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ARTICLES

GONE BUT NOT CONFORMING:
PROTECTING THE ABHORRENT TESTATOR FROM MAJORITARIAN CULTURAL NORMS THROUGH MINORITY-CULTURE ARBITRATION

E. Gary Spitko†

In a variety of contexts, cultural minorities1 have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel (most notably including judges and jurors). This is particularly true when cultural minorities attempt to use formal legal processes to give effect to choices which are inconsistent with prevailing community norms. In such cases, the substantive merit of their legal claims is at risk of being subjugated to majoritarian values, through a process that relies on members of the majority culture to vindicate the substantive rights at issue.

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1 For the purposes of this Article, I define “culture” as a set of shared values and beliefs. I define a “cultural minority” member as an individual whose core religious, political or social values and beliefs differ meaningfully and substantially from majoritarian norms.
This phenomenon presents a cruel dilemma: cultural minorities must either forego the formal enforcement of their legal rights or trust enforcement of their rights to a culturally-biased forum. This Article proposes a solution to this Catch-22, at least insofar as testamentary freedom is concerned.

Our society is committed in principle to the ideal of testamentary freedom. In practice, however, the law disfavors testamentary dispositions that deviate from the norm; it prefers gifts to the testator’s legal spouse and close blood relations over gifts to other potential beneficiaries. Thus, for example, the matriarch who disinherits her children in favor of the guru who gave her spiritual comfort in her declining years faces a greater likelihood that her estate plan will be invalidated by a trier of fact whose sense of propriety is offended by the gift. ²

Using the “abhorrent” testator as the focal point for an exploration of the larger problem of systemic bias, this Article considers testator-compelled arbitration as a means for overcoming the trier of fact’s propensity to invalidate any estate plan that does not conform to majoritarian cultural norms. Part I of this Article identifies the problem and explores how the trier of fact in a will contest, wittingly or unwittingly, may use legal doctrines intended to safeguard testamentary freedom to undermine the testamentary freedom of the nonconforming testator. For example, the doctrines of mental capacity, undue influence and testamentary fraud incorporate a rational bias in favor of the testator’s legal spouse and close blood relations. This bias, sensible though it may be, imperils any estate plan that disfavors the testator’s legal spouse or close blood relations in favor of non-family beneficiaries. ³ These doctrines also are sufficiently ambiguous that they provide cover for a trier of fact that wishes to reorder an estate plan to conform to her own values. The trier of fact might wish to do so, particularly if the values reflected in the testator’s estate plan offend her sensibilities.

Part II of this Article suggests a means for alleviating this threat to the nonconforming testator’s estate plan. Since the threat arises from distinctions between the testator’s culture and those of the trier of fact, the proposed solution focuses on cultural understanding. Part II recommends that the nonconforming testator direct in her will that

² See Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502, 508 (Ark. Ct. App. 1987) (holding that the finding that a non-mainstream spiritual leader unduly influenced testator to disinherit her minor son and execute a will favoring the spiritual leader was supported by the evidence).

³ For ease of discussion, I use the term “family” in this Article to mean one’s legal spouse and close blood relations. Some people, of course, have come to define their “family” more broadly. See, e.g., Braschi v. Stahl Associates, Co., 543 N.E.2d 49, 53-54 (N.Y. 1989) (extending the definition of “family” to include those persons whose relationship with each other possesses “all of the normal familial characteristics”).
any contest concerning the will shall be adjudicated by an arbitrator appointed by the testator. Thus, the testator will be able to select a decision-maker who is familiar with and respectful of the values that informed the drafting of her estate plan.

Lastly, Part III of this Article considers and rejects several objections to testator-compelled arbitration. First, testator-compelled arbitration conflicts with the archetype of arbitration—a dispute resolution mechanism to which all parties to the dispute voluntarily assent. Part III argues, however, that the testator’s right to compel arbitration of any challenge to her estate plan derives from the hierarchy of rights at issue. The testator’s right to devise her property as she wishes supersedes any claim that her heirs or putative legatees may assert to succeed to that property.

Second, it may be argued that an arbitrator’s authority to adjudicate a will contest may not arise from the very instrument that the will contestant alleges is invalid. The doctrine of separability, however, dictates that the testator may invest the arbitrator with authority to decide all challenges to her will, save those that allege specifically the invalidity of the will’s arbitration clause.

Finally, the impartiality of the testator’s appointed arbitrator may be questioned. Arguably, such a party-appointed arbitrator is presumptively biased in favor of the testator and, thus, presumptively unfit to adjudicate a challenge to the testator’s estate plan. Part III concludes that public policy should preclude adjudication before an arbitrator whose interests are disproportionately aligned with those of the testator so that the arbitration is unlikely to provide a meaningful opportunity for the will contestant to prevail on the merits. Such a principle, however, should not be a per se bar to adjudication before an arbitrator who shares a common minority culture with the testator. Part III also proposes an alternative arbitration scheme—arbitration before a tripartite body composed of one arbitrator selected by the testator, a second arbitrator selected by the will contestant and a third arbitrator selected by the two party-appointed arbitrators—that incorporates off-setting biases and, thus, should be above any reproach on grounds of arbitrator bias. In sum, the Article concludes that arbitration presents a viable solution to the problem of cultural bias in traditional legal forums, at least in the context of will contests.
I. THE FREEDOM TO CONFORM

The ideal of testamentary freedom grounds the law of testation.\(^4\) Freedom of testation encompasses the right to pass one's property at death to the persons or institutions of one's choosing.\(^5\) It is widely accepted that testamentary freedom furthers important social policies. Testamentary freedom provides an incentive for property owners to remain economically engaged, to make their capital productive and to preserve, rather than consume, their assets. Testamentary freedom also contributes to the stability of the family by providing a financial incentive, if one is needed, for children and more distant relations to care for their physically declining (and soon-to-be-devising) family members.\(^6\) Therefore, while the law of testation does expressly place a few restrictions on testamentary freedom,\(^7\) "virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life."\(^8\)

In furtherance of this ideal, to ensure that the state may discern the testator's dispositive wishes after her death, the law of wills sets forth certain formalities for the execution of a will.\(^9\) Although the details of these formalities vary from state to state, in general, every state requires that a will be in writing, be signed by the testator and be attested to by competent witnesses.\(^10\)

Moreover, to ensure that the testator's purported will truly represents her dispositive preferences, the law prescribes that the testator must possess testamentary capacity and be free from undue influence and fraud at the time she executes her will. The test for testamentary capacity is not demanding: the testator must only be capable of under-

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\(^4\) See, e.g., Joseph W. deFuria, Jr., Testamentary Gifts Resulting From Meretricious Relationships: Undue Influence or Natural Beneficence?, 64 NOTRE DAME L. REV. 200, 200 (1989) ("[R]estrictions on the freedom of testation are usually considered anathema both to private property rights and to the rights of the individual."); John H. Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489, 491 (1975) [hereinafter Langbein, Substantial Compliance] ("The first principle of the law of wills is freedom of testation.").

\(^5\) More broadly, freedom of testation also includes the right to pass one's property at death in the form of one's choosing and to appoint to another the right to make each of these decisions. See LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 6 (2d ed. 1997).

