THE LIMITS OF TESTAMENTARY ARBITRATION

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INTRODUCTION

In the well-known case of *Estate of Lakatosh*, a handyman named Roger Jacobs insinuated himself into the life of Rose Lakatosh, an elderly woman who was suffering from dementia.[1] Roger earned Rose's confidence, stole money from her, and allowed her to live in squalor.[2] Eventually, Roger took Rose to his second cousin, a lawyer, who executed a document in which Rose left most of her property to Roger after she died.[3] Rose's so-called "will" makes regular appearances in Trusts and Estates textbooks and scholarship because it is a paradigmatic example of a testamentary instrument that was obtained by undue influence.[4]

But imagine that Roger had gone further, and also instructed his cousin to add a clause to Rose's will that mandated arbitration for any subsequent dispute. If one of Rose's intestate heirs—perhaps her sister Margaret[5]—had challenged the bogus will, would she have needed to resolve her claim in a private tribunal?

I think the answer is—and should be—"no." Admittedly, it is hard to say anything definitive about testamentary arbitration, which is deeply unsettled.[6] But due to the white-hot controversy surrounding the U.S. Supreme Court's expansion of the Federal Arbitration Act (FAA)[7] in

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1. *See* Estate of Lakatosh, 656 A.2d 1378, 1381 (Pa. Super. Ct. 1995).
2. *See id.* at 1381–82.
3. *See id.*
4. *See id.* at 1385 (affirming the trial court's determination that Roger had obtained the will through undue influence); *see also* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 284–89 (9th ed. 2013); STEWART E. STERK ET. AL, ESTATES AND TRUSTS 455 (4th ed. 2011); John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 347 (2013); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 598 n.100 (1997); *cf.* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 246 (2010).
5. *See Lakatosh*, 656 A.2d at 1381 (mentioning Margaret). In the actual case, the lawsuit was filed by the guardian of Rose's estate. *See id.* at 1379. I use Margaret as the contestant in my hypothetical for the sake of simplicity.
6. *See, e.g.*, JESSE DUKEMINIER ET AL., WILLS, TRUSTS, & ESTATES 608–09 (8th ed. 2009) (noting that "[t]he authorities are scarce and contradictory"); 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) (stating that the issue of whether arbitration clauses in wills and trusts are enforceable "is unresolved in almost every jurisdiction").
7. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).

consumer and employment law,[8] there has been stiff resistance to opening the door to arbitration clauses in wills and trusts. Most appellate courts have refused to extend state arbitration statutes to donative instruments.[9] And although five legislatures have passed laws that validate testamentary arbitration clauses in a few narrow contexts, none of them would govern Margaret's hypothetical undue influence challenge.[10]

Likewise, although I have argued elsewhere that some testamentary arbitration provisions *should* trigger the FAA,[11] my theory would not apply to Margaret's lawsuit. My reading of the FAA rests on two principles. First, arbitration arises from agreement.[12] Second, beneficiaries agree to an arbitration clause within an estate plan when they accept money or property from that estate plan.[13] But note the limits here. When an omitted heir like Margaret argues that an *entire* will or trust is invalid, she is what I will call a "non-consenting party": She does *not* acquiesce to any part of the document. She can vindicate her rights in probate court for the simple reason that "a party cannot be compelled to arbitrate unless [she] has agreed to do so."[14]

Nevertheless, in *The Will As An Implied Unilateral Arbitration Contract*—recently published in the *Florida Law Review*—Professor E.

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8. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 58–62 (2015); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 458 (2016); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266 (2015).

9. *See infra* text accompanying notes 23–25.

10. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10205 (2016) ("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."); FLA. STAT. § 731.401(1) (2016) ("A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, . . . is enforceable."); MO. REV. STAT. § 456.2-205 (2016) ("A provision in a trust instrument requiring the mediation or arbitration of disputes relating to the validity of a trust is not enforceable . . . ."); N.H. REV. STAT. ANN. § 564-B:1-111A (2016) (authorizing the arbitration of trust disputes, but not those relating to "a determination of the validity of the trust"); S.D. CODIFIED LAWS § 55-1-54 (2016) ("[A] provision in a trust requiring the arbitration of a dispute between or among the beneficiaries . . . is enforceable [except with respect to] a challenge to the validity of all or part of the trust . . . .").

