitrate Claims contained a "delegation clause," which entrusted the arbitrator with determining the very question of whether the Mutual Agreement to Arbitrate Claims was enforceable. *See id.* at 2776. Invoking the separability doctrine, the Court conceptualized the delegation clause as an independent arbitration clause ("an agreement to arbitrate threshold issues concerning the arbitration agreement") within a broader contract to arbitrate (the Mutual Agreement to Arbitrate Claims). *Id.* at 2777. As a result, the Court held that employees could not challenge the validity of the Mutual Agreement to Arbitrate Claims in court; rather, the delegation clause required them to arbitrate that issue. *See id.* at 2779–80.

182. *See, e.g., Morris v. Homeowners Loan Corp.*, No. 06-CV-13484-DT, 2007 WL 674770, at \*2 (E.D. Mich. Feb. 28, 2007).

183. Rau, *supra* note 160, at 15.

description of separability—that it permits judges to decide challenges to the arbitration clause, but not the container contract<sup>184</sup>—is a gross oversimplification. Suppose a party contends that she is a minor, or lacks capacity, or reasonably did not believe that she was even entering into a binding deal. In those instances, even though the party argues that the container contract is unenforceable, her allegation also imperils the arbitration clause.<sup>185</sup> Indeed, the gravamen of her assertion is that she could not legally consent to *anything*, including arbitration.<sup>186</sup> Thus, despite the Court’s rhetoric, judges should resolve claims that revolve around the “‘nonexistence’ of the agreement to arbitrate itself”,<sup>187</sup> indeed, the Court has never squarely held otherwise.<sup>188</sup>

However, this principle has an important corollary: if both parties are capable of offering legally cognizable assent, it is possible that they *did agree* to have the arbitrator decide whether the container contract is valid.<sup>189</sup> The very point of an arbitration clause is to permit arbitrators to settle all controversies between the parties, and the enforceability of the container contract is such a controversy.<sup>190</sup> As a result, any time a party attacks the container contract under a defense such as fraud, duress, or mistake, the question arises: did the parties mean to entrust that matter to the arbitrator? This is where the separability doctrine kicks in. Courts rarely have evidence about whether the parties intended to submit disputes about the validity of the container contract to arbitration. Thus, they must fall back on a default rule.<sup>191</sup> And that is exactly what the separability doctrine is: a federal common law background principle that infers that the parties wish to arbitrate *all* matters relating to the container contract, including its susceptibility to a

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184. See, e.g., *Rent-A-Center W., Inc.*, 130 S. Ct. at 2778 (“If a party challenges the validity . . . of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (distinguishing between “challenges specifically [to] the validity of the agreement to arbitrate” and “challenges [to] the contract as a whole”).

185. Rau, *supra* note 160, at 14.

186. See *id.*

187. *Id.* at 15.

188. Cf. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2858 (2010) (opining that judges must decide issues that pertain to the “formation of the parties’ arbitration agreement”). This issue is discussed in further depth *infra* notes 310–22.

189. See Rau, *supra* note 160, at 18–21.

190. See *id.* at 32.

191. See *id.* at 29.

traditional contract defense.<sup>192</sup> As Alan Rau contends, this implicit agreement to arbitrate “is no more a ‘fiction’ than is our usual assumption that a seller has promised to deliver merchantable goods.”<sup>193</sup> At bottom, then, separability boils down to whether there is an agreement to arbitrate, with “agreement” defined the same way it is “use[d] . . . every day in the realm of contract.”<sup>194</sup>

At first blush, this default presumption of arbitrability seems to provide a hook for testamentary arbitration. If the mere existence of an arbitration clause in a contract suggests that the parties have agreed to arbitrate all disputes about the contract, then perhaps the same holds true for estate plans. Nevertheless, that argument overlooks a key difference between the contractual and testamentary domains. Parties to a purported contract have, at minimum, manifested assent to the purported contract—an action that can be seen as the source of their pact to arbitrate disputes related to the document’s validity. Yet recall the limits of this principle: courts cannot imply an agreement to arbitrate when one party alleges that she *never actually agreed* to the contract. As discussed in greater depth below, many probate litigants make precisely such a claim with respect to wills and trusts. For example, if an omitted heir contends that an entire trust was obtained by undue influence, there is simply no basis to deem him to have acquiesced to any part of the instrument. He is no more bound by the trust than he is by a contract between two strangers. Thus, the default rule approach to contractual separability—the idea that the mere existence of an arbitration clause in a document triggers a finding that the parties have agreed to arbitrate disputes about that document—does not translate neatly into the realm of decedents’ estates.

At the same time, though, some parties to an estate plan engage in affirmative conduct that manifests their assent to arbitrate. Indeed,

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192. See *id.* at 29–34; see also Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1121 (2011) (calling separability “a default rule for allocation of authority” between courts and arbitrators). A detailed critique of this perspective is outside the scope of this Article. Nevertheless, I am not persuaded that the separability doctrine can be classified as a default rule. Default rules *supply* terms to existing agreements—they do not *create* agreements out of whole cloth. Thus, to use Professor Rau’s example, the implied warranty of merchantability requires sellers to deliver quality goods but does not require sellers to deliver goods in the first instance. Rau, *supra* note 160, at 29–34. Conversely, the separability doctrine does something that no default rule does: it binds parties together who otherwise would not be bound. Cf. Ware, *supra* note 160, at 123 n.107 (“Rules about what constitutes an enforceable contract cannot be default rules because they are logically prior to the concept of ‘default rule.’”).

193. Rau, *supra* note 160, at 29.

194. *Id.* at 8 (emphasis omitted).

courts find agreements to arbitrate in contexts that are indistinguishable from the dynamic in probate. For instance, sometimes a contract that contains an arbitration clause expires, but the parties continue to act as though it governs their relationship. Because the FAA only mandates that arbitration clauses be “written”—not signed<sup>195</sup>—courts hold that the parties entered into an implied-in-fact contract to arbitrate.<sup>196</sup> As the Third Circuit explained, the arbitration provision “survive[s] intact unless either one of the parties clearly and manifestly indicates . . . that it no longer wishes to continue to be bound.”<sup>197</sup> Likewise, a robust equitable estoppel doctrine emanates from the FAA. It prevents parties from asking judges to honor “specific terms of [an] agreement while seeking to avoid [its] arbitration provision.”<sup>198</sup> In fact, courts have applied this principle to bind a decedent’s heirs and beneficiaries to an arbitration clause in the decedent’s pension, health plan, or retirement account.<sup>199</sup> The reasoning in these cases—that the arbitration clause

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195. See, e.g., *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (“[T]he FAA requires arbitration agreements to be written, [but] it does not require them to be signed.”); *Valero Ref., Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64 (5th Cir. 1987) (“It is established that a party may be bound by an agreement to arbitrate even in the absence of his signature.”).

196. Implied-in-fact contracts are “based on a tacit promise, one that is inferred in whole or in part from the parties’ conduct.” *Gem Broad., Inc. v. Minker*, 763 So. 2d 1149, 1150 (Fla. Dist. Ct. App. 2000) (quoting *Commerce P’ship 8098 Ltd. P’ship v. Equity Contracting Co.*, 695 So. 2d 383, 385 (Fla. Dist. Ct. App. 1997) (en banc)); see also *RESTATEMENT (SECOND) OF CONTRACTS* § 4 (1981) (“A promise . . . may be inferred wholly or partly from conduct.”). For implied-in-fact agreements to arbitrate, see *Luden’s Inc. v. Local Union No. 6 of the Bakery*, 28 F.3d 347, 356 (3d Cir. 1994); *Johnson v. Long John Silver’s Restaurants, Inc.*, 320 F. Supp. 2d 656, 664 (M.D. Tenn. 2004); *Durkin v. CIGNA Property & Casualty Corp.*, 942 F. Supp. 481, 487 (D. Kan. 1996); *Kropf v. Snap-On Tools Corp.*, 859 F. Supp. 952, 955 (D. Md. 1994).

197. *Luden’s*, 28 F.3d at 355–56; cf. *Williamsbridge Manor Nursing Home v. Local 144 Div. of 1199, Nat’l Health & Human Servs. Emp’rs Union*, 107 F. Supp. 2d 222, 226 (2000) (rejecting the rule in *Luden’s* in the context of a collective bargaining agreement).

198. *S.W. Tex. Pathology Assocs. v. Roosth*, 27 S.W.3d 204, 208 (Tex. App. 2000); see also *Wash. Mut. Fin. Grp. LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004) (noting that the FAA’s version of equitable estoppel prohibits parties from “having it both ways” (internal quotation marks omitted)). Most courts have construed this rule not to be an extension of state contract principles but rather part of the “federal substantive law of arbitrability.” *R.J. Griffin & Co. v. Beach Club II Homeowners Ass’n*, 384 F.3d 157, 160 n.1 (4th Cir. 2004) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 416 (4th Cir. 2000)).

199. See *Shahan v. Staley (In re Shahan Irrevocable and Inter Vivos Trust)*, 932 P.2d 1345, 1348 (Ariz. Ct. App. 1996) (holding that a “trust beneficiary[] was the intended third-party beneficiary of the customer agreement between the trust and [the trustee]”); *Collins v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 561 So. 2d 952, 955 (La. Ct. App. 1990) (binding “the successors and assigns of the customer” to arbitration clause in financial services agreement). But see *Clark v. Clark*, 57 P.3d 95, 99 (Okla. 2002)

survives the signatory's death and governs her "intended successors"<sup>200</sup>—applies with full force to arbitration provisions in estate plans. And as one court noted, "[d]ecedents are able to bind their heirs through wills and other testamentary dispositions so the concept is not new or illogical."<sup>201</sup>

As in these contexts, parties to an estate plan can agree to arbitrate by accepting benefits under the terms of an instrument that contains an arbitration clause. Consider the inter vivos trust. A settlor transfers property to a trustee to manage for the settlor's benefit during life, and then for the beneficiaries after the settlor dies. In the written trust instrument, the settlor agrees to pay the trustee's fee in return for the trustee's promise to manage the corpus as instructed. Because the settlor dictates the terms and the trustee can either accept or decline them, their "relationship is . . . contractual."<sup>202</sup> For instance, in the nineteenth century, the great legal historian Frederic Maitland explained that trusts revolve around agreement:

Why at all events should not the courts of law treat this bargain as a contract? An agreement there certainly is. In consideration of a conveyance made by A to X, Y, Z, the said X, Y, Z, agree that they will hold the land for the behoof of A, will allow him to enjoy it, and will convey it as he shall direct . . . [A] trust generally has its origin in something that we can not [sic] but call an agreement.<sup>203</sup>

Decades later, a California appellate court echoed this view:

A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party. The trustor declares that he will transfer certain property to a trustee if the trustee agrees to use and dispose of the property and its proceeds in a manner designated by the trustor for the benefit

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(arbitration clause signed by trustee did not apply to residual beneficiary, who was unaware of its existence).