\(^6\) See generally Mark L. Ascher, Curtailing Inherited Wealth, 89 MICH. L. REV. 69, 100-21 (1990) (discussing the justifications commonly asserted in favor of testamentary freedom and arguing that such justifications are overstated).

\(^7\) Taxation of the decedent's estate and restrictions in favor of granting the surviving spouse a share of the decedent's estate are among the most significant restrictions that the state places on a property owner's right to pass her property at death. See UNIF. PROBATE CODE §§ 2-201 to 2-214 (1993) (granting to a surviving spouse the right to take an elective share percentage of the decedent's estate).

\(^8\) Langbein, Substantial Compliance, supra note 4, at 491.

\(^9\) See id. ("The many rules governing testamentary capacity and the construction of wills are directed to two broad issues of testamentary intent: did the decedent intend to make a will, and if so what are its terms?").

standing (1) what she owns, (2) which persons are the natural objects of her bounty, (3) the estate plan that she is drafting and (4) how these first three elements relate to each other. The test for undue influence is easily stated although it is not so easily applied: "A will is invalid if it is obtained through an influence which destroys the free agency of the testator and substitutes another’s volition for his. Influence may be undue although it does not amount to physical coercion, but mere advice, persuasion or kindness does not constitute undue influence." Finally, testamentary fraud has five elements: (1) a misrepresentation told (2) with the intent to deceive the testator and (3) with the intent to influence the will, which misrepresentation (4) does deceive the testator and (5) does influence the will.

These express standards for guarding testamentary freedom, in practice, incorporate an implicit societal norm favoring donative transfers to legal spouses and close blood relations over other donees. This norm favoring family furthers donative freedom on the whole in that it appropriately reflects the wishes of the average testator. As Professor Mary Louise Fellows explains:

The nature of the distribution plan is probably the most critical observable fact influencing the outcomes of cases in which capacity, undue influence, or fraud are at issue. The public policy concern for the financial security and fair treatment of spouses and children, and the belief that most property owners probably intend to provide for their spouses and lineal descendants, create a presumption in favor of the family. In other words, absent contrary evidence, courts impute to a property owner the intent to provide for the family in a manner that favors the spouse over other relatives, favors blood relatives over institutions and unrelated friends, and treats children equally.

12 Id. at 255.
13 See id. at 265-67.
15 Id. at 621-22 (footnotes omitted). In many jurisdictions, a confidential relationship between the testator and the beneficiary may give rise to a presumption of undue influence. See McGovern et al., supra note 10, at 279; Melanie B. Leslie, The Myth of Testamentary Freedom, 38 ARIZ. L. REV. 235, 253 (1996); see also deFuria, supra note 4, at 202 (arguing that "it makes far more sense to view testamentary gifts based upon meretricious relationships as evidence of the natural beneficence of the testator, rather than as evidence of undue influence"). A confidential relationship generally is characterized by particular closeness or dependence. See McGovern et al., supra note 10, at 280. It is surprising, therefore, that courts are far less likely to find that a confidential relationship existed between the testator and her legal spouse as compared to a relationship between the testator and a non-spouse. See Jeffrey G. Sherman, Undue Influence and the Homosexual Testator, 42 U. PITT. L. REV. 225, 230 (1981) ("Courts often assert that a wife is allowed greater freedom than others in urging the testator to make a
Thus, all things being equal, a testamentary disposition favoring family is more likely to survive a capacity, undue influence or fraud challenge than is a disposition favoring non-family. In this way, the very standards aimed at ensuring testamentary freedom risk the testamentary freedom of a nontraditional testator who willingly executes an estate plan that fails to conform to societal norms, namely those preferring the legal spouse and close blood relations to all other potential beneficiaries.

Intestacy statutes exacerbate this danger to the nonconforming testator. Every state has an intestacy statute that provides a scheme for distributing an owner's property at her death in the absence of valid arrangements made by the property owner during her life. Such arrangements typically include a will and/or will substitutes such as a joint tenancy or an inter vivos trust.

Intestacy statutes are intended to distribute a decedent's intestate property according to the preferences of the average intestate person. Thus, the typical intestacy statute calls for distribution of the decedent's intestate property to the decedent's spouse and issue or, if the decedent left no issue, to the decedent's spouse and parents. If the decedent left neither a spouse nor issue, most intestacy statutes give the decedent's intestate property to her parents and/or siblings or,
if the decedent also left no parents or siblings, to more distant blood relatives of the decedent.22

The express preference for a legal spouse and blood relations incorporated into intestacy statutes works in conjunction with the implicit societal norm favoring such relations incorporated into testamentary freedom standards to disrupt the nonconforming estate plan. Thus, once a nonconforming will is successfully challenged on grounds such as testamentary fraud, inadequate mental capacity or undue influence, the testator’s probate estate will be distributed according to the state’s intestacy provisions, which the legislature drafted in accordance with those same majoritarian norms favoring a legal spouse and close blood relations.

Commentators have widely hypothesized that there is a second way in which the standards for testamentary freedom jeopardize the testamentary freedom of a nonconforming testator. If the nonconforming disposition (or the explanation given for it) offends the trier of fact’s sense of equity or propriety, the fact-finder might choose to use these standards to discard the estate plan of the testator in favor of an intestacy scheme that conforms more closely to the fact-finder’s own cultural norms.23 In this way, a contest challenging the validity of a nonconforming estate plan becomes a conflict of deeply held values.24 Our society highly values testamentary freedom but is reluctant to endorse personal relationships that deviate meaningfully from the

22See, e.g., id. At § 2-103; MCGOVERN ET AL., supra note 10, at 13. Presently, only Hawaii allows for intestate inheritance rights to a decedent’s same-sex partner. See HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1997). Hawaii provides for an intestate distribution to and an elective share right in “reciprocal beneficiaries” which the relevant statute defines as “two adults who are parties to a valid reciprocal beneficiary relationship and meet the requisites for a valid reciprocal beneficiary relationship.” HAW. REV. STAT. ANN. § 572C-3. These requirements include that the parties consent to the relationship and (1) be at least eighteen years of age, (2) be unmarried and not a party to another reciprocal beneficiary relationship, and (3) be legally prohibited from marrying each other; thus, a same-sex couple may qualify. See id. § 572C-4; cf. OR. REV. STAT. § 112.017(2)(b) (1997) (providing intestacy rights for unmarried couples who cohabit for at least 10 years and hold “themselves out as husband and wife” provided that the couple could have been legally married had they chosen to do so; thus, a same-sex couple may not qualify).

23See deFuria, supra note 4, at 201 (arguing that “because it is often impossible for judges or juries to decide [undue influence] cases in a moral vacuum, the doctrine [of undue influence] often functions instead as a barometer of society’s mores”); Leslie, supra note 15, at 236 (reviewing case law and concluding that “many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent. . . . [Thus, nonconforming wills] typically are upheld only if the will’s proponent can convince the fact-finder that the testator’s deviation from normative values is morally justifiable.”); Ray D. Madoff, Unmasking Undue Influence, 81 MICH. L. REV. 571, 598 (1997) (concluding that undue influence is a means for the “imposition of societal norms as to appropriate testamentary behavior.”).