11. *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1032 (2012) [hereinafter "Horton, *FAA and Testamentary Instruments*"]. *See generally* David Horton, *Donative Trusts and the Federal Arbitration Act*, *in* ARBITRATION OF INTERNAL TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW (Oxford University Press, forthcoming 2016) [hereinafter "Horton, *FAA and Trusts*"].

12. *See, e.g.*, Horton, *FAA and Testamentary Instruments*, *supra* note 11, at 1059.

13. *See id.* at 1060–64.

14. Am. Fuel Corp. v. Utah Energy Dev. Co., 122 F.3d 130, 133 (2d Cir. 1997).

Gary Spitko offers a fundamentally different perspective.[15] Professor Spitko has published several outstanding pieces on these topics, and this provocative and immensely creative article is no exception.[16] Professor Spitko argues that there is an implied unilateral contract between the government and individual property owners.[17] He claims that the state promises to distribute a person's assets at death according to their wishes (including their desire to compel arbitration of any claim relating to their estate) in return for the person generating wealth during their life.[18] He therefore concludes that even people who are not mentioned in the will, such as Margaret in my example, are either equitably estopped from challenging the arbitration provision or bound as third party beneficiaries of this "donative freedom contract."[19]

In this invited reply to the *Florida Law Review Forum*, I explain why I respectfully disagree with Professor Spitko. I argue that the FAA and its state analogues do not cover claims brought by non-consenting parties. In addition, I contend that this exclusion is necessary to prevent opportunists like Roger Jacobs from using testamentary arbitration to insulate their conduct from judicial review.

I. BACKGROUND

Professor Spitko is exactly right when he says that "[t]he use of arbitration to resolve a probate dispute . . . has much to recommend it."[20] After all, estate litigation is slow, expensive, and nasty—traits immortalized in Charles Dickens's *Bleak House*.[21] Arbitration can be faster and cheaper than court-based proceedings. It allows a testator to handpick a decision-maker who shares her values. And unlike probate, arbitration is private, and throws a cloak around the tawdry family secrets that often emerge during will contests.

However, testamentary arbitration faces a threshold hurdle. The FAA makes arbitration clauses in *contracts* presumptively valid:

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15. E. Gary Spitko, *The Will As An Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49 (2016).

16. For other examples of Professor Spitko's excellent contributions to these debates, see 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); E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065 (1999); E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1 (2015).

17. *See* Spitko, *supra* note 15, at 55–56.

18. *See id.*

19. *Id.* at 84.

20. *Id.* at 50.

21. CHARLES DICKENS, BLEAK HOUSE 3 (1853) (describing *Jarndyce and Jarndyce*, a matter that has been pending for generations).

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[22]

Likewise, some state statutes (or judicial interpretations of state statutes) only create a safe harbor for arbitration clauses in "contracts."[23] Courts in Arizona, California, and the District of Columbia have cited this prerequisite to refuse to enforce testamentary arbitration provisions under their local arbitration laws.[24] The logic here is simple and highly formal: "the arbitration clause is not contained in a written agreement or a contract."[25]

In an article and a book chapter, I have argued that the FAA governs some arbitration clauses in wills and trusts.[26] The Supreme Court's separability doctrine deems arbitration provisions to be their own independent contracts that have legal force even when they are not embedded in valid "container" contracts.[27] As a result, judges enforce arbitration clauses in instruments that are *not* contracts: the bylaws of a real estate investment trust,[28] a condominium's covenants, conditions, and restrictions,[29] an employee handbook that stated that it was "not intended to constitute a legal contract,"[30] and a tariff filed with the Federal Communications Commission.[31] Put simply, the fact that wills

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22. 9 U.S.C. § 2 (2012).

23. *See, e.g.*, 710 ILL. COMP. STAT. 5/1 (2016); LA. STAT. ANN. § 9:4201 (2016); NEB. REV. STAT. § 25-2602.01 (2016); N.H. REV. STAT. ANN. § 542:1 (2016); N.J. STAT. ANN. § 2A:24-1 (West 2016); OHIO REV. CODE ANN. § 2711.01 (LexisNexis 2016); 10 R.I. GEN. LAWS § 10-3-2 (2016); WIS. STAT. § 788.01 (2016); Schoneberger v. Oelze, 96 P.3d 1078, 1079 (Ariz. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2016); Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 613 (Ct. App. 2011), *vacated*, 287 P.3d 67 (Cal. 2012); *In re* Calomiris, 894 A.2d 408, 410 (D.C. 2006).