200. *Jansen v. Salomon Smith Barney, Inc.*, 776 A.2d 816, 821 (N.J. Super. Ct. App. Div. 2001); *see also* *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 727 (Miss. 2001) ("As a successor of Hilliard, Henry is covered by the arbitration clause of the client agreements.").

201. *Herbert v. Superior Court*, 215 Cal. Rptr. 477, 481 (Ct. App. 1985).

202. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 643 (2004).

203. F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 28 (John Brunyate rev. ed., 1936).

of third parties. There is in this situation an offer by the trustor and an acceptance by the trustee.<sup>204</sup>

And more recently, John Langbein has argued that trusts are “deals” between the settlor and trustee because they feature the “bedrock elements” of contract: “consensual formation and consensual terms.”<sup>205</sup>

Similarly, when an individual accepts the position of executor under a will that contains an arbitration provision, she too agrees to arbitrate. Indeed, “[y]ou cannot be appointed executor of a will against your wishes.”<sup>206</sup> To be sure, wills differ from inter vivos trusts because the testator will be dead when the person named as executor must decide whether to serve. In contract law, the death of an offeror usually revokes an offer.<sup>207</sup> Yet the basis for this rule is that once the offeree knows about the offeror’s demise, the offeree can no longer reasonably rely on the offer.<sup>208</sup> This rationale does not apply to “offers” embedded in estate plans, which are specifically intended to remain open after death.<sup>209</sup> And indeed, the law recognizes the normative significance of the fact that trusteeship and executorship are voluntary. Once a trustee or executor assumes her role, she accepts—and is bound by—all of an instrument’s terms.<sup>210</sup> There is no reason to treat an arbitration clause differently.<sup>211</sup>

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204. *In re Estate of Bodger*, 279 P.2d 61, 67 (Cal. Ct. App. 1955). *But see* *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610, 613 (Ct. App. 2011), *opinion vacated by* 257 P.3d 1129, 1129 (Cal. 2011) (disapproving of *Bodger* and calling its discussion dicta).

205. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 671 (1995). Testamentary trusts, which arise out of wills, likewise are “consensual,” as “[t]he testamentary trustee decides whether to accept the trust on the terms contained in the instrument and in the background default law of trusts.” *Id.* at 637. The only non-contractual form of trust is the declaration of trust in which the settlor declares that she holds property as trustee for the benefit of others. After all, “[t]he settlor cannot contract with himself or herself.” *Id.* at 627. Yet the declaration of trust plays a minor role in modern estate planning. *Id.* at 628.

206. *Id.* at 637 (noting that wills “exhibit[] the twin features of contractarianism—consensual formation and consensual terms”).

207. See RESTATEMENT (SECOND) OF CONTRACTS § 48 (1981).

208. See Val D. Ricks, *The Death of Offers*, 79 IND. L.J. 667, 686 (2004).

209. In addition, this Article will return to the issue of whether arbitration clauses in estate plans must satisfy the black letter test for contractual validity *infra* Part II.A.2.c.

210. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) (noting that the testator or settlor’s intent as specified in the instrument controls); see also *In re Estate of Bodger*, 279 P.2d 61, 67–68 (Cal. Ct. App. 1955) (drawing on contract principles to hold that courts lack the power to override the trustee’s fee as stated in the instrument).

211. To be sure, wills are less contractual than trusts in other ways, too. Unlike contracts, which are private, wills generally must be lodged with the clerk of court, available for all to see. Also, the administration of a testator’s estate under a will is usually

Likewise, when beneficiaries inherit under an estate plan, they forge a contract-like link with the testator or settlor. For one, beneficiaries usually enjoy several months to decide whether to disclaim a bequest.<sup>212</sup> In addition, beneficiaries remain free to challenge the validity of a will or trust—conduct that is incompatible with the idea that they have consented to the instrument. Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the testator or settlor. As in the expired contract cases, when they do not do so, their “assent [to arbitrate] may fairly be inferred.”<sup>213</sup> The nineteenth century opinions that analogized arbitration clauses in estate plans to conditional gifts are instructive.<sup>214</sup> As these courts recognized, a will or trust with an arbitration clause puts beneficiaries to an election: either renounce the gift or take it subject to the strings attached. This choice is indistinguishable from an offer to enter into a contract. For instance, as the Supreme Court of Appeals of West Virginia explained, a testamentary instrument may not formally be “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.”<sup>215</sup>

In sum, wills and trusts can serve as the springboard for agreements to arbitrate. To be sure, estate plans do not involve bargaining; likewise, executors, trustees, and beneficiaries assent to the instrument by failing to denounce it, rather than by affirmatively selecting its provisions. Yet courts routinely enforce adhesive consumer and employment contracts under precisely those

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subject to court supervision. Nevertheless, these nuances do not diminish the most important fact for my purposes: that executorship is voluntary, and executors are deemed to agree to—and abide by—the terms of the will.

212. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 36(c) (1959). Compare *Brodhag v. United States*, 319 F. Supp. 747, 751 (S.D. W. Va. 1970) (stating that a disclaimer must occur two months after will is admitted into probate), with *In re Estate of Meland*, 712 N.W.2d 1, 3 (S.D. 2006) (stating that a disclaimer must occur within nine months of the testator or settlor’s death).

213. *D’Angelo v. Bob Hastings Oldsmobile, Inc.*, 453 N.Y.S.2d 503, 504 (App. Div. 1982).

214. See *supra* notes 47–49.

215. *Moore v. Harper*, 27 W. Va. 362, 374 (1886); see also *Am. Bd. of Comm’rs of Foreign Missions v. Ferry*, 15 F. 696, 701 (C.C.W.D. Mich. 1883) (“The testator had the legal right to give or not to give, and giving, he had the right to bestow his bounties on such conditions, and with such limitations and restrictions as he chose to impose.”); cf. *Spitko*, *supra* note 23, at 299 (arguing that “the testator ought to be able to condition any distribution of her property on compliance with her reasonable directions respecting resolution of disputes over her estate”).

conditions.<sup>216</sup> Thus, by accepting benefits—fees or property—under a will or trust that contains an arbitration clause, executors, trustees, and beneficiaries fall within the FAA’s coverage.

*c. The Savings Clause*

Recall that section 2 instructs courts to ensure that arbitration clauses comply with “such grounds that exist at law or in equity for the revocation of any contract.”<sup>217</sup> Even if the FAA does not require an arbitration clause to appear in a “contract,” this savings clause seems to introduce contract law through the back door: like “any contract,” arbitration clauses cannot fall prey to formation defects (like lack of assent or indefiniteness) or defenses (such as fraud, duress, or unconscionability). This rubric leads to two counterarguments to my thesis.

First, recall the state court cases that have refused to enforce arbitration clauses on the grounds that testamentary instruments do not involve “an exchange of promises.”<sup>218</sup> Although these cases hold that estate plans are not “contracts,” their reasoning can be refashioned into a different objection to my reading of the statute. The absence of consideration—a pillar of contract formation—is a ground for revoking a contract.<sup>219</sup> Technically, wills and trusts law does not require beneficiaries to provide something of value to any other party.<sup>220</sup> Thus, perhaps even if estate plans generate agreements to arbitrate, these agreements lack consideration, rendering them invalid under the savings clause.

I have several responses. For one, just as the Court has not interpreted “contract” rigidly, the Court has also disregarded the

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216. *Cf. Metro E. Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l*, 294 F.3d 924, 926 (7th Cir. 2002) (rejecting the argument that “individual negotiation, clause by clause” is a prerequisite for an agreement to arbitrate under the FAA); Langbein, *supra* note 205, at 637 (noting that the “deal” between the testator or settlor and the executor or trustee “is of the take-it-or-leave-it type, like the movie-theater ticket or the vending-machine contract; there is no negotiating terms with a decedent”).

217. 9 U.S.C. § 2 (2006).

218. *See, e.g., Schoneberger v. Oelze*, 96 P.3d 1078, 1080 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2011), *as recognized in Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598 (Ct. App. Feb. 22, 2011).

219. *See* 9 U.S.C. § 2; *cf. Rachal v. Reitz*, 347 S.W.3d 305, 311 (Tex. App. 2011) (en banc) (refusing to enforce arbitration clause in trust because, among other things, “consideration is . . . a fundamental element of every valid contract” (internal citation and quotation marks omitted)).

220. This Article focuses on beneficiaries because executors and trustees nearly always engage in conduct that would satisfy the test for consideration: agreeing to manage the decedent’s property in return for the payment of fees out of the estate.



savings clause when necessary to “promote arbitration.”<sup>221</sup> For instance, the Court has held that the FAA preempts the longstanding contract defense of violation of public policy.<sup>222</sup> Likewise, the Court enforced an arbitration provision that did not comply with the savings clause in *AT&T Mobility LLC v. Concepcion*.<sup>223</sup> The Supreme Court of California had held that class arbitration waivers in consumer contracts could be unconscionable because they prevent plaintiffs from prosecuting numerous low-value claims.<sup>224</sup> But *Concepcion* held that the FAA preempted the state supreme court’s interpretation of its own contract law.<sup>225</sup> The court reasoned that because class arbitration is slower and more formal than two-party arbitration, California’s attempt to guarantee such procedures through the unconscionability doctrine “stand[s] as an obstacle to the accomplishment of the FAA’s objectives.”<sup>226</sup> Thus, literal compliance with the savings clause is actually not a prerequisite.