24See John H. Langbein, Will Contests, 103 YALE L.J. 2039, 2043 (1994) (book review) [hereinafter Langbein, Will Contests] (“Our fundamental value in the law of wills is freedom of testation, but the inner tendencies of civil jury trial put our procedural system in conflict with our substantive law. . . . because jurors who decide without giving reasons have such latitude to substitute their wishes for the testator’s.”).
These values come into conflict when a trier of fact equates upholding a nontraditional testamentary gift with endorsing the non-traditional relationship that influenced the gift. Thus, the “abhorrent” testator who disinherits her legal spouse or close blood relations in favor of, for example, a non-mainstream religion, a radical political organization, or a same-sex romantic partner, is especially at risk of having her estate plan discarded. This Article explores a means for overcoming this threat and ensuring equal testamentary freedom, in fact as well as in principle, for the “abhorrent” testator.

25 But see Fellows et al., supra note 20, at 72 n.295 (“When courts address property divisions upon the termination of a relationship, [as by the death of one of the committed partners,] to a large extent, rather than recognizing the legal status of family units headed by committed partners, they are protecting individual claimants and not ongoing family units.”).

26 See, e.g., Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502, 507 (Ark. Ct. App. 1987) (commenting that “[w]here the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart, to the dictates of parental affection, to natural justice, to solemn promises, and to moral duty, such unexplained inequality is entitled to great weight in considering the question of testamentary capacity and undue influence”). In Carpenter the court found that a spiritual leader whose “doctrine is somewhat unclear from the record but appears to have involved delving into the metaphysical in an effort to get closer to God and included reincarnation, soul mates, and meditation” unduly influenced the testator who disinherited her minor son. Id. at 503; see also Ingersoll v. Gourley, 139 P. 207-09 (Wash. 1914) (affirming jury verdict setting aside will on grounds of mental incapacity where will left estate to “the founder of a peculiar religious sect” and would not have been made “if the testator had not entertained some peculiar religious belief”).

27 See, e.g., In re Strittmater, 53 A.2d 205, 206 (N.J. 1947) (finding that testator’s “insane delusions about the male” caused her to disinherit her cousins, with whom she had very little contact, in favor of the National Women’s Party); cf. In re Ararian’s Estate, 166 N.Y.S.2d 1006, 1007 (Sur. Ct. N.Y. County 1957) (holding that testamentary trust settlor’s purpose of providing scholarships for Americans to study at a Soviet university was “not possible or practicable” because “[t]o permit students to attend that university might result in education with political indoctrination adverse to good American citizenship”).

28 See In re Kaufmann’s Will, 247 N.Y.S.2d 664, 683 (N.Y. App. Div. 1964), aff’d, 205 N.E.2d 864 (N.Y. 1965) (affirming jury’s finding of undue influence by testator’s long-term same-sex “best pal” despite testator’s explanation in a letter accompanying his will of how his partner had enriched his life through the years; such letter was “cogent evidence of [the testator’s] complete domination by [his partner]”); see also Sherman, supra note 15, at 227 (arguing that the trier of fact’s discomfort with homosexuality, coupled with the preference under the law for dispositions to “natural objects of the testator’s bounty” over dispositions to “strangers in blood” can be expected to disadvantage a gay testator who leaves property to his significant other).

29 It is difficult to estimate the frequency with which nonconforming estate plans are disrupted by disgruntled heirs or putative legatees. In assessing the magnitude of the problem, one must consider the will contest that terminates prior to adjudication. See John H. Langbein, Living Probate: The Conservatorship Model, 77 Mich. L. Rev. 63, 66 (1978) [hereinafter Langbein, Conservatorship Model] (theorizing that a great many will contests are intended to, and do, result in a pretrial settlement); Sherman, supra note 15, at 233 n.43 (hypothesizing that the fact that by 1981 there were relatively few reported cases involving an undue influence challenge to the will of a gay or lesbian testator might be due to the pressure on the testator’s intended legatees to settle a case when the testator’s sexual orientation is likely to be an issue in the case).
The doctrines of mental capacity and undue influence, the most popular vehicles for challenging a will\(^{30}\) appear particularly conducive to abuse by the trier of fact adjudicating the validity of a nonconforming estate plan. These standards are sufficiently nebulous that they enable the fact-finder to rewrite the testator's estate plan in accordance with societal norms.\(^ {31}\)

The danger that a nonconforming testator will have her estate plan discarded by the trier of fact has been documented over time.\(^ {32}\) One might reasonably hypothesize that demographic changes in the structure of the typical American family and corresponding shifts in attitudes toward what constitutes a family\(^ {33}\) would have diminished the problem. Recent will studies appear to confirm, however, that this danger to the nonconforming testator persists.\(^ {34}\)

Professor Melanie Leslie recently studied a large number of will challenges culminating in reported decisions in the years 1985

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\(^{30}\)See Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP., PROB. & TR. J. 607, 647-50 (1987) ("[T]he predominant weapon for attempting to undo a will is an allegation of undue influence or lack of testamentary capacity. . . . [U]ndue influence and lack of testamentary capacity accounted for the exclusive grounds of contest in 39 of 60 cases in which the allegations could be determined.") (footnotes omitted).

\(^{31}\)See ATKINSON, supra note 11, at 255 ("It is difficult to put a realistic concept of undue influence into a capsule. . . . As in case of mental capacity we are dealing largely with subjective elements."); Langbein, *Conservatorship Model*, supra note 29, at 66 ("The genre [of mental capacity challenges] is inevitably intensely factious: the recurrent issue is the condition of the particular testator as the trier can infer it from evidence of his past conduct and circumstances."); Schoenblum, supra note 30, at 649 ("The absence of clear legal principles and the difficulty of applying such standards to 'idiosyncratic' behavior of the testator may encourage will contests that ought not to be brought.").

\(^{32}\)See Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 543, 545-46 (noting that a 1938 Minnesota study of undue influence and mental capacity challenges found that jury verdicts were reversed on appeal in 60% of undue influence cases and 30% of mental capacity cases as compared to a reversal rate of less than 10% for decisions by trial judges in similar cases); Peter Van Every, Comment, *Undue Influence—Judicial Implementation of Social Policy*, 1968 Wis. L. REV. 569, 570, 573 (examining 35 undue influence cases before the Wisconsin Supreme Court between 1945 and 1968 and concluding that "[a] close blood relationship between the proponent and the testator appears to make it considerably more difficult to establish undue influence"); Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 nn.4-5 (1953) (reporting that a study of mental capacity and undue influence cases in California between 1892 and 1953 found that 77% of the cases reaching the jury resulted in a verdict for the contestant; in addition, 62% of will contest verdicts for the contestant that were appealed to the California Supreme Court for insufficiency of the evidence between 1892 and 1953 resulted in reversal).

\(^{33}\)See, e.g., Fellows et al., supra note 20, at 2 nn.1-3 (citing to studies evidencing an increased number of U.S. households with blended families, single parents, and unmarried same-sex and mixed-sex committed couples).