24. *See, e.g.*, *Schoneberger*, 96 P.3d at 1079; *Diaz*, 125 Cal. Rptr. 3d at 615; *Calomiris*, 894 A.2d at 410.

25. *Calomiris*, 894 A.2d at 409; *see also Schoneberger* 96 P.3d at 1079 ("[A] trust is not a 'written contract' requiring arbitration."); *Diaz*, 125 Cal. Rptr. 3d at 613 ("The Trust does not meet the statutory definition of a contract because there is no evidence that the beneficiaries gave either their consent or consideration to achieve the status of beneficiary.").

26. *See* Horton, *FAA and Trusts*, *supra* note 11; Horton, *FAA and Testamentary Instruments*, *supra* note 11, at 1032.

27. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967).

28. *See* Del. Cty. Emps. Ret. Fund v. Portnoy, No. 13-10405-DJC, 2014 WL 1271528, at *11 (D. Mass. Mar. 26, 2014).

29. *See* Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1231 (Cal. 2012).

30. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997).

31. *See* Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc., 294 F.3d 924, 926, 930 (7th Cir. 2002).

and trusts are "not contracts" is irrelevant under federal common law.[32]

Instead, under the FAA, the key is whether a party has agreed to arbitrate. Consent to arbitration "may be implied in fact."[33] Under the doctrine of direct benefits estoppel, a party can manifest assent to arbitrate by exercising rights under an instrument that includes an arbitration provision.[34] For example, judges have applied direct benefits estoppel to beneficiaries who assert claims stemming from a decedent's pension, health plan, or retirement account, explaining that the arbitration provision governs not just the decedent, but also her "intended successors."[35] 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."[36]

In turn, when a beneficiary accepts money or property under an instrument, she acquiesces to its terms, including its arbitration provision. Recall the example in the Introduction from *Estate of Lakatosh*.[37] Suppose Rose divided the residue of her estate between her friend Grace and the conniving Roger. If Grace alleges that the bequest to Roger is a product of undue influence, she must arbitrate this claim. Because Grace is not an intestate heir, her ability to inherit depends on the existence of the will. She cannot invoke her rights under the document and yet wash her hands of its arbitration clause.

Critically, though, not all heirs and beneficiaries assent to an estate plan's terms. If Rose's sister Margaret, who was not mentioned in the will, challenged the entire instrument, she should not be compelled to arbitrate. Margaret has not benefitted from the will; in fact, she contends

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32. Although I have not previously mentioned the issue, many state arbitration statutes also do not require arbitration provisions to appear in a "contract." Over a dozen of these laws track the Revised Uniform Arbitration Act and validate arbitration clauses in a "record." Unif. Arbitration Act § 6(a) (Unif. Law Comm'n 2000) [hereinafter RUAA]; *see also* ARK. CODE ANN. § 16-108-206 (2016); COLO. REV. STAT. § 13-22-206 (2016); D.C. CODE § 16-4406 (2016); HAW. REV. STAT. § 658A-6 (2016); MICH. COMP. LAWS § 691.1686 (2016); MINN. STAT. § 572B.06 (2016); NEV. REV. STAT. § 38.219 (2015); N.J. STAT. ANN. § 2A:23B-6 (West 2016); N.M. STAT. ANN. § 44-7A-7 (2016); N.C. GEN. STAT. § 1-569.6 (2016); N.D. CENT. CODE § 32-29.3-06 (2016); OKLA. STAT. tit. 12, § 1857 (2016); OR. REV. STAT. § 36.620 (2016); UTAH CODE ANN. § 78B-11-107 (West 2016); WASH. REV. CODE § 7.04A.060 (2016); W. VA. CODE § 55-10-8 (2016). The RUAA defines "record" expansively, as "information that is inscribed on a tangible medium . . . ." RUAA, *supra*, at § 1(6). Because testamentary arbitration clauses appear in "record[s]," they can give rise to agreements to arbitrate under state law. The same is true of other state statutes, which expressly apply to "agreements," not "contracts." CAL. CIV. PROC. CODE § 1281 (West 2016); IND. CODE § 34-57-2-1 (2016); N.Y. C.P.L.R. 7501 (McKinney 2016); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 2015).

33. *See Pinnacle*, 282 P.3d at 1224.

34. *See, e.g.*, Damon v. StrucSure Home Warranty, LLC, 338 P.3d 123, 128 (N.M. 2014).