With this nudge from federal law, beneficiaries likely come close enough to providing consideration to satisfy the savings clause. The notoriously toothless test for consideration simply requires one party to surrender a legal right in accordance with another party’s wishes.<sup>227</sup> By forgoing the opportunity to litigate in court in response to the testator or settlor’s request, beneficiaries meet this criterion. As a general matter, arbitration clauses in estate plans—like all conditional gifts—“are not true gratuities at all” because, “[l]ike a contract, they require performance of a quid pro quo.”<sup>228</sup>

Moreover, as discussed above, there is a plausible argument that wills and trusts are “contracts” for the purposes of the FAA. Indeed, estate plans seem as contractual as the myriad non-contracts that

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221. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

222. 9 U.S.C. § 2; *see, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 18–20 (Stevens, J., concurring in part and dissenting in part).

223. 131 S. Ct. at 1749.

224. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1108–10 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. at 1749.

225. *Concepcion*, 131 S. Ct. at 1753.

226. *Id.* at 1748. Because the contract at issue contained a “blowup” clause—which specified that if a court annulled the class arbitration waiver, “the entirety of this arbitration provision shall be null and void”—there was no dispute that the class arbitration waiver (and by extension the entire arbitration clause) violated a ground for the revocation of any contract. Brief for Respondents at 3, *Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 4411292, at \*3. Yet, the case did continue to arbitration.

227. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

228. Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2194 (2011).

have spawned agreements to arbitrate.<sup>229</sup> And when arbitration provisions are part of a larger contract—or at least what passes for a “contract” under the FAA—they need not boast their own separately identifiable consideration. Instead, they can ride the wake of the consideration that underlies the broader “contract.”<sup>230</sup> Thus, testamentary arbitration provisions are not necessarily incompatible with “grounds . . . for the revocation of any contract.”<sup>231</sup>

A second savings clause-related objection is that this Article’s interpretation of the FAA creates an anomaly. The savings clause permits courts to strike down arbitration clauses under contract doctrine and *only* contract doctrine. But extending the statute to probate matters would create situations in which arbitration clauses might be invalid under wills and trusts law, not contract law. For instance, several jurisdictions limit the enforceability of “exculpatory clauses” in trusts, which they define as terms “relieving a trustee of liability for breach of trust.”<sup>232</sup> Suppose a trust’s arbitration clause violates this rule by barring awards of consequential or punitive damages against the trustee. Because the anti-exculpatory clause doctrine is not a “ground[] . . . [to] revok[e] any contract,”<sup>233</sup> the plain language of the savings clause seems to preclude a probate judge from invoking the rule. In turn, this awkward, unpalatable result reinforces the fact that Congress never meant the FAA to apply to decedents’ estates.

Although I acknowledge that this is a forceful argument, I am ultimately not persuaded. For starters, the overwhelming majority of grounds to invalidate an estate plan overlap with contract defenses. Indeed, both bodies of law recognize rules such as fraud, duress,

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229. See *supra* notes 161–77.

230. For cases holding that an arbitration clause need not be supported by its own independent consideration, see *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 180 (3d Cir. 1999); *Doctor’s Associates, Inc. v. Distajo*, 66 F.3d 438, 451–53 (2d Cir. 1995); *Wilson Electric Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 168–69 (6th Cir. 1989); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp. 2d 804, 807 (N.D. Ill. 1999).

231. 9 U.S.C. § 2 (2006).

232. UNIF. TRUST CODE § 1008(a), 7C U.L.A. 126 (Supp. 2008) (requiring exculpatory clauses to satisfy heightened disclosure standards and be substantively reasonable if they were inserted by a fiduciary or its lawyers); see, e.g., *Rutanen v. Ballard*, 678 N.E.2d 133, 141 (Mass. 1997) (striking down exculpatory clause); RESTATEMENT (SECOND) OF TRUSTS § 222, cmt. d (1959) (articulating a six-factor test for the validity of exculpatory clauses); cf. *Ams. for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust*, 855 N.E.2d 592, 598 (Ind. Ct. App. 2006) (rejecting challenge to exculpatory clause because complaining parties “were all represented by numerous sophisticated attorneys who are experienced in the area of trusts and estate planning”).

233. 9 U.S.C. § 2; *Southland Corp. v. Keating*, 465 U.S. 1, 18–20 (Stevens, J., concurring in part and dissenting in part).

incapacity, undue influence, mistake, impossibility, and violation of public policy.<sup>234</sup> And as I have discussed elsewhere, the anti-exculpatory clause doctrine in trust law bears a strong resemblance to—and could easily be replaced by—the contract defense of unconscionability.<sup>235</sup> Thus, the fact that the savings clause forbids judges from invalidating testamentary arbitration clauses under wills and trusts principles makes almost no practical difference.

In addition, to take the savings clause at face value—as limiting judges to nullifying arbitration clauses on “grounds . . . for the revocation of any contract”<sup>236</sup>—is to exclude many *contract* principles. Only a handful of rules actually govern “any contract.” For example, courts routinely find arbitration clauses to be unenforceable “material alteration[s]” to offers under the Uniform Commercial Code (“UCC”) section 2-207.<sup>237</sup> But the UCC does not apply to “any contract”—it only controls contracts for the sale of goods.<sup>238</sup> Accordingly, it does not make sense to overemphasize the text of the savings clause, and the mere fact that wills and trusts rules are not “grounds . . . for the revocation of any contract”<sup>239</sup> should not be fatal to testamentary arbitration.<sup>240</sup>

### B. “Involving Commerce”

The FAA governs arbitration clauses in contracts “evidencing a transaction involving commerce.”<sup>241</sup> The statute borrows its definition of “commerce” from the Commerce Clause: “commerce . . . among the several States.”<sup>242</sup> Thus, in 1995, the Supreme Court held in *Allied-Bruce v. Terminix Cos.*<sup>243</sup> that Congress intended the FAA to extend to the outer perimeter of the Commerce power.<sup>244</sup> But shortly

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234. See, e.g., David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1680 (2009).

235. See *id.* at 1727–31.

236. 9 U.S.C. § 2.

237. See, e.g., *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283–85 (10th Cir. 1997).

238. See U.C.C. § 2-102 (2011).

239. 9 U.S.C. § 2.

240. However, the disconnect between wills and trusts law and contract law does raise novel preemption issues, which is addressed *infra* Part III.D.

241. *Infra* Part III.D.

242. 9 U.S.C. § 1. *But see* U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . [t]o regulate commerce . . . among the several states . . .”).

243. 513 U.S. 265 (1995).

244. *Id.* at 277. The Court reached this conclusion despite the fact that no other federal statute uses the phrase “involving commerce.” See *id.* at 273–74 (interpreting “involving commerce” to be the equivalent of “in commerce” or “affecting commerce”); see also *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (foreshadowing the holding in *Allied-Bruce* by

afterward, the Court muddled the waters by striking down two federal statutes for lacking a nexus to interstate commerce. In *United States v. Lopez*,<sup>245</sup> the Court nullified a law that criminalized the possession of a firearm in a school zone, reasoning that it “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>246</sup> Then, in *United States v. Morrison*,<sup>247</sup> the Court invalidated the civil remedies provision of the Violence Against Women Act, explaining that Congress lacks the authority to “regulate noneconomic, violent criminal conduct based solely on [its] aggregate effect on interstate commerce.”<sup>248</sup> These cases threw lower courts into disarray over whether the FAA governed arbitration clauses in wholly intrastate transactions.<sup>249</sup>

Recently, in *Citizens Bank v. Alafabco*,<sup>250</sup> the Court reaffirmed the FAA’s vast scope.<sup>251</sup> A bank and a construction company, both from Alabama, entered into a loan restructuring contract that included an arbitration clause.<sup>252</sup> Despite the intrastate nature of the transaction, the Court held that the FAA applied for several reasons. First, the Court reasoned that even if the agreement at issue did not substantially affect interstate commerce, Congress can regulate patently “economic” activity as a “general practice.”<sup>253</sup> The Court found that commercial lending, with its heavy impact on the market, met this criterion and thus was subject to wholesale congressional control.<sup>254</sup> Second, the Court noted that the construction company had used the loan to fund projects not just in Alabama, but also in North Carolina and Tennessee.<sup>255</sup> Finally, the Court explained that

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opining that the FAA “provide[s] for the enforcement of arbitration agreements within the full reach of the Commerce Clause”).

245. 514 U.S. 549 (1995).

246. *Id.* at 561.

247. 529 U.S. 598 (2000).

248. *Id.* at 617.

249. *Compare* *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 761–62 (Ala. 2000) (finding that *Lopez* partially overruled *Allied-Bruce*), *with* *Basura v. U.S. Home Corp.*, 120 Cal. Rptr. 2d 328, 333 n.8 (Ct. App. 2002) (“*Lopez* did not purport to abrogate, limit or distinguish *Allied-Bruce*.”), *and* *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370, 375 (Tex. App. 1999) (“The Texas courts of appeals have split on the issue. . .”).

250. 539 U.S. 52 (2003) (*per curiam*).

251. *Id.* at 56–58.

252. *Id.* at 53–55.

253. *Id.* at 56–57.

254. *Id.* at 58.