\(^{34}\)See Leslie, supra note 15, at 236-37 ("[C]ourts faced with an offensive will often use other doctrines ostensibly designed to ascertain whether the testator formulated testamentary intent—doctrines such as capacity, undue influence and fraud—to frustrate the testator's intent and distribute estate assets to family members."); Schoenblum, supra note 30, at 654, 659 (reporting results of his study of will contests in Davidson County, Tennessee, between 1976 and 1984, which found that "[w]hen wills involving bequests and devises to non-relatives and friends were adjudicated at trial, the outcome was rarely in favor of sustaining the will").
through 1989. She found that the trier of fact was far more likely to uphold the testator's estate plan where the will contestant and the principal will beneficiary were equally related to the testator as compared to cases where the will contestant was related to the testator by blood or marriage and the principal will beneficiary was a non-relative. In only eighteen of the seventy (25.7%) undue influence cases involving will contestants and will beneficiaries of equal family relation to the testator was the will denied probate on the grounds of undue influence. In comparison, in eighteen of the thirty-six (50%) undue influence cases in which a will contestant related to the testator by blood or marriage challenged a devise to a non-relative of the testator, the will was found to have been procured through undue influence. Thus, the trier of fact was twice as likely to invalidate a will on grounds of undue influence when the will contest implicated the cultural norm favoring the legal spouse and close blood relations over non-relatives.

Professor Leslie concluded that courts utilized a de facto lower standard of proof in cases of alleged undue influence where a family member challenged a bequest to a non-family member as compared to undue influence challenges where both the contestant and the beneficiary were relatives of the testator. Moreover, she found that where a relative contested on grounds of undue influence a gift to a non-relative, the court was more likely to focus not on whether the devisee had destroyed the free agency of the testator and replaced the testator's volition with her own, but on whether the devise to the non-relative was "just."

One could, however, attribute these disparate results in undue influence cases as being the product, not of a pernicious disregard of the "abhorrent" testator's testamentary freedom, but of the fact-finder's sensible presumption that most property owners would prefer that their property pass at their death to close family members rather than to non-relatives. It is most significant, therefore, that Professor Leslie also found that courts are more likely to declare a will invalid for failure to comply with testamentary formalities when the will's

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35 Professor Leslie "examined each case noted in ... Westlaw topic number 409 (Wills), key numbers 154-66 (covering the elements of undue influence and related evidentiary and procedural issues) for the period between December 31, 1984 and January 1, 1990." Leslie, supra note 15, at 243 n.41.
36 See id. at 243-44 ("Courts were much more likely to honor testamentary intent when the will provided for family members as opposed to non-relatives.").
37 See id. at 244 n.42.
38 See id. at 245 ("[A] significant number of courts confronted with wills that disinherited family members in favor of non-family members upheld or imposed findings of undue influence based on minimal evidence, or evidence that would be insufficient to meet the contestant's burden of proof in a case where the will's primary beneficiaries were non-relatives.").
39 See id. at 246.
40 See supra notes 14-15 and accompanying text.
provisions favor non-relatives over family members. This finding is notable because there does not appear to be any “innocent” explanation for such a finding. It is simply not tenable to argue that testators who prefer non-relatives to family members are less likely to comply with the testamentary formalities required for the execution of a will—principally, that the testator put her will in writing, sign the will and have the will attested to by witnesses.

Professor Leslie’s findings led her to conclude that “[t]he axiom that wills law is designed only to effectuate testamentary intent is therefore false, and the idea that individuals enjoy complete testamentary freedom is a myth. Generally, individuals have ‘freedom’ to distribute their property along carefully delineated channels in accordance with prevailing norms.”

Moreover, will substitutes, which pass property at the owner’s death without probate administration, do not provide an adequate safe harbor for the “abhorrent” property donor. A “pure” will substitute allows the property owner to retain all of the incidents of ownership over her property during her life, while also affording her a means to designate the successor to her property at her death by a mechanism that keeps the property outside of probate administration. The four principal “pure” will substitutes are life insurance policies, pension accounts, joint accounts and revocable inter vivos trusts. By comparison to the “pure” will substitutes, an “imperfect” will substitute, such as a joint tenancy, also allows the property owner to pass her property at death without probate but requires her to give up some rights of ownership in the property at the creation of the “imperfect” will substitute. The owner of real or personal property who places the property in a joint tenancy, for example, must irrevocably pass to her co-tenant at the creation of the joint tenancy a partial interest in the property.

The availability of even “pure” will substitutes can not offer sufficient protection to the minority-culture property donor from majoritarian cultural norms. First, will substitutes, other than the revocable inter vivos trust, are inherently asset-specific in that each will

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41 See Leslie, supra note 15, at 260; see also id. at 237, 259, 263-64.
42 Id. at 273; see also id. at 257-58 (“[R]egardless of what courts declare, the presumption in favor of family members generally can be overcome only where the court views the testator’s reason for disinheriting relatives as morally acceptable. Thus, courts often focus more on the character of the disinherited contestant and his or her relationship with the testator than the quantity of evidence tending to show undue influence. Accordingly, testators who wish to distribute their property in a way that a court may view immoral, unjust or improper have limited freedom to do so.”) (footnote omitted).
44 See id. at 1109.
45 See id. at 1114.
46 See id.
substitute relates only to a particular type of property.\textsuperscript{47} Thus, the property owner who utilizes will substitutes still may need to execute a will to ensure, as best she can, that none of her property passes according to an intestacy scheme that does not comport with her donative wishes. Second, will substitutes are subject to the same grounds of attack as are testamentary transfers.\textsuperscript{48} Moreover, even if will substitutes could provide an escape for the "abhorrent" testator from majoritarian limitations on her testamentary freedom, such limitations would remain troubling. Every competent citizen should have an equal right to make a will and to have her testamentary wishes therein respected.\textsuperscript{49}

II. A VOICE AT THE TABLE

A. Culture and the Application of Neutral Law

Some evidence supports the widely held view that juries are even more likely to upset the testator's nonconforming estate plan than are judges sitting as finders of fact.\textsuperscript{50} Courts and commentators alike have decried the tendency of juries to upset estate plans based solely on "their own concepts of how testators should have disposed of their properties."\textsuperscript{51} At least one commentator has called for the elimination of jury trials in will contests because juries are more likely than are judges to ignore the law and to decide the case based on their own

\textsuperscript{47} See id. at 1115, 1115 n.32; Grayson M.P. McCouch, Will Substitutes Under the Revised Uniform Probate Code, 58 BROOK. L. REV. 1123, 1149-50 (1993).

\textsuperscript{48} See Sherman, supra note 15, at 264-66 (concluding that a "homosexual settlor must be as concerned about charges of undue influence as is the homosexual testator").

\textsuperscript{49} This is particularly so in light of the fact that the subsidiary rules applicable to wills, which "are the product of centuries of legal experience in attempting to discern transferors' wishes and suppress litigation," may not apply to a will substitute. Langbein, Nonprobate Revolution, supra note 43, at 1134-40. But cf. McCouch, supra note 47, at 1149-72 (explicating the several ways in which the 1990 Uniform Probate Code moves toward unification of the subsidiary laws of wills and will substitutes).