35. Jansen v. Salomon Smith Barney, Inc., 776 A.2d 816, 821 (N.J. Super. Ct. App. Div. 2001).

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

37. *See supra* text accompanying notes 1–4.

that the document is a legal nullity. Likewise, the result would be the same if the will gave Margaret $25,000, but she disclaimed this gift and then filed an undue influence claim.[38] In either scenario, Margaret's repudiation of the will makes her a "non-consenting party" who is free to go to court.[39]

II. THE WILL AS AN IMPLIED UNILATERAL CONTRACT

Conversely, Professor Spitko argues that all heirs and beneficiaries—even non-consenting ones—should be bound to an arbitration clause in a will. This Part summarizes his intriguing argument.

Professor Spitko's view of testamentary freedom is strikingly original. To be sure, several scholars have observed that there is a thin line between testamentary instruments and contracts. For instance, trusts can be seen as "deals" in which the settlor transfers property to the trustee in return for the trustee's promise to manage it.[40] Likewise, testators and settlors enter into consensual relationships with beneficiaries, who must adhere to the terms of the estate plan in order to receive their bequests.[41] However, Professor Spitko breaks new ground. Rather than contending that wills are transactions between the testator and the *beneficiaries*, he asserts that wills are deals between the testator and the *government*: "[A] will is an implied unilateral contract between the testator and the state. The state offers to pass the testator's property at his death to his preferred donees. The testator accepts this offer by creating and prudently managing his wealth."[42]

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38. Two recent cases decided under state arbitration statutes roughly track this logic. *See* Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013) (holding that beneficiary who argued the trustee breached his fiduciary duty had "accept[ed] the benefits of the trust" and thus was bound to arbitrate); *see also* McArthur v. McArthur, 168 Cal. Rptr. 3d 785, 795 (Ct. App. 2014) (finding that party did not consent to arbitration when she challenged the validity of a trust amendment that contained an arbitration provision).

39. The separability doctrine muddies the waters here. Under that rule, arbitrators (not courts) resolve allegations that the container contract is marred by fraud or duress. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). Thus, one might also expect arbitrators to entertain any contention that the container "will" is invalid. However, separability does not (or at least should not) permit arbitrators to hear a party's assertion that she never manifested assent to the container instrument in the first place. *See, e.g.*, Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 27–33 (2003). In the realm of testamentary arbitration, a non-consenting party raises precisely such a claim, and thus can invoke the jurisdiction of the probate court. *See, e.g.*, Horton, *FAA and Testamentary Instruments*, *supra* note 11, at 1058–60.

40. *See* David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1677 (2009); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995).

41. *See* Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2193 (2011).

42. *See* Spitko, *supra* note 15, at 67.

Although beneficiaries are not signatories to this "donative freedom contract," Professor Spitko contends that they must comply with an arbitration clause in a will.[43] Because they profit from the implied agreement, they are bound to its terms under third party beneficiary and equitable estoppel principles.[44]

Professor Spitko supports this novel account by relying heavily on employment law. He observes that courts sometimes conceptualize promises to pay retention bonuses or severance benefits as offers to enter into unilateral contracts.[45] In these scenarios, firms promise to reward employees who work for a prescribed time period.[46] Once an employee hits the benchmark, she accepts the offer.[47] Similarly, Professor Spitko notes that judges often deem employment handbooks to contain implied promises of job security, reasoning that the employer's official policies "create[] a situation 'instinct with an obligation.'"[48] As Professor Spitko sees it, the state probate code also creates tacit contractual duties:

> [T]he property owner accepts and provides consideration for the donative freedom contract in a manner similar to that by which an employee accepts the unilateral contract for job security in an employee handbook. In both cases, the offeree's performance in the form of hard work constitutes her acceptance of the contract and her consideration given for the contract. More precisely, the property owner accepts the state's offer to honor his donative intent and provides consideration for the donative freedom contract by being economically productive and by saving and investing his estate rather than consuming it.[49]

One might think that this model would exempt non-consenting parties. Suppose an intestate heir who is omitted from the will files a petition alleging that the instrument is unenforceable because it does not satisfy the demands of the Wills Act, or is tainted by fraud, duress, incapacity, or undue influence. The disinherited heir is not a third party beneficiary of the implied unilateral contract between the testator and the state because she is not mentioned in the will. And she is not estopped from challenging the document because she has not accepted benefits under it. Thus, she should be allowed to seek relief in probate court.

Nevertheless, Professor Spitko contends otherwise. In a portion of his

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43. *Id.* at 78.