255. *Id.* at 57.

the loans were secured by the construction company's assets, which included goods made from out-of-state materials.<sup>256</sup>

Despite the breadth of *Citizens Bank*, wills and trusts do not fit snugly into the Court's Commerce Clause jurisprudence. For one, it is unclear whether the appropriate "transaction" is the creation of the will or trust or the post-death administration of a decedent's property. But then again, it may not matter: both estate planning and administration boast a deep economic footprint. As noted, Americans bequeath hundreds of billions of dollars annually.<sup>257</sup> Trusts in particular have become "big business indeed."<sup>258</sup> For instance, in 2007, irrevocable trusts alone generated \$142.5 billion in income and \$3.7 billion in trustees' fees.<sup>259</sup> These assets are often managed across state lines. In fact, one of the most debated trends in decedents' estates has been jurisdictional competition for trust funds.<sup>260</sup> Settlers can opt into the law of any state simply by transferring assets into its

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256. *Id.* After *Citizens Bank*, successful Commerce Clause-based challenges to the applicability of the FAA have been few and far between. Some such cases involve unusual facts. See, e.g., *Slaughter v. Stewart Enters.*, No. C 07-01157, 2007 WL 2255221, at \*3, \*8 (N.D. Cal. Aug. 3, 2007) (finding an arbitration clause in crematorium's employment contract was not "a transaction involving commerce" because the cemetery business is state-licensed and does not involve products shipped between states); *Jim Parker Bldg. Co. v. G & S Glass & Supply Co.*, 69 So. 3d 124, 133–34 (Ala. 2011) (noting that the party seeking enforcement "wholly failed to allege that the contract evidences a transaction involving interstate commerce . . . [and] failed to even mention the phrase 'interstate commerce' in its motion to compel arbitration"). At least one other court refused to find a link to interstate commerce in a nursing home admission contract: a holding that may reflect distaste over the foisting of arbitration clauses upon vulnerable elders more than clear-eyed analysis of the Commerce Clause. See *Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) (explaining that nursing home admission contract "involves a profoundly local transaction—in-state nursing home care provided to an Oklahoma individual by an Oklahoma entity licensed under Oklahoma law"). But see *Carter v. SSC Odin Operating Co.*, 955 N.E.2d 1233, 1240 (Ill. App. Ct. 2011) ("The [nursing home] facility's aggregate economic activities clearly have an effect upon interstate commerce . . ."); *Estate of Ruszala v. Brookdale Living Cmtys., Inc.*, 1 A.3d 806, 817 (N.J. Super. Ct. App. Div. 2010) ("Clearly these nursing home facilities cannot function without the materials procured from . . . out-of-state suppliers."). For other cases that found that facilities used out-of-state materials, see *Canyon Sudar Partners, LLC v. Cole*, No. 3:10–1001, 2011 WL 1233320, at \*9 (S.D. W. Va. Mar. 29, 2011); *Oesterle v. Atria Management Co.*, No. 09-4010, 2009 WL 2043492, at \*6 (D. Kan. Jul. 14, 2009); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987–88 (Ala. 2004); *Triad Health Management of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785, 787–88 (Ga. Ct. App. 2009); and *Fosler v. Midwest Care Center II, Inc.*, 928 N.E.2d 1, 15 (Ill. App. Ct. 2009).

257. See *supra* note 11 and accompanying text.

258. *DUKEMINIER ET AL.*, *supra* note 16, at 544.

259. *Id.*

260. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1312–16 (2003) (describing the forces that led states to begin to compete for trust funds).

borders, and trust management creates lucrative jobs for lawyers, accountants, and fiduciaries.<sup>261</sup> As a result, twenty-six jurisdictions have abolished or limited the Rule Against Perpetuities in an effort to seem settlor-friendly.<sup>262</sup> As Rob Sitkoff and Max Schanzenbach have proven, this maneuvering by state lawmakers has caused settlors to transfer “roughly \$100 billion” in assets between states.<sup>263</sup> Given these staggering figures, the Court might fashion a blanket rule that testamentary instruments are “transaction[s] involving commerce.” As much as commercial loans, they are part and parcel of a “general practice” with profound fiscal significance, permitting Congress to exercise its Commerce prerogative “in individual cases without showing any specific effect upon interstate commerce.”<sup>264</sup>

A second complication is that wills and trusts can be formed without consideration. Thus, one might argue that estate plans are not “economic” because they merely reallocate—rather than create—wealth. Yet this claim is unpersuasive. First, the Court has opined that the bare “distribution” of property is a “quintessentially economic” activity,<sup>265</sup> and, of course, wills and trusts convey land, cash, stocks, and heirlooms between generations. Second, it is not uncommon for Congress to regulate gratuities under the Commerce Clause. At least two federal statutes impose criminal liability for making gifts in

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261. See, e.g., Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1065–66 (2000) (describing the ease with which a settlor can change a trust's situs).

262. See ALASKA STAT. § 34.27.051 (2010); ARIZ. REV. STAT. ANN. § 14-2904 (2005); COLO. REV. STAT. § 15-11-1102.5 (2007); DEL. CODE ANN. tit. 25, § 503(a) (2009); D.C. CODE § 19-904 (Supp. 2011); FLA. STAT. ANN. § 689.225 (West 1994); IDAHO CODE ANN. § 55-111 (2007); 765 ILL. COMP. STAT. ANN. 305/4 (West 2001); IOWA CODE ANN. § 558.68 (West 1992); KY. REV. STAT. ANN. § 381.215 (LexisNexis Supp. 2011); ME. REV. STAT. ANN. tit. 33, § 101-A (Supp. 2011); MD. CODE ANN., EST. & TRUSTS § 11-102 (LexisNexis 2011); MO. ANN. STAT. § 442.555 (West 2000); MONT. CODE ANN. § 72-2-1005 (2011); NEB. REV. STAT. § 76-2005 (2009); NEV. REV. STAT. ANN. § 111.1031 (LexisNexis 2010); N.H. REV. STAT. ANN. § 564:24 (LexisNexis 2006); N.J. STAT. ANN. § 46:2F-9 (West 2003); N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 2002); N.C. GEN. STAT. § 41-15 (2011); N.D. CENT. CODE § 47-02-27.4 (1999); S.D. CODIFIED LAWS § 43-5-1 (2004); TENN. CODE ANN. § 66-1-205 (Supp. 2011).

263. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005) (“[O]n average, through 2003 a state's abolition of the Rule Against Perpetuities increased its reported trust assets by about \$6 billion and its average trust account size by roughly \$200,000.”).

264. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

265. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005).

certain situations.<sup>266</sup> Third, few scholars believe that so-called “sterile” promises have no financial or pecuniary value.<sup>267</sup> To the contrary, “gratuitous transfers frequently involve implicit elements of exchange” and “rival[] the traditional market in . . . significance.”<sup>268</sup>

Finally, even if the Court insisted on specific proof of a substantial effect on interstate commerce, most estate plans would pass with flying colors. As one district judge recently put it, “[t]ransactions involving the interstate transfer of money . . . and diverse parties” satisfy the FAA’s commerce element.<sup>269</sup> Accordingly, either naming a single beneficiary who lives out of state or selecting a fiduciary from another jurisdiction satisfies this test by sending valuable property across state borders.<sup>270</sup> In fact, the threshold may be lower: some estate plans may “involv[e] commerce” even if the parties are not diverse. Like the wholly intrastate loans in *Citizens Bank*, which were secured by goods made in other states,<sup>271</sup> choosing a local bank or trust company as executor or trustee links the estate to a web of national relationships. Indeed, as the Third Circuit has explained, assets held by financial institutions are “constantly moving

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266. See, e.g., Money Laundering Control Act, 18 U.S.C.A. § 1956(c)(3) (Supp. 2011) (outlawing gifts of assets with links to crime); Foreign Corrupt Practices Act, §§ 103(a), 104, 15 U.S.C. §§ 78dd-1, 78dd-2 (2006) (prohibiting gifts made as bribes).

267. The phrase “sterile promise” is usually attributed to Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941) (“While an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is . . . a ‘sterile transmission.’” (quoting CLAUDE BUFNOIR, PROPRIÉTÉ ET CONTRAT 487 (2d ed. 1924))). But “even Fuller shied away from relying too heavily on this argument.” David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299, 1311 n.30 (2006); see also Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 4 (1979) (noting the utility-enhancing functions of gift-giving); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 49 n.33 (1992) (explaining that few writers actually claim that promises that lack consideration are “entirely ‘sterile’”).

268. Hirsch, *supra* note 228, at 2182–83.

269. *Mitchell v. Career Educ. Corp.*, No. 4:11cv1581 TCM, 2011 WL 6009658, at \*2 (E.D. Mo. Dec. 1, 2011).

270. See, e.g., *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 790–91 (8th Cir. 1998) (holding similarly that “the parties are located in different states . . . and the agreement contemplates the transfer of inventory and money between the states”); *Pickering v. Urbantus, LLC*, No. 4:11-cv-00411-JEG-RAW, 2011 WL 6076332, at \*3–4 (S.D. Iowa Nov. 23, 2011) (similar); *Jenkins v. Atelier Homes, Inc.*, 62 So. 3d 504, 510 (Ala. 2010) (holding that a “transaction involved interstate commerce because . . . [c]ertain goods, funds, and documents crossed state lines” (internal quotation marks omitted)).

271. *Citizens Bank v. Alafabco*, 539 U.S. 52, 57 (2003) (per curiam).

in and out of interstate commerce.”<sup>272</sup> Thus, most (if not all) wills and trusts “involv[e] commerce.”

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In sum, federal law does not require an arbitration clause to appear in a contract. Instead, the FAA applies if the parties have agreed to arbitrate. When an executor, trustee, or beneficiary accepts fees or property under an estate plan, they fall within the FAA’s coverage. In addition, they virtually always also satisfy the statute’s final element: the necessity of a “transaction involving commerce.”<sup>273</sup> In turn, this raises a host of new questions about how the statute would impact probate. The next Part considers those issues.

### III. TESTAMENTARY ARBITRATION UNDER THE FAA

This Part describes how probate arbitration would function under the FAA. It focuses on four important and controversial aspects of federal arbitration law: the ambit of the agreement to arbitrate, the boundaries of the FAA, the separability rule, and preemption. It does so in an attempt to help courts and policymakers who may be called upon to assimilate the FAA into probate. In addition, this Part highlights several reasons why testamentary arbitration should be less objectionable than consumer and employment arbitration. In particular, it argues that arbitration clauses in wills and trusts generate a more meaningful form of consent than arbitration clauses in adhesion contracts, and that gaps in the FAA’s coverage of probate disputes create greater opportunities for state regulation.