\textsuperscript{50} See Schoenblum, supra note 30, at 626-27 (studying probate records for Davidson County, Tennessee, for the years 1976-1984 and concluding that juries were more likely to hold for the will contestant than were judges).

\textsuperscript{51} In re Fritischi's Estate, 384 P.2d 656, 659 (Cal. 1963); see also id. at 659 n.1 ("But the fact that juries exhibit consistent unconcern for the wishes of testators should come as no surprise. Indeed, the tendency of juries in this respect is so pronounced that it has been said to be a proper subject of judicial notice."); Langbein, Conservatorship Model, supra note 29, at 64-65 (attributing the greater frequency of will contests in the United States, as compared to European nations, in part, to the fact that many American jurisdictions allow juries to decide issues of mental capacity and theorizing that a jury may be "more disposed to work equity for the disinherited than to obey the directions of an eccentric decedent who is in any event beyond suffering"); Athanas, supra note 32, at 546 ("Juries tend to decide which party appears most entitled to the property, not whether the instrument accurately represents the will of the testator. Thus, juries substitute their own sense of equity in place of the law's recognition that testators may dispose of their property as they choose.").
sense of equity. This proposed solution falls short, however, because it leaves the fate of the "abhorrent" testator's estate plan in the hands of a decision-maker who is likely not to appreciate or respect the values and beliefs of the "abhorrent" testator. Judges elected by the greater community as well as judges appointed and confirmed by officials who are themselves elected by that community are likely to share the values and biases of the community.

Cultural understanding, tolerance and acceptance are as important as facially-neutral laws in securing equal rights for minorities. True equality requires that neutral law be applied in a culturally neutral fashion.

See Athanas, supra note 32, at 530-31. Athanas conducts a state-by-state analysis of the constitutional and statutory rights to a jury trial in will contests. He reports that 13 states do not use juries in deciding will contests. Further, he concludes that no state has a constitutional right to jury trial in will contests. See id. at 541; see also Peter I. Mason & Mark W. Weisbard, The Pitfalls of Will Contest Litigation, 16 I. MARSHALL L. REV. 499, 521-22 (1983) (explaining that the right to a jury trial in a will contest in Illinois is statutory only and not mandated by either the Illinois or U.S Constitutions).

For an argument that the jury in a will contest should not be informed of the dispositive elements of the will so as to protect testamentary freedom, see Michael Falkner, Comment, A Case Against Admitting Into Evidence the Dispositive Elements of a Will Contest Based on Testamentary Incapacity, 2 CONN. L. REV. 616 (1970).

Unfortunately, one can not state with confidence that the probate bench is likely to put aside its biases in ruling on the validity of the nonconforming estate plan. See Langbein, Will Contests, supra note 24, at 2044 ("There have long been difficulties in staffing the American probate bench, and some of the people who serve there ... are menacing. ... [T]he integrity and ability of the American probate bench has so often been found wanting that confidence in the predictability and correctness of adjudication in these courts has been impaired.").

See Ronald J. Krotosznyski, Jr., Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change, 47 CASE W. RES. L. REV. 423, 440 (1997) ("The substantive content of many rights is culturally dependent; one's sense of justice is necessarily something of a function of one's cultural norms."); Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45, 47-48 (1997) (arguing that "expanding gay rights requires only reason, tempered and informed by empathy. ... [T]he root of most opposition to gay rights... is not legal doctrine per se, but judges' failures to approach matters involving human sexuality by using available social science research, and their broader failure to empathize with those whose sexual identity and desires are not exclusively heterosexual."); Sharon Elizabeth Rush, Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation, 13 HARV. BLACKLETR J. 65, 68 (1997) ("Dismantling hegemony requires empathy and sympathy, that is, understanding others' perspectives, identifying and breaking down aspects of society that subordinate different groups and constructing a new society that is acceptable to all.").

See, e.g., E. Gary Spitko, He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard, 18 BERKELEY J. EMP. & LAB. L. 56, 81-89 (1997) (arguing that gay people will be disadvantaged by recognition of a cause of action for same-sex sexual harassment because "any given sexual comment or behavior will be judged more harshly by the finder of fact when the claimed victim of the alleged harassment is of the same sex as the alleged harasser than when he is of the other sex"); see also William N. Eskridge, Jr., Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981, 25 HOFSTRA L. REV. 817, 952 (1997) ("[E]volution of public law is driven by changes in society, culture, and politics. In the larger time frame, public law is not just the application of 'neutral' principles, but is really a conflictual struggle to determine what in the short term will be considered 'neutral' application of agreed-upon principles and criteria.") (footnote omitted).
The law of wills, on its face, places no disability on the right of a member of a cultural minority to devise her property as she sees fit. Thus, for example, the lesbian who bequeaths her property to her same-sex life partner stands de jure on equal legal footing with the wife who leaves her estate to her husband. In fact, however, a challenge to the former devise is far more likely to succeed as compared to a contest against the latter estate plan.\(^5\)

This distinction in de facto testamentary rights under facially-neutral law arises from one part ignorance, one part fear and one part loathing. The trier of fact is likely to view the bequest to a same-sex partner through a heterosexual mind’s eye.\(^6\) The trier of fact expects

Professor Eskridge illustrates this point by way of the Miller v. California, 413 U.S. 15 (1973), standard for defining “obscenity.” See Eskridge, supra, at 892. Under Miller, the government may ban as obscene material that (1) the “average person, applying contemporary community standards” finds “appeals to the prurient interest,” (2) depicts sexual material “in a patently offensive” manner, and 3) “taken as a whole, lacks serious literary, artistic, political, or scientific value.” Miller, 413 U.S. at 24 (citations omitted). Professor Eskridge argues that “under Miller prosecutors could play on juror revulsion against or ignorance of homoerotic material to prove violation of community standards and insufficient redeeming social value. . . .” Eskridge, supra, at 894. Thus, “an inexorable consequence of the [Miller standard] was to encourage local crackdowns on gay erotica, which was significantly more likely to violate Miller’s ‘community standards’ test than straight erotica.” Id. Similarly, Professor Nadine Strossen reports that under the Canadian Supreme Court’s 1992 decision in Butler v. The Queen [1992] S.C.R. 452, which held that the government could outlaw materials that subordinate or degrade women, government censors have focused on lesbian and gay erotica while leaving mainstream violent and misogynistic heterosexual pornography largely untouched. See NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS 170, 235-39 (1995). For arguments that the Butler test could be applied in a manner that does not disadvantage gay men or lesbians, see Christopher N. Kendall, Gay Male Pornography After Little Sisters Book and Art Emporium: A Call for Gay Male Cooperation in the Struggle for Sex Equality, 12 WIS. WOMEN’S L.J. 21, 22, 61-63, 73 (1997) (“[R]ather than enforce and implement the equality mandate recently adopted by the Canadian Supreme Court in Butler, Customs’ officials continue to judge and define harm according to their personal perceptions of what is morally repugnant and socially undesirable.”); Margaret McIntyre, Sex Panic or False Alarm? The Latest Round in the Feminist Debate over Pornography, 6 UCLA WOMEN’S L.J. 189, 238-39 (1995) (conceding that Canadian Customs has implemented Butler in a homophobic manner but arguing that “the law’s definition of subordination and degradation are inherently vague and that perhaps this vagueness can be clarified [so as to protect gay and lesbian erotica]”).