44. *See id.* at 84.

45. *See id.* at 67–68.

46. *See id.* at 67.

47. *See id.*

48. *Id.* at 70 & n.122 (quoting Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1268 (N.J. 1985)).

49. *Id.* at 73–74.

paper that is less well-developed, he argues that non-consenting parties are subject to a larger "donative freedom contract" that transcends the existence of a will:

> The more complicated argument is that a will contestant who challenges a will containing an arbitration clause necessarily seeks to assert a claim arising from the contract. The argument derives from an understanding that the will is but one part of a greater donative freedom contract, which also contains a provision providing for the intestate passing of a decedent's property where the decedent failed during his life to execute an effective estate plan.[50]

Accordingly, as Professor Spitko correctly notes, his "theory is the first one that encompasses even a will contest that seeks to render the will a complete nullity."[51]

III. THE LIMITS OF TESTAMENTARY ARBITRATION

There is much to admire about Professor Spitko's innovative article. For one, if his thesis gains traction, it would obliterate the distinction between wills and contracts that has sidetracked some courts and thwarted testamentary arbitration.[52] Indeed, if wills are implied unilateral contracts, then—as Professor Spitko astutely observes—they fall squarely under the text of the FAA and its state analogues.[53] In addition, Professor Spitko writes with his trademark force and eloquence.

Nevertheless, I am not persuaded that wills are implied unilateral contracts. And I disagree with Professor Spitko's broader claim that non-consenting parties should be funneled into the arbitral forum.

For starters, arguments that the government has created a contract by promulgating a statute almost always fail. There is a strong presumption that a law does not "create private contractual or vested rights[,] but merely declares a policy to be pursued until the legislature shall ordain otherwise."[54] This premise makes perfect sense. To be sure, regulation influences conduct, much the same way a promise can inspire reliance. But allowing statutes to perform double duty as binding agreements "would enormously curtail the operation of democratic government" by "creating rights that could never be retracted or even modified."[55] That is

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50. *Id.* at 85.

51. *Id.* at 56.

52. *See supra* text accompanying notes 23–25.

53. *Cf.* Spitko, *supra* note 15, at 61–63 (noting that any theory based entirely on a beneficiary's agreement to arbitrate "is a nonstarter" if courts read "contract" literally).

54. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985) (quoting Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)).

55. Pittman v. Chi. Bd. of Educ., 64 F.3d 1098, 1104 (7th Cir. 1995).

why claimants have been unsuccessful in their efforts to prove that zoning ordinances,[56] tax exemptions,[57] and even statutory tenure protections[58] have ripened into contracts. I suspect that Professor Spitko's unique description of wills would meet the same fate in court.

To his credit, Professor Spitko anticipates this objection. He remarks in a footnote that courts have permitted employers to modify their handbooks by giving employees advance warning of the change.[59] Accordingly, he concludes that a similar rubric would permit to amend its probate code without breaching a contract with its citizens.[60]

Although this is a shrewd point, it does not entirely defuse the rationale behind the general reluctance to contractualize statutes. For one, the government would need to comply with the cumbersome obligation of proposing and publicizing changes to its statues before enacting them. Also, given the difficulty of knowing whether notice of is sufficiently clear or owners have been given enough lead time, the state would expose itself to massive contractual liability every time it tinkered with the probate code.

Moreover, Professor Spitko's clever analogy to employment agreements dissolves upon close inspection. Under Wood's rule, at-will employment is the norm, which means that firms do not owe enforceable duties to their workers.[61] That is why contract law enters the picture: It is necessary to plug this gap when an employer promises to pay a bonus or provide job security.[62] In sharp contrast, there is no lacuna for contract law to fill in decedents' estates. Whether a person makes a will or dies without engaging in any estate planning, the probate code *already* compels the government to carry out her stated or implied wishes. In employment, contract is indispensable; in inheritance, contract is superfluous.

The conflation of wills and contracts also creates perverse results. Consider the issue of acceptance. To accept an offer to enter into a unilateral contract, one must perform the act the offeror has requested.[63] As a result, unilateral contract cases often contain thorny questions about

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56. *See, e.g.*, Triangle Ranch, Inc. v. Union Oil Co. of Cal., 287 P.2d 537, 542 (Cal. 1955).

57. *See, e.g.*, Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 385–86 (1903).

58. *See, e.g.*, *Pittman*, 64 F.3d at 1104.