#### A. *The Scope of the Agreement To Arbitrate*

The “presumption in favor of arbitration”<sup>274</sup> only goes so far. As shown, courts will bend over backwards to enforce an arbitration clause *if* the parties have reached an agreement (even if it is not a valid “contract”). But this pro-arbitration approach does not apply to the threshold issue of *whether* the parties have entered into an agreement. Indeed, judges are far more receptive to litigants who contend that they do not fall within the scope of an agreement or its

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272. *United States v. Spinello*, 265 F.3d 150, 157 (3d Cir. 2001) (quoting Brief for Appellee at 33, *Spinello*, 265 F.3d 150 (No. 00-3504), 2001 WL 34095074, at \*33) (upholding federal bank robbery statute as a proper exercise of the commerce power).

273. 9 U.S.C. § 2 (2006).

274. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003).



arbitration clause.<sup>275</sup> As several federal appellate courts have explained, the FAA does not “extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place.”<sup>276</sup>

This subtle distinction helps define the limits of testamentary arbitration under the FAA. I have argued that the statute should bind parties to arbitration clauses in wills and trusts if they can be deemed to consent to the terms of the instrument (usually by accepting benefits under it). Executors and trustees, who receive their fees from the estate, should usually meet this standard. As noted, they agree to arbitrate disputes as much as they agree to manage and distribute the property according to the testator or settlor’s wishes. Similarly, a beneficiary who attempts to enforce rights that would not exist without the will or trust manifests her assent to its arbitration clause. For instance, a beneficiary who brings a claim for breach of fiduciary duty seeks to hold the executor or trustee to his obligations under the instrument and thus acquiesces to its other provisions, including its arbitration clause.

Likewise, some challenges to the validity of an estate plan may be arbitrable. Suppose the settlor executes a trust that contains an arbitration clause and leaves her property one-third to her best friend, one-third to her son, and one-third to her daughter. Now assume that the son alleges that the daughter obtained her one-third share through undue influence. Although the son is seeking to overturn part of the trust, he is also attempting to accept benefits under the rest of the trust. He should not simultaneously be able to accept his bequest and disavow the instrument’s arbitration clause. Like any other term in the estate plan, the arbitration clause is a tacit condition to which the son agrees when he chooses to inherit. Similarly, if the friend accuses both the son and daughter of undue influence, she should be bound to arbitrate. Because the friend is not

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275. See, e.g., *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986) (“‘[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’” (quoting *United Steelworkers of Am. v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960))).

276. *Grundstad v. Ritt*, 106 F.3d 201, 205 n.5 (7th Cir. 1997); see also *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London*, 584 F.3d 513, 526 (3d Cir. 2009) (noting that the “presumption in favor of arbitration” does not apply to “the threshold question as to the existence of an agreement between the parties to arbitrate”); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (explaining that the presumption of arbitrability “does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear”); *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990) (“[N]o party can be forced to arbitrate unless that party has entered into an agreement to so.”).

a blood relative, she would not be able to take anything from the settlor absent the trust.<sup>277</sup> Thus, any claim she might bring depends on the instrument's existence. If she wants to accept this gift, she must also accept the method of dispute resolution specified in the trust.

But the flip side of this principle is that some litigants in probate cases do not consent to anything in the estate plan, including its arbitration clause. Consider a variation on the hypothetical above: the son alleges that the trust is invalid because the settlor lacked mental capacity. Here, the son is not attempting to reap the advantages of the instrument while avoiding the burden of the arbitration clause. To the contrary, he is challenging the trust's very existence.<sup>278</sup> Just as he does not agree to the trust's dispositive scheme, he does not assent to arbitrate his dispute. Likewise, if the mother had omitted the son from the trust, he could not be bound by an arbitration clause in an instrument that does not mention him at all.

Admittedly, this necessity of an implicit agreement to arbitrate may diminish the FAA's usefulness in probate. Testators and settlors place arbitration clauses in wills and trusts largely to minimize the expense and delay caused by individuals who are disappointed with their gifts. But because these disgruntled beneficiaries will often seek to nullify the instrument—rather than enforce its terms—they cannot be compelled to arbitrate.

Yet these limits may help probate arbitration under the FAA achieve the legitimacy that has eluded contractual arbitration. Recall that some courts and scholars have accused consumer and employment arbitration of being nonconsensual.<sup>279</sup> Several factors would diminish these concerns in testamentary arbitration as I have described it. First, because being named in a testamentary instrument is a rare event, beneficiaries are more likely to pay attention to arbitration clauses in estate plans than arbitration clauses in adhesion contracts. Second, there are at least two ways in which beneficiaries can opt out of arbitration. For one, they can disclaim their bequests. State law generally gives beneficiaries several months to make such a choice, allowing them ample time to weigh their options and even obtain counsel.<sup>280</sup> A decision made on that timeline generates a far

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277. See, e.g., Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 201 (2001) (noting that under intestacy statutes, "[d]ecedents and their survivors remain first and foremost spouses, parents, children, and siblings").

278. Challenges to the validity of a testamentary instrument will raise issues under the separability doctrine, which is discussed *infra* Part III.C.

279. See *supra* notes 86–87 and accompanying text.

280. See *supra* note 212 and accompanying text.

more robust form of consent than a “bill stuffer” that deems a consumer to have agreed to arbitrate unless she closes her account within thirty days.<sup>281</sup> And even if a beneficiary does not disclaim, she should still be entitled to a judicial forum if the nature of her claim—for example, a challenge to the entire instrument—reveals that she does not agree to arbitrate. Third, contractual arbitration is problematic because drafters impose it at the time of contracting, when most adherents are not thinking about the prospect of litigation and tend to undervalue their procedural rights.<sup>282</sup> Conversely, beneficiaries are almost always aware at the time of the testator or settlor’s death of the facts that might give rise to an incapacity or undue influence claim. Accordingly, even those who strongly oppose the rise and spread of contractual arbitration need not be as wary of testamentary arbitration.

Similarly, these gaps in the FAA’s coverage may assuage federalism concerns. A second major criticism of the Court’s arbitration jurisprudence is that it constitutes “a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.”<sup>283</sup> But because the FAA would not govern many probate litigants, it would permit states to shape testamentary arbitration law. For example, state lawmakers would be free to declare that challenges to an estate plan’s validity should be arbitrable whether or not the plaintiff can be said to agree to the instrument’s terms. In fact, that is exactly what Arizona lawmakers did in 2008, passing a trust-specific arbitration statute that “allows the

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281. Of course, testamentary arbitration will rarely be “consensual” for beneficiaries in the sense that it springs from an independent, affirmative choice. Because estate plans can be windfalls—and also deeply symbolic and emotional—hardly anyone will disclaim a bequest out of pure enmity toward arbitration. Nevertheless, an element of coercion is par for the arbitration course. As the Seventh Circuit has remarked:

Arbitration often comes with the territory, so to speak—for example, with a job or with membership in the National Association of Securities Dealers. . . . Although these requirements may be non-negotiable—one cannot join the NASD without accepting its arbitration regimen, and often an investor cannot trade securities *through* NASD members without committing to arbitrate—they remain “agreements” because the person could have chosen to do something else.

*Metro E. Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l*, 294 F.3d 924, 926 (7th Cir. 2002) (citations omitted).

282. See *supra* text accompanying notes 92–94.

283. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1762 (2011) (Breyer, J., dissenting) (accusing the Court of “not honor[ing] federalist principles”); Schwartz, *supra* note 24, at 5 (calling the Court’s reading of the FAA “a major federalism mistake”).

imposition of arbitration without beneficiaries' consent."<sup>284</sup> Regardless of whether the Arizona statute is wise policy, it is precisely the kind of judgment that states have not been able to make in the contractual arbitration arena. For these reasons, probate arbitration under the FAA may avoid some of the flaws that have made contractual arbitration so polarizing.

### *B. The Probate Exception and the Boundaries of the FAA*

Questions about the FAA's scope are a persistent challenge. This problem transcends the question of whether the Court has interpreted the statute more broadly than lawmakers would have wished. Because the FAA predates the massive expansion of the federal Commerce power, matters that Congress did not intend to regulate in 1925 now fall squarely within the statute's text. For instance, there is strong evidence that lawmakers did not want the FAA to govern arbitration clauses in insurance contracts,<sup>285</sup> yet, there is no doubt that the statute's plain language now encompasses those agreements.<sup>286</sup> The Court has resolved this issue in case after case by favoring sweeping literal interpretations of the statute over narrower constructions grounded in context or legislative history.<sup>287</sup>

284. *Jones v. Fink*, No. 1 CA-SA-10-0262, 2011 WL 601598, at \*2 (Ariz. Ct. App. Feb. 22, 2011); *see also* ARIZ. REV. STAT. ANN. § 14-10205 (2011) ("A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.").

285. For instance, during the Senate Judiciary Subcommittee hearings on the bill, Senator Walsh stated: "The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it." *Hearing on S. 4213 and S. 4214, supra* note 2, at 9. W. H. H. Piatt, who was then testifying, replied that "it is not the intention of this bill to cover insurance cases." *Id.*

286. Currently, certain insurance-related issues do not fall within the FAA because of a unique federal statute, the McCarran-Ferguson Act, which reverse-preempts federal law. Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (2006)). *See, e.g.,* *Kremer v. Rural Cmty. Ins. Co.*, 788 N.W.2d 538, 551 (Neb. 2010) (discussing this phenomenon). Yet there is no question that insurance policies are "contract[s] evidencing a transaction involving commerce" within the meaning of FAA section 2.