\(^5\) See, e.g., Eskridge, supra note 55, at 947 (describing how Gertrude Stein’s blood family successfully challenged Stein’s will, which bequeathed her estate to her lesbian partner of forty years, on undue influence grounds).

\(^6\) See, e.g., Katherine M. Franke, What’s Wrong with Sexual Harassment?, 49 STAN. L. REV. 691, 732 (1997) (“While proof of the [alleged sexual] harasser’s heterosexuality is never required in different-sex cases because it is merely assumed, proof of homosexuality is frequently required in same-sex [sexual harassment] cases in order to demonstrate that the conduct was undertaken ‘because of sex’.”). The typical judge or juror is likely to be a non-gay person who can not directly access the same-sex romantic and affectional experiences of the gay testator. See generally EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 293 (1994) (reporting that 2.8% of American men and 1.4% of American women between the ages of 18 and 60 identify themselves as gay or lesbian). Moreover, one can not assume that the relatively rare gay judge or juror will demonstrate empathy or respect for the values that informed the gay testator’s estate plan. See, e.g., TONI A.H. MCNARON, POISONED IVY: LESBIAN AND GAY ACADEMICS CONFRONTING
to find the norm—a marriage between a man and a woman. Instead, what the trier of fact finds is, quite literally, queer. The trier of fact’s explanation for this testamentary deviancy is likely to be informed by its assumptions with respect to gay people. As Professor Marc Fajer explains:

Pre-understanding about a particular group can interfere with discourse about that group because many people believe they “know” important things about members of the group, things which often are not true about many group members. The pre-understanding of judges and lawyers can infect the legal process and build incorrect or overbroad assumptions into the structure of laws and legal decisions. For example, the pre-understanding that lesbians and gay men live lives in which sexual activity is separate from love and family is an important part of the majority opinion in *Bowers v. Hardwick*, which allowed states to criminalize same-sex activity.

The “pre-understanding” that gay relationships are principally sexual—a series of hedonistic sexual encounters—and are not comparable to non-gay relationships with respect to romantic, familial or social attachments and obligations, is at the heart of the threat to any devise to a same-sex partner. The less value the fact-finder places on a gay relationship the more likely she is to find that some force other than the testator’s affection or sense of obligation—such as mental incapacity, undue influence or testamentary fraud—motivated the bequest. This problem is compounded to the extent that the trier

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HOMOPHOBIA passim (1997) (reporting numerous narratives of lesbian and gay academics who have experienced disparate treatment on the basis of their sexual orientation at the hands of closeted gay faculty colleagues and administrators).

58 See, e.g., Rush, *supra* note 54, at 94 (“[T]he heterosexual traditional family is such an entrenched social, legal, and economic norm that any family that deviates from it typically experiences discrimination.”).

59 See Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1847 (1994) (explaining that “pre-understandings”—assumptions that members of the majority culture have with respect to people who belong to certain “outsider” cultural groups—often influence the outcome of a case).

60 Id. (citations omitted); see also Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 513-14, 544 (1992) (arguing that the prejudicial effects of “pre-understanding” may be diffused by relaying the reality of gay people’s lives).

61 See, e.g., Leslie, *supra* note 15, at 290 (calling for a “confront[ation] and explor[at]ion of prejudices that may prevent courts from understanding others’ desires to make bequests for non-traditional reasons”); Massaro, *supra* note 54, at 108 (“Lawyers and other advocates for gay rights... can make some progress by supplementing the more abstract, reason-based appeals for justice with concrete accounts of... the ordinariness and orderliness of many gay and lesbian existences...”).
of fact also fears, or is offended by, a culture that she finds foreign. Therefore, a viable solution to the problem of judicial hostility to the non-conforming estate plan should take into account the role that values and beliefs play in the application of the facially-neutral law of wills.

B. Ante-Mortem Probate

Ante-mortem probate, also known as living probate, is one long-debated probate reform that allows the testator personally to educate the fact-finder with respect to the culture that informed her choice to devise her property as she did. Generally, ante-mortem probate is a mechanism for judicial determination during the testator’s life of the validity of the testator’s will. The principal advantage of ante-mortem probate is that it allows the court to consider the best evidence of the testator’s capacity to execute a will, namely, the testator herself. Thus, ante-mortem probate affords the testator the opportunity to explain in person to the fact-finder why she devised her estate as she did and to refute personally any claims that her “unnatural” disposition of her property was the product of fraud, undue influence or a deficient mental capacity at the time she executed her will.

In the late 1970s, three states, Arkansas, North Dakota and Ohio, added ante-mortem statutes to their probate codes. Each of these states enacted a “contest model” of ante-mortem probate along the

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63 See Langbein, Conservatorship Model, supra note 29, at 67, 72 (discussing the comparative advantage of pre-death probate hearings).

64 A related precautionary measure is the afforced execution ceremony in which the testator creates a record of her mental capacity at the time she executes her will, which record may be introduced into evidence if the testator’s will is challenged after her death. See id. at 68. Typically, the testator explains the reasons for her dispositions and, specifically, why she is disinheriting one or more of her heirs apparent. See Langbein, Will Contests, supra note 24, at 2046. The testator’s comments may be recorded stenographically or by videotape. See Langbein, Conservatorship Model, supra note 29, at 68. Persons long familiar with the testator and, perhaps, a physician, pay particular attention to the testator’s mental state at the time she executes her will and memorialize their observations. See Langbein, Will Contests, supra note 24, at 2046. Although the afforced execution ceremony may be helpful in averting or ultimately winning the meritless will contest, in reality, the trier of fact remains free to disregard superior evidence of the testator’s capacity if she is sufficiently offended by the testator’s testamentary dispositions. See Langbein, Conservatorship Model, supra note 29, at 68 (noting that even with afforced execution, summary judgment may be hard to obtain if there is sufficient evidence for a jury to find incompetence or undue influence, and concluding that afforced execution is “not a wholly adequate solution to the underlying problem”).


66 Professor Langbein coined the phrase “contest model” of ante-mortem probate, in distinction to the “conservatorship model” of ante-mortem probate that he advocated. See Lang-
lines proposed by Professor Howard Fink. These statutes provide for notice to the testator's beneficiaries named in the will as well as to the testator's heirs apparent (the persons who would be the testator's intestate heirs if she died at that moment), an adversarial proceeding in which the parties contest the validity of the will, and a declaratory judgment by the court as to the will's validity.