59. *See* Spitko, *supra* note 15, at 77 n.156.

60. *See id.*

61. *See* 2 H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 134 (2d ed. 1886).

62. *See, e.g.*, Roberts v. Mays Mills, 114 S.E. 530, 533 (N.C. 1922); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1267 (N.J. 1985); *see also* Spitko, *supra* note 15, at 67–71 (relying heavily on *Roberts* and *Woolley*).

63. *See* 26 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 6:2 (Richard A. Lord ed., 4th ed. 2003).

whether the offeree has done what is necessary to consummate the deal.[64] Professor Spitko's thesis would force courts to confront this problem again and again. According to Professor Spitko, a property owner accepts the government's offer "by creating and prudently managing his wealth."[65] However, not everybody leads an economically productive life. Some people are born into riches and die in rags. Others devote their energy to non-material pursuits. Are judges really going to decide whether someone *has*, in fact, been fiscally responsible? If not, how are we to know whether they have done the task mandated to perfect the "donative freedom contract"?

Finally, Professor Spitko's argument that non-consenting parties must arbitrate their lawsuits is not persuasive. As noted above, this issue arises when the testator makes a will that contains an arbitration clause and then an heir files a petition arguing that the will is invalid. Professor Spitko contends that the heir must arbitrate her existential challenge to the will.[66] According to Professor Spitko, this is true because the heir seeks to expand her share of the decedent's *intestate* estate and is thus a "third-party beneficiary of the intestacy provisions of the greater donative freedom contract."[67] But even if there is some kind of spectral, overarching "donative freedom contract," Professor Spitko never explains why it would mandate arbitration of a dispute relating to the estate. Intestacy statutes say nothing about arbitration. And even if the decedent placed an arbitration clause in her purported will, that makes no difference: Intestacy only applies if the will is ineffective. For these reasons, I remain convinced that the foundation of testamentary arbitration is agreement. A litigant who tries to overthrow the entire instrument does not assent to its arbitration clause and can pursue her claim in court.

This limit is essential to the legitimacy of testamentary arbitration. Arbitration can be an elegant method of conflict resolution. But in the wrong hands, it degenerates into a way to deter meritorious claims. When arbitration clauses first appeared in fine print consumer and employment contracts, they were often blatant attempts to tilt the scales of the justice system. Powerful companies hijacked the process by slashing statutes of limitation,[68] restricting discovery,[69] selecting far-flung forums,[70]

64. *See, e.g.*, Petterson v. Pattberg, 161 N.E. 428, 430 (N.Y. 1928) (struggling to determine whether a debtor had complied with the creditor's offer to forgive a portion of the loan if the debtor paid off the balance by a certain date).

65. Spitko, *supra* note 15, at 67.

66. *Id.* at 90.

67. *Id.* at 90–91.

68. *See, e.g.*, Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997).

69. *See, e.g.*, Estate of Ruszala v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 821 (N.J. Super. Ct. App. Div. 2010).

70. *See, e.g.*, Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1285 (9th Cir. 2006).

choosing biased arbitrators,[71] saddling plaintiffs with costs,[72] and prohibiting arbitrators from awarding certain remedies.[73] Testamentary arbitration is not immune to this danger. Extending its scope too far would encourage wrongdoers like Roger Jacobs from *Estate of Lakatosh*. Why would someone like Roger stop at coercing a phony estate plan when he could also try to immunize it from contests through a one-sided arbitration clause? The way to reduce this risk is to exempt omitted heirs like Margaret, who object to the authenticity of the very instrument that contains the arbitration mandate. To emerge as a bona fide alternative to probate litigation—and not simply a shield against liability—testamentary arbitration must be consensual.

CONCLUSION

Professor Spitko's article is essential reading for anyone interested in the intersection of decedents' estates and alternative dispute resolution. We see eye-to-eye on the need for courts and policymakers to expand the use of arbitration in estate plans. However, we part ways on how to accomplish this goal. I am skeptical of Professor Spitko's descriptive argument that there is an implied unilateral contract between decedents and the government. And as a normative matter, I continue to believe that testamentary arbitration should only occur when a beneficiary assents to the terms of an instrument that contains an arbitration clause.

71. *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–39 (4th Cir. 1999).
72. *See, e.g.*, McNulty v. H&R Block, Inc., 843 A.2d 1267, 1273–74 (Pa. Super. Ct. 2004).
73. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 45, 52 (1st Cir. 2006).