287. For instance, section 1 excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2006). Congress inserted this exception in response to objections that the FAA would govern employment contracts. *See Hearing on S. 4213 and S. 4214, supra* note 2, at 14 (quoting a letter from then-Secretary of Commerce Herbert Hoover that noted "objection[s] . . . to the inclusion of workers' contracts in the law's scheme"). Nevertheless, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), the Court ignored the legislative history and held that section 1 only exempts transportation workers from the FAA.

Accordingly, I have argued that the Court would likely find the FAA to cover arbitration clauses in estate plans even though Congress did not envision that result.

Nevertheless, this subsection claims that the Court should recognize a rare implied exception to the FAA. Specifically, the Court ought to exclude “core probate” matters from the statute’s ambit. Core probate petitions ask a court to (1) supervise the administration of a testator’s estate or (2) invalidate a will (but not a trust).<sup>288</sup>

This carve-out does not merely reflect the mere fact that Congress enjoyed less power in 1925; rather, it stems from a more authoritative source: the longstanding probate exception to federal subject matter jurisdiction. Under the probate exception, federal courts cannot hear “matters of strict probate,” even if they would otherwise have diversity jurisdiction.<sup>289</sup> Most courts and scholars trace the probate exception to the Judiciary Act of 1789, which created diversity jurisdiction.<sup>290</sup> The Judiciary Act empowered federal courts to hear “all suits of a civil nature at common law or in equity” if the parties are from different states and the complaint seeks damages of a certain amount.<sup>291</sup> The phrase “suits . . . at common law or in equity” extended federal jurisdiction to cases that would have been heard by English common law or high chancery courts in 1789.<sup>292</sup> But in 1789, English ecclesiastic courts (not common law or high chancery courts) adjudicated core probate issues.<sup>293</sup> Thus, as the Court has explained,

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288. See, e.g., *Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006).

289. *Sutton v. English*, 246 U.S. 199, 205 (1918); see also *Marshall*, 547 U.S. at 311 (“[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate . . . .”); *Markam v. Allen*, 326 U.S. 490, 494 (1946) (“[A] federal court has no jurisdiction to probate a will or administer an estate . . . .”).

290. Ch. 20, § 13, 1 Stat. 73 (1789); see also Allison Graves, Comment, *Marshall v. Marshall: The Past, Present, and Future of the Probate Exception to Federal Jurisdiction*, 59 ALA. L. REV. 1643, 1643 (2007) (explaining why the probate exception has been linked to the Judiciary Act).

291. Ch. 20, § 11, 1 Stat. 73.

292. See, e.g., *Waterman v. Canal-La. Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (“[C]ontroversies between citizens of different States . . . are within the established equity jurisdiction of the federal courts[. . .] which . . . is like unto the high court of chancery in England at the time of the adoption of the judiciary act of 1789 . . . .”). The diversity statute now applies to “all civil actions” rather than “all suits . . . at common law or in equity.” 28 U.S.C. § 1332(a) (2006). Yet because Congress did not intend this change to alter the scope of diversity jurisdiction, it did not eliminate the probate exception. See Reviser’s Note to 28 U.S.C. § 1332 (1988).

293. See, e.g., *Sutton*, 246 U.S. at 205 (“[S]ince it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof . . . matters of this

“a federal court has no jurisdiction to probate a will or administer an estate” because “the Judiciary Act . . . did not extend to [these] matters.”<sup>294</sup>

On a superficial level, there appears to be no dissonance between the probate exception and the FAA as applied to core probate issues. Because the FAA does not create federal subject matter jurisdiction,<sup>295</sup> it is facially consistent with the Judiciary Act: neither allows federal courts to hear core probate disputes. For example, if a beneficiary alleges that a will was obtained by undue influence, only a state court may resolve this core probate issue. Even if the parties are diverse and the complaint seeks more than \$75,000, the Judiciary Act does not permit a federal court to hear the matter. And even if the will contains an arbitration clause that triggers the FAA, the case must remain in state court. The FAA does not enlarge federal jurisdiction *at all*, let alone in a manner that contradicts the probate exception.

But on closer inspection, applying the FAA to core probate disputes would be anomalous. The FAA may not confer subject matter jurisdiction, but it “creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.”<sup>296</sup> Applying the statute to core probate matters would thus bring federal law into a niche that has long been the exclusive province of the states. Compare the Court’s oft-criticized decision that the FAA preempts state contract law. As Ian Macneil argues, the fact that the FAA passed unanimously reveals that Congress could not have possibly intended the statute to override state contract principles:

A mandatory federal requirement that the state courts grant such specific performance in cases involving interstate

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character are not within the ordinary equity jurisdiction of the federal courts . . .”). Other courts and scholars have criticized this logic. *See, e.g., Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1071 (2d Cir. 1990) (“Ecclesiastical courts are not part of the American legal tradition, and the drafters of the Judiciary Act may well have viewed chancery’s deference to such courts as nothing but a quirk of English legal history . . .”); Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1502–14 (2001) (explaining that English ecclesiastical courts only had exclusive jurisdiction of a fraction of probate disputes). Because English courts of equity—not ecclesiastical courts—decided trust issues, courts have generally limited the probate exception to wills. *Id.* at 1493 n.70.

294. *Markam*, 326 U.S. at 494.

295. *See, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

296. *Id.*

commerce would have been a major and extraordinary expansion of federal power [in 1925]. It would hardly have started another Civil War, but it would certainly have been enough to cause an immense stir in legislative and legal circles.<sup>297</sup>

Macneil's point rings true even though Congress has long regulated contracts in some industries.<sup>298</sup> But Congress has never passed a law that governs core probate issues. Thus, while federalizing contract law would have been controversial, federalizing core probate issues would have been unprecedented.

Extending the FAA to core probate matters would also have a bizarre consequence. Because of the probate exception, Congress would have created federal arbitration principles that federal district and appellate courts could not enforce. Suppose a controversy develops about whether the FAA preempts a certain state law rule. Currently, federal and state courts share responsibility for answering that question.<sup>299</sup> Even when the underlying case does not involve a federal cause of action—for instance, a tort, contract, or state statutory dispute—federal courts will resolve the FAA preemption issue when sitting in diversity. Given the perception that state courts are hotbeds of discrimination against the FAA,<sup>300</sup> this check on state judges is arguably a critical structural component of the statute. Yet the probate exception ropes off an entire substantive area from federal dockets. Reading the FAA to govern core probate cases would thus give state courts total dominion over federal arbitration law in this niche, subject only to the Court's limited certiorari power over state court judgments.<sup>301</sup> It seems unlikely that Congress would have intended to aggrandize state courts in this manner.<sup>302</sup>

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297. MACNEIL, *supra* note 24, at 115.

298. This was true even at the time Congress passed the FAA. *See, e.g.*, *Bd. of Trade v. Olsen*, 262 U.S. 1, 36–37 (1923) (regulating grain futures).

299. *See, e.g.*, *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1215 (Ill. 2010) (noting that both state and federal courts resolve FAA preemption issues).

300. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1432 (2008) (“Certain state courts have been among the most vocal critics of arbitration’s expansion beyond commercial contexts.”).

301. The Court has the power to review “state judicial decision[s] denying enforcement of the contract to arbitrate.” *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (emphasis added). But because the Court exercises its certiorari power so infrequently, as a practical matter state courts would be free to apply the FAA to core probate issues with little interference from federal authorities. *Cf.* Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505–06 (2006) (“In reality, state court judgments resting upon the interpretation of federal statutes may—indeed, in

The friction between core probate issues and arbitration underscores this point. Core probate proceedings are in rem. As noted above, in the early twentieth century, some judges refused to compel arbitration of will contests on the grounds that in rem cases are not well-suited for informal proceedings.<sup>303</sup> An unlikely source may have breathed new life into those opinions. In its April 2011 decision in *AT&T Mobility LLC v. Concepcion*,<sup>304</sup> the Court held that class arbitration, with its detailed and time-consuming procedures, is “inconsistent with the FAA.”<sup>305</sup> The Court reasoned that class arbitration “includes absent parties,” makes “[c]onfidentiality . . . more difficult,” and “sacrifices the principal advantage of arbitration—its informality.”<sup>306</sup> The same could be said for attempts to arbitrate core probate cases. Courts cannot resolve core probate issues without first giving all potential heirs and creditors a chance to be heard. In turn, this means that a party must publish notice over the course of several weeks of their intention to seek judicial administration of an estate or to file a will contest.<sup>307</sup> The in rem nature of core probate issues—like class arbitration—thus “requires procedural formality.”<sup>308</sup> It creates a nasty Catch-22. On the one hand, relaxing the onerous notice requirements would create a risk

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the overwhelming majority of cases today, do—govern the rights and duties of parties subject to them without Supreme Court review.”).

302. One might object that reading the FAA to exclude core probate disputes would aggrandize state courts as much as reading the FAA to govern core probate disputes. After all, if the statute does not cover core probate issues, state lawmakers can fill the gap with whatever arbitration principles they desire. Arguably, that would be no different than what I claim is perverse about interpreting the FAA to apply to core probate matters: the fact that it gives states broad discretion over arbitration law. Yet this line of reasoning conflates two issues: (1) power over arbitration generally and (2) power over *the FAA itself*. Construing the FAA to exclude core probate issues would give state courts the first kind of power, but not the second. Conversely, reading the FAA to govern core probate disputes would give state courts both powers. It is this second component that seems perverse: nowhere else in the statute did Congress give state judges nearly exclusive dominion over federal arbitration law.

303. *See supra* notes 38–41 and accompanying text.

304. 131 S. Ct. 1740 (2011).

305. *Id.* at 1751.

306. *Id.* at 1750–51.

307. To get a sense of how detailed these requirements are, consider the California Probate Code. The executor must publish notice “in a newspaper of general circulation in the city where the decedent resided at the time of death.” CAL. PROB. CODE § 8121 (West 2008). The first publication date must be “at least 15 days before the hearing,” and “[t]hree publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient.” *Id.* The caption of the notice “shall be in 8-point type or larger and the text shall be in 7-point type or larger.” *Id.* § 8123.