Although providing the testator with the advantage of allowing her personally to defend her estate plan, ante-mortem probate also has considerable disadvantages. Professor John H. Langbein argues that chief among these disadvantages is the fact that while the testator is alive, her heirs apparent can not be certain that they will survive the testator to become heirs under the state's intestacy scheme. Therefore, the heirs apparent must consider carefully whether they wish to fight an expensive, time-consuming and psychologically draining will contest knowing full well that it may be many years before a potential payoff (the testator's death) and that they will not enjoy the fruits of their litigious labors unless they survive the testator. Thus, Professor Langbein theorizes, many wills offered for ante-mortem probate will go unchallenged by the only persons with standing to challenge the will in such a proceeding, the heirs apparent, even when solid grounds exist for challenging the will.

To remedy this substantial shortcoming in the "contest model" of ante-mortem probate, Professor Langbein offers his "conservatorship model" of ante-mortem probate. The "conservatorship model" borrows heavily from existing conservatorship and guardianship procedures for determining the competency of living property owners. Professor Langbein proposes that the testator who fears a will contest after her death file her will with the court that has jurisdiction to adjudicate competency in conservatorship and guardianship proceedings and seek from that court a determination that she possessed the requisite capacity at the time she executed her will. The court then would appoint a guardian ad litem to represent all persons, born and unborn, who might ultimately be affected by the court's determination as to whether or not the testator possessed the requisite capacity to execute
her will. While such potentially affected parties would retain the right to contest the will on their own behalf, the guardian ad litem feature of Professor Langbein’s proposal would afford these individuals the option of participating in the ante-mortem procedure only as sources of information for the guardian ad litem who would be charged with representing their interests.

Professor Langbein concedes that his proposal retains a major drawback of the “contest model” of ante-mortem probate: the testator who attaches her will to her ante-mortem probate petition publicizes her estate plan to her heirs apparent during her lifetime. This disclosure is likely to undermine family harmony to the extent that the testator’s dispositive scheme gives less to one or more family members than they had expected to receive. Of course, post-mortem probate, which similarly discloses to the testator’s family members the contents of her will, may also result in family members who are hurt and disappointed in the testator. With post-mortem probate, however, the testator is no longer alive; thus, she does not have to endure the consequences of family disharmony.

With this “publicity” shortcoming of ante-mortem probate in mind, Professors Gregory S. Alexander and Albert M. Pearson have proposed an “administrative model” of ante-mortem probate. The “administrative model” retains Professor Langbein’s guardian ad litem feature but is an ex parte proceeding, rather than an adversarial proceeding, in which the testator’s heirs apparent have no right to participate. In determining the validity of the will, the trier of fact relies upon the guardian ad litem, who acts as “a court-appointed special master.” The administrative model charges the guardian ad litem with the responsibility of interviewing the testator and others who may provide insight into the testator’s competence and with reporting to the court on her findings.

**Notes:**

75 See id. at 78. This group of potentially-affected individuals includes the heirs apparent, unborn potential heirs, and beneficiaries under any of the testator’s prior wills whose potential interest would be diminished under the instant will. See id.

76 See id. at 78.

77 See id. at 77.


79 See Alexander & Pearson, supra note 78, at 94.

80 See id. passim.

81 See id. at 112. Professors Alexander and Pearson argue that “[h]eirs at law and disappointed legatees need not be given an opportunity to contest [the will] because . . . their interests, being only derivative of the testator’s, are bound by the testator’s actions [in utilizing ex parte ante-mortem probate].” Id. at 117. I pick up this point infra. See infra notes 108-33 and accompanying text (discussing the testator’s right to impose arbitration upon a will challenger).

82 Alexander & Pearson, supra note 78, at 113.

83 See id. at 113-14.
guardian ad litem and reviews the testator’s will in camera before determining the will’s validity.\textsuperscript{84} At no time are the testator’s heirs apparent made aware of the testator’s estate plan.\textsuperscript{85}

The robust debate over, and enthusiasm for, ante-mortem probate within the academic community in the late 1970s\textsuperscript{86} has not translated into widespread legislative enactment of such statutes.\textsuperscript{87} Arkansas, in 1979, was the third and, to date, the last state to add an ante-mortem option to its probate code. For the “abhorrent” testator, this is just as well because, unfortunately, no amount of tinkering with the various ante-mortem proposals can cure the central defect of ante-mortem probate: a will that the court declares valid in an ante-mortem probate proceeding may still be the subject of a post-mortem will challenge. An ante-mortem probate proceeding can not adjudicate an allegation of fraud or undue influence that does not occur until after the ante-mortem probate proceeding. Thus, ante-mortem probate can not preclude the testator’s heirs from challenging the will on the grounds that fraud or undue influence occurring after the ante-mortem probate determination prevented the testator from revoking her will and, perhaps also, from executing a new estate plan.\textsuperscript{88} Thus, the “abhorrent” tes-

\textsuperscript{84}See id.
\textsuperscript{85}See id.
\textsuperscript{86}See id. at 90 (predicting that “ante-mortem probate is likely to be widely implemented in some form”).
\textsuperscript{87}In 1980, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) appointed a drafting committee on a Uniform Antemortem Probate of Wills Act. Professor Alexander served as the Reporter for this project. Professor Langbein, Professor Richard Wellman and several practitioners also served on the drafting committee. Professor Alexander initially prepared two alternative draft versions of a Uniform Act, one adopting Professor Langbein’s “conservatorship model,” the other adopting his own “administrative model.” At its first meeting, the drafting committee discussed at length both draft versions of the Uniform Act. Several committee members expressed reservations about whether an ante-mortem probate procedure was needed at all. The committee failed at its first meeting to choose between the two draft versions. At the committee’s instruction, Professor Alexander made several modifications in both versions of the Uniform Act, prepared Reporter’s comments and submitted a second draft of both versions. At the committee’s second meeting, a practicing attorney from Arkansas, one of three states at the time with an ante-mortem probate statute, stated that Arkansas’ ante-mortem probate statute was little known and little used in his state. Several other practitioners on the committee expressed doubt that an ante-mortem probate statute was needed in light of the facts that will contests are so rare and, in the critics’ view, other preventive measures, such as an afforced execution ceremony, worked well enough to safeguard against will contests. Again, the committee adjourned without endorsing either version of the Uniform Act. Some time later, NCCUSL terminated the project and the committee disbanded. Professor Alexander believes that the disagreement between himself and Professor Langbein regarding the optimal ante-mortem probate model prevented the development of any consensus over the basic idea of ante-mortem probate as a desirable law reform measure. \textit{See Letter} from Professor Gregory S. Alexander, Visiting Professor of Law, Harvard Law School, to E. Gary Spitko, Assistant Professor of Law, Indiana University School of Law, Indianapolis (May 21, 1998) (on file with author).

\textsuperscript{88}See Fellows, Against Living Probate, supra note 68, at 1082-83 (pointing out this shortcoming of ante-mortem probate and concluding that “for all practical purposes, wills may be no more immune from attack after living probate than before”); \textit{see also} Latham v. Father Divine, 85 N.E.2d 168 (N.Y. 1949) (holding that an allegation that the Defendants fraudulently pre-
tator must find another way to try to ensure that her values are considered and respected in a determination of the validity of her estate plan.