308. *Concepcion*, 131 S. Ct. at 1751.



that absent parties “would not be bound by the arbitration.”<sup>309</sup> On the other hand, adhering to the laborious probate court notice requirements defeats the very purpose of arbitration: to streamline dispute resolution. This incongruity suggests that core probate issues are not amenable to arbitration.<sup>310</sup>

In sum, there are powerful reasons to exempt several common types of cases involving wills from the FAA. Although this implied exception would not apply to fiduciary litigation or any matter involving a trust, it represents another way in which the statute’s coverage would be more fine-grained in probate than it is in the contractual context. And again, this would create a window for states to supplement the FAA with their own arbitration law.

### C. Separability

Testamentary arbitration under the FAA would also raise unique issues under the separability doctrine. The separability rule arises largely from section 4 of the FAA, which instructs courts how to handle motions to compel arbitration:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, . . . the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . . If the making of the arbitration agreement . . .

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309. *Id.* The Due Process Clause of the Fourteenth Amendment requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). However, most courts have held that the Due Process Clause does not apply to bilateral arbitration because “the state action element . . . is absent.” *Davis v. Prudential Sec.*, 59 F.3d 1186, 1191 (11th Cir. 1995). Nevertheless, most judges and scholars have assumed that due process is required in class arbitration. *See, e.g.*, Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 226 (2006). Arguably, arbitration of core probate matters would share some of the issues (notice requirements and concern for the rights of absent parties) that underlie the extension of due process to class arbitration.

310. Admittedly, some courts also consider trust-related matters to be in rem or quasi in rem. *See, e.g.*, *Brayton v. Bos. Safe Deposit & Trust Co.*, 937 F. Supp. 150, 151 (D.R.I. 1996). However, many of these trust issues do not involve the same notice requirements as core probate matters. *Compare* CAL. PROB. CODE § 19050 (West 2011) (requiring executors and administrators of intestate estates to give notice to creditors), *with id.* § 19054 (not requiring trustees to provide such notice). Accordingly, there is less tension between in rem and quasi in rem trust-related cases and arbitration than there is between in rem core probate disputes and arbitration.

be in issue, the court shall proceed summarily to the trial thereof.<sup>311</sup>

The separability doctrine exists because the Court has interpreted the phrase “agreement for arbitration” in section 4 to signify the arbitration clause, rather than the “container” contract in which the arbitration clause appears.<sup>312</sup> Thus construed, section 4 only permits judges to resolve claims that hinge on “the making of the [arbitration clause].”<sup>313</sup> The Court has sometimes described the separability rule in binary terms, drawing a bright line between challenges to the validity of the arbitration clause (which are for courts) and challenges to the validity of the container contract (which are for arbitrators).<sup>314</sup>

However, as noted above, the Court has created an exception to this neat dichotomy. If a party claims that *she never actually entered into the container contract*—instead of contending that the container contract is invalid under a contract defense such as duress, fraud, or unconscionability—courts resolve the matter. Indeed, as the Court recently opined in *Granite Rock Co. v. International Brotherhood of Teamsters*,<sup>315</sup> judges must decide issues that pertain to the “formation of the parties’ arbitration agreement.”<sup>316</sup> Likewise, in *First Options of Chicago, Inc. v. Kaplan*,<sup>317</sup> the Court opined that a judge (not an arbitrator) should decide whether a businessman was bound to arbitrate in his individual capacity when a company that he owned signed an agreement that included an arbitration clause.<sup>318</sup> In a

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311. 9 U.S.C. § 4 (2006). *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (linking the separability doctrine to section 4). At one point, state courts seemed to be free to disregard the separability doctrine, since section 4 only applies in “United States district court.” 9 U.S.C. § 4; *see also* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (noting that section 4 “appear[s] to apply only to proceedings in federal court”). However, the Court has recently asserted that the separability “rule ultimately arises out of § 2,” which extends the rule into state courts as well. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006).

312. *See, e.g.*, *Prima Paint*, 388 U.S. at 402–04; *see also* *Buckeye*, 546 U.S. at 445 (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”).

313. 9 U.S.C. § 4.

314. *Buckeye*, 546 U.S. at 445–46 (“Unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”).

315. 130 S. Ct. 2847 (2010).

316. *Id.* at 2858.

317. 514 U.S. 938 (1995).

318. *Id.* at 943–44.

subsequent case, *Howsam v. Dean Witter Reynolds Inc.*,<sup>319</sup> the Court cited *First Options* for the proposition that “whether the parties are bound by a given arbitration clause [is] . . . for a court to decide.”<sup>320</sup> And even in *Buckeye*, the Court’s most dramatic expansion of the separability doctrine, the Court noted that “[t]he issue of the contract’s validity is different from the issue whether any agreement between the [parties] was ever concluded.”<sup>321</sup> Thus, as Stephen Ware has noted, it appears that “the separability doctrine does not apply to contract-formation arguments.”<sup>322</sup>

This doctrinal nuance would be critical to importing the separability doctrine into probate. As I have argued, testamentary arbitration cannot occur unless there is some indication that the parties have consented to the terms of the will or trust. As a result, any challenge to the validity of an estate plan would not only raise traditional separability issues, but also separability issues that stem from the gateway matter of whether litigants can be deemed to have agreed to the instrument. Accordingly, the testamentary separability rule would need to be two-pronged. First, as under the traditional doctrine, courts would decide any challenge to the arbitration clause itself. Just as in contractual separability, such a claim places the “making of the arbitration agreement . . . in issue” under section 4 and requires “the court [to] proceed summarily to the trial thereof.”<sup>323</sup> Second, even when a party does not attempt to nullify the arbitration clause specifically, a court may still be able to adjudicate the matter. Many challenges to the container instrument—for instance, an attempt to invalidate it completely—reveal that the litigant has *not* acquiesced to its terms. Because those circumstances present the question of “whether any agreement between the [parties] was ever concluded,”<sup>324</sup> they fall within the “formation” exception to the separability doctrine. Like a litigant who argues that she never agreed to the container contract, a party who has not accepted the terms of the estate plan is entitled to a judicial forum for that claim.

To make this analysis concrete, recall the fact pattern where the settlor creates a trust that contains an arbitration clause and divides her estate among her best friend, her son, and her daughter. If the daughter alleges that the trust is invalid on the grounds of undue

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319. 537 U.S. 79 (2002).

320. *Id.* at 84 (internal quotation marks omitted).

321. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006).

322. Ware, *supra* note 160, at 115.

323. 9 U.S.C. § 4 (2006).

324. *Buckeye*, 546 U.S. at 444 n.1.

influence, she merely attempts to nullify the container instrument, not the arbitration provision. Under the traditional rule, this would be dispositive: “[U]nless the challenge is to the arbitration clause itself, the issue of the [instrument]’s validity is considered by the arbitrator . . . .”<sup>325</sup> However, that cannot also be the result in the context of probate arbitration. There is simply no reason to bind the daughter to arbitrate in the first instance. As her lawsuit indicates, she does not assent to any of the trust’s provisions. Under the formation exception to the separability doctrine, a court must decide the merits of her claim. Conversely, if the best friend asserted that the gift to the son was invalid, the matter would go to the arbitrator. For one, the complaint would target a particular part of the container instrument, rather than the arbitration clause. In addition, the best friend needs the trust to inherit: she would take nothing from the settlor without it. The best friend must be seen as agreeing to all of the instrument’s provisions, and therefore does not fall within the formation exception.

This bifurcated approach would make the probate separability doctrine less troubling than its contractual counterpart. Critics have cited the separability rule as further evidence that arbitration under the FAA is not consensual.<sup>326</sup> After all, one way a party can fail to offer her authentic, autonomous assent to arbitrate is if she is defrauded, coerced, or mistaken when she agrees to a contract that contains an arbitration provision.<sup>327</sup> But because the Court’s separability jurisprudence allows arbitrators to decide those very allegations, it funnels litigants into a private forum even when they did not “agree” to arbitrate in any meaningful sense.<sup>328</sup> In sharp contrast, the probate separability doctrine would not send these claims to arbitration. For example, if a beneficiary alleges that a trust that contains an arbitration clause is entirely invalid on the grounds of fraud, he has not consented to the instrument’s terms, and a court must resolve his fraud claim. On the other hand, if the beneficiary merely asserts that a single gift within the trust was obtained by fraud,

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325. *Id.* at 445–46.

326. See, e.g., Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 845 (2003) (“[S]eparability perverts contract law because it assumes away the fundamental principle of contractual consent . . . .”); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 137 (1996) (arguing that the separability doctrine must be abolished “to make the law well-suited to ensure that arbitration is based on significant consent”).

327. See, e.g., Ware, *supra* note 160, at 120–21.

328. *Buckeye*, 546 U.S. at 445–46.

he seeks to increase his share under the trust and thus assents to its provisions. In that circumstance, the arbitrator hears his fraud claim. Critically, however, arbitration occurs only *because of* his consent to the trust, not in the face of his pleas that he did not consent to the trust.

#### D. Preemption

Of all the issues related to the Court's reading of the FAA, perhaps none has been more of a lightning rod than preemption. According to the Court, the statute eclipses state law in two ways. First, it prohibits state courts and lawmakers from singling out arbitration clauses for invalidity.<sup>329</sup> Because section 2 requires judges to enforce arbitration provisions "save upon such grounds as exist at law or in equity for the revocation of any contract,"<sup>330</sup> states can regulate arbitration clauses through rules that apply to "any contract," such as fraud, duress, and unconscionability.<sup>331</sup> For example, Alabama cannot ban pre-dispute arbitration clauses,<sup>332</sup> California cannot exempt franchise and employment cases from arbitration,<sup>333</sup> and Montana cannot require drafters to give conspicuous notice that an agreement contains an arbitration clause.<sup>334</sup> Second, the Court recently held that even when states apply generally applicable contract defenses to arbitration clauses, they cannot do so in a way that thwarts the "purposes and objectives"<sup>335</sup> of the FAA, which are to streamline dispute resolution.<sup>336</sup>

Unfortunately, applying these tests has proven difficult. The trouble lies with a wide range of state regulation that is both (1) capable of nullifying arbitration clauses but (2) does not apply *only* to

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329. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

330. 9 U.S.C. § 2 (2006).

331. *Doctor's Assocs.*, 517 U.S. at 687 ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."); *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.").

332. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995).

333. See *Perry*, 482 U.S. at 489–91 (finding the same for wage and hour claims); *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984) (finding that a California statute cannot exempt franchise disputes from arbitration).

334. *Doctor's Assocs.*, 517 U.S. at 687.

335. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (citing *Hines v. Davidowitz*, 312 U.S. 52, 57 (1941)).

336. *Id.* at 1748.

arbitration clauses.<sup>337</sup> For example, the Illinois Nursing Home Act outlaws jury trial waivers in nursing home admission contracts,<sup>338</sup> and the California Consumer Legal Remedies Act confers a non-waivable right to bring a class action in cases arising from “the sale or lease of goods or services to any consumer.”<sup>339</sup> Although neither law expressly governs arbitration, both can be used to strike down all or part of an arbitration clause. Does the FAA preempt these statutes because they can annul arbitration clauses and yet only apply to *some* contracts (not “any contract”)? Or do these laws survive because they do not govern arbitration provisions exclusively? The issue divided courts in both states.<sup>340</sup>

Even with this doctrinal uncertainty, some wills and trusts principles stand out as likely candidates for preemption. For one, as noted, a few courts have refused to compel arbitration of challenges to the validity of a testamentary instrument based on vague notions of state public policy, or on the related grounds that the legislature has given the probate court exclusive jurisdiction over those cases.<sup>341</sup> The FAA would trump these decisions. As the Court has made clear, “state laws lodging primary jurisdiction in another forum . . . are superseded by the FAA.”<sup>342</sup> State judges could also no longer refuse to send trust disputes to arbitration on the grounds that state arbitration statutes only validate arbitration clauses in “contracts.”<sup>343</sup> This literal interpretation of the word “contract” must yield to the Court’s broader reading, which includes wills and trusts.

In another relatively straightforward application of FAA preemption, states could not regulate arbitration clauses in the same way that they have policed similar provisions in wills and trusts.

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337. See, e.g., Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1199 (2011) (noting that these laws “point to a gaping hole in FAA preemption jurisprudence”); cf. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394 (2004) (noting the uncertainty about how to treat these laws as well as those that regulate the arbitration process (as opposed to individual arbitration clauses)).

338. 210 ILL. COMP. STAT. ANN. 45/3-606 to -607 (West 2008).

339. CAL. CIV. CODE §§ 1751, 1770(a), 1781(a) (West 2009).

340. Compare *Fosler v. Midwest Care Ctr. II, Inc.*, 928 N.E.2d 1, 11–14 (Ill. App. Ct. 2010) (holding that the Nursing Home Act was preempted), with *Carter v. SSC Odin Operating Co.*, 885 N.E.2d 1204, 1208–09 (Ill. App. Ct. 2008) (finding that the statute was not preempted), *overruled by Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219 (Ill. 2010). Compare also *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (holding that the Consumer Legal Remedies Act was preempted), with *Fisher v. DCH Temecula Imps. LLC*, 114 Cal. Rptr. 3d 24, 34 (Ct. App. 2010) (reaching the opposite conclusion).

341. See *supra* notes 104–16 and accompanying text.

342. *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008).

343. See *supra* notes 122–29 and accompanying text.

Consider the no-contest clause. Some jurisdictions refuse to enforce no-contest clauses in any circumstances.<sup>344</sup> Other states exempt certain claims, such as challenges to an executor or trustee's exercise of their basic fiduciary duties.<sup>345</sup> And still others prohibit blanket no-contest clauses, requiring testators and settlors to identify with particularity the claims which will cause a forfeiture.<sup>346</sup> These approaches would not be viable with respect to arbitration clauses. No matter how well-intentioned, policymakers cannot "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."<sup>347</sup> Thus, for example, the FAA would preempt statutes that purported to exclude trust contests from arbitration, or required all testamentary arbitration clauses to appear in a large, eye-catching font.<sup>348</sup>

Inevitably, however, more challenging issues would materialize. Recall that several states subject exculpatory clauses in trusts to heightened scrutiny.<sup>349</sup> As noted above, an arbitration clause that deprives beneficiaries of remedies against a trustee creates a dilemma: because the anti-exculpatory clause rules govern trusts, they are not "grounds . . . for the revocation of any contract."<sup>350</sup> Like the Illinois and California laws noted above, the anti-exculpatory clause doctrines have the potential to nullify portions of arbitration clauses but do not exclusively govern arbitration clauses. In fact, this issue is even thornier. At least the Illinois and California statutes offer a "ground . . . to revo[ke]" a contract. Conversely, the exculpatory clause doctrines do not apply to contracts at all.

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344. See FLA. STAT. ANN. § 732.517 (West 2010) ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."); IND. CODE ANN. § 29-1-6-2 (West Supp. 2011) ("[No contest] provisions shall be void and of no force or effect."). Other states enforce no-contest clauses only when a litigant lacks "probable cause" for a lawsuit. See *In re Estate of Pepler v. Connelly*, 971 P.2d 694, 697 (Colo. App. 1998); *Hannam v. Brown*, 956 P.2d 794, 798 (Nev. 1998).

345. See, e.g., *Wojtalewicz v. Woitel (In re Estate of Wojtalewicz)*, 418 N.E.2d 418, 420–21 (Ill. App. Ct. 1981) (holding that no-contest clauses cannot waive beneficiaries' right to challenge accounting); *In re Andrus' Will*, 281 N.Y.S. 831, 851–61 (Sur. Ct. 1935) (holding that a no-contest clause cannot require unwavering allegiance to the trustee's decisions and immunize the trustee from liability for gross administrative negligence).

346. See, e.g., CAL. PROB. CODE § 21311(a)(3) (West 2011) (providing that no-contest clauses can govern creditor's claims only if the clause "expressly [so] provides").

347. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

348. See *id.* (holding that the FAA preempts a Montana statute designed to inform adherents that a particular agreement contains an arbitration clause).

349. See *supra* note 232.

350. 9 U.S.C. § 2 (2006).

Accordingly, even more than the Illinois and California laws, the exculpatory clause rules tee up the question of what the scope of FAA preemption should be. Most courts have held that even if a state law does not single out arbitration clauses, it must apply to “any contract” to avoid preemption.<sup>351</sup> Of course, under this majority view, the exculpatory clause doctrines—which *cannot* apply to contracts—would be preempted. Yet it is not clear that the “any contract” test makes sense. As noted above, it would seem to preempt the entire UCC (which only governs contracts for the sale of goods)<sup>352</sup> and the unconscionability doctrine (which applies almost exclusively to adhesion contracts).<sup>353</sup> These bizarre outcomes do not serve any plausible congressional purpose.

What seems more compelling is to understand FAA preemption as serving two objectives. First, the statute eclipses state law to prohibit jurisdictions from reviving the ouster and revocability doctrines through measures that target arbitration clauses and only arbitration clauses.<sup>354</sup> Second, FAA preemption ensures that states do not enact laws that seem neutral on their face, but are in fact guerrilla warfare against arbitration. For instance, the FAA would eclipse state laws that require judicially monitored discovery or the application of the Federal Rules of Evidence in arbitration.<sup>355</sup> These rules would undermine the FAA’s purpose of “facilitat[ing] streamlined proceedings.”<sup>356</sup>

State restrictions on exculpatory clauses in wills and trusts suffer from neither infirmity. First, they are not like the ouster and revocability doctrines because they apply equally to estate plans that contain arbitration clauses as well as estate plans that do not. Second,

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351. See Aragaki, *supra* note 337, at 1204–05; see also *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1218 (Ill. 2010) (holding that the FAA preempts the Illinois Nursing Care Act and reasoning that state laws may be preempted even if “they do not ‘single out’ arbitration agreements for special treatment”).

352. See *supra* notes 238–40 and accompanying text.

353. See, e.g., David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. (forthcoming 2012), available at 106 NW. U. L. REV. COLLOQUY 13, 17–18 (2011), <http://colloquy.law.northwestern.edu/main/2011/08/unconscionability-wars.html>.

354. See, e.g., Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1247 (2011) (“Enforcement-impeding laws that ‘single out’ arbitration . . . are always preempted.”); Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1012 (1996) (“Any law that singles out arbitration agreements by making them less enforceable than other contracts is preempted by the FAA.”). But see Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 46–48 (2003) (endorsing the “any contract” approach).

355. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1741 (2011).

356. *Id.* at 1748.



since state regulation of liability-limiting terms does not make arbitration any slower or more formal, it does not erect an obstacle to the FAA's core goals. Both of these conclusions remain true despite the fact that the exculpatory clause rules do not apply to contracts—let alone “any contract.”

Nevertheless, I do not deny that the FAA would trump some wills and trusts principles and limit state autonomy to regulate testamentary arbitration clauses in other ways. And as with contractual arbitration, FAA preemption of probate doctrine raises federalism concerns. When judges and policymakers face the task of drawing the boundaries of testamentary arbitration, I hope that these dangers will prompt them to restrict the statute's coverage as I have described in the previous sections.

### CONCLUSION

After fundamentally altering the way consumer and employment disputes are resolved, the FAA's next frontier will be wills and trusts. Unlike state law, which requires an arbitration clause to appear in a contract, the FAA applies if the parties have agreed to arbitrate. Because executors, trustees, and beneficiaries consent to arbitration when they accept benefits under an instrument that contains an arbitration clause, they fall within the FAA. In turn, this raises difficult questions about how the statute will affect probate. I have argued that courts and lawmakers should pay careful attention to who can be bound by a testamentary arbitration provision and the boundaries of the statute. By doing so, they can capitalize on the benefits of arbitration while avoiding many of its drawbacks.