C. Testator-Compelled Arbitration of Will Challenges

Arbitration provides an alternate, arguably more viable, means for the testator to have a voice at the table when the validity of her estate plan is adjudicated. A testator may provide that any challenges to the meaning or validity of her will shall be adjudicated not by a judge or jury but rather by an arbitrator selected by the testator and named in her will. Following an arbitration hearing and an award or

vented the testator from revoking her will stated a cause of action for which a constructive trust may be imposed).

89See Pray v. Belt, 26 U.S. 670, 679-80 (1 Pet.) (1828) (holding that a testator may empower her executor to decide will construction disputes); American Bd. of Comm'rs of Foreign Missions v. Ferry, 15 F. 696, 699-700 (C.C.W.D. Mich. 1883) (holding that a testator may designate an individual to construe her will); Estate of Phillips, 48 Leg. Int. 232 (10 Pa. County Ct. 1891) (holding that a testator may designate an individual to decide "all questions of distribution or construction, arising under his will"); Moore v. Harper, 27 W. Va. 362, 373-74 (1886) ("[A] testator has the power not only to appoint a person or arbitrator to interpret and settle difficulties among the devisees and legatees growing out of the dispositions made by the will, but [also] he has the right to make the decision of such arbiter, if made without fraud or corruption, final and conclusive on the beneficiaries under the will.").

In almost every jurisdiction, a testator lacks the authority to compel her personal representative to hire a specific attorney as attorney for the estate. See, e.g., Highfield v. Bozio, 207 P. 242 (Cal. 1922); In re Caldwell, 80 N.E. 663 (N.Y. 1907); see also Jean Fleming Powers, Testamentary Designations of Attorneys and Other Employees, 20 GOLDEN GATE U. L. REV. 261, 269 (1990) ("The great weight of authority is that a purported appointment of an attorney is not binding and gives the attorney no beneficial interest in the estate.") (footnotes omitted); Richard H. Allen, Note, Power to Contractually Appoint "Attorney for the Estate": A Nonexistent Right of a Decedent, 21 J. OF THE LEGAL PROF. 145, 146 (1997) (citing to cases in numerous states holding that a testator has no right to appoint an attorney for his estate). Louisiana alone grants to the testator the right to appoint by will a specific attorney for the estate. See LA. REV. STAT. ANN. § 9:2448 (West 1991).

Two related rationales support the majority rule. First, the attorney for the estate does not in fact perform her duties as the attorney of the estate but instead acts as the attorney for the personal representative with whom she has an attorney-client relationship. See Allen, supra, at 146-47. Second, should the attorney for the estate fail to live up to her duties as attorney, the executor may be held liable for those shortcomings. See id. It follows that the executor should have the freedom to choose the attorney for the estate, with whom she will have an attorney-client relationship and for whose mistakes she may incur liability. See id.; see also In re Ogier's Estate, 35 P. 900, 901 (Cal. 1894) ("There is no such office or position known to the law as 'attorney of an estate.' . . . [I]f the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will. This being so, it would seem to be neither reasonable nor right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator"); Powers, supra, at 264-65 (discussing problems associated with testamentary designations of employment); cf. In re Estate of Fresia, 390 So. 2d 176, 178 (Fla. Dist. Ct. App. 1980) (finding that a testamentary designation of a particular real estate agent was advisory only, due to the fiduciary nature of the relationship). But see Schmelting v. Devroy, 325 N.W.2d 345 (Wis. 1982) (holding that a testator may condition appointment of a personal representative on the representative's agreement to hire a specific attorney as attorney for the estate).

The twin policies grounding the nearly universal refusal to recognize a testator's right to appoint the attorney for the estate have no relevance to the issue of whether the testator ought to
decision by the arbitrator, the probate court, or the court of general jurisdiction, should enter the judgment and, if need be, order its execution.\footnote{90}

The use of arbitration as a means of protecting minority rights may strike some familiar with arbitration as counterintuitive. Indeed, one group of commentators has theorized that arbitration may actually imperil the rights of minorities.\footnote{91} Professor Richard Delgado and his colleagues point out that arbitration lacks many of the procedural safeguards that are present in more formal adjudication and that are designed to reduce the risk of prejudice. Such safeguards include limitations on the admission of evidence and rigorous appellate review.\footnote{92}

Delgado and his colleagues conclude from their review of social science research on prejudice that the rules and structure of formal adjudication tend to suppress bias, whereas informality tends to increase it\footnote{93} and that the risk of prejudice posed by informal adjudication is further increased "when the issue to be adjudicated touches a

have the power to appoint a specific arbitrator to hear contests of her will: The will contestant will not enter into a fiduciary relationship with the arbitrator and will not incur liability for any negligence or malfeasance on the part of the arbitrator.

\footnote{90}The Uniform Probate Code endorses resolution of will contests through alternative dispute resolution. \textit{See} UNIF. PROBATE CODE § 3-912 (1993) (requiring the personal representative to abide by the terms of an agreement reached by the successors to the estate with respect to "alter[ing] the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions"); \textit{Id.} § 3-1101 ("A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the Court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located."); \textit{Id.} § 3-1102 (providing that a court may approve a will contest settlement agreement if, after notice to all interested persons, the court "finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable").

\footnote{91}\textit{See} Richard Delgado et al., \textit{Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution}, 1985 Wis. L. Rev. 1339 (discussing necessary safeguards against prejudice in alternative dispute resolution).

\footnote{92}\textit{See id.} at 1367 n.65. Arbitration awards are subject to review under a "manifest disregard of the law" standard. \textit{See} Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986); \textit{see also} Wilko v. Swann, 346 U.S. 427, 436-37 (1953) (stating in dictum that a court may vacate an arbitration decision that shows "manifest disregard" of substantive law). \textit{See generally} Brad A. Galbraith, Note, \textit{Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard}, 27 IND. L. REV. 241 (1993) (discussing the various legal grounds used to vacate commercial arbitration awards). To succeed under the "manifest disregard" of the law standard, the appellant must show not only that the arbitrator made an obvious error but also that the record demonstrates that the arbitrator was aware of a clearly governing legal standard and chose to ignore that standard. \textit{See Bobker}, 808 F.2d at 933.

\footnote{93}\textit{See Delgado et al., supra note 92, at 1375-91} (detailing theories on the creation and destruction of bias in ADR proceedings).
sensitive or intimate area of life."\textsuperscript{94} Moreover, arbitration is thought to de-emphasize substantive law in favor of "equitable" outcomes.\textsuperscript{95} This subordination of legal norms arguably opens the door to prejudiced decision-making.

Arbitration should also be seen, however, as a means to empower minorities. Arbitration can empower cultural minorities by providing a forum for adjudication in which the decision-maker is selected because she understands and appreciates the minority culture at issue. Such a decision-maker need not herself be a member of the minority culture so long as she is empathetic to the values and beliefs of the parties whose dispute she is adjudicating.

The case of the "abhorrent" testator, for whom the procedural and substantive protections of formal adjudication offer no safe harbor, is illustrative. Very little has been written about testator-compelled arbitration. What has been written has focused on arbitration as a means of controlling costs and delay in probate.\textsuperscript{96} A principal advantage of arbitration, however, and a virtue that is directly relevant to the estate planning concerns of the "abhorrent" testator, is that it permits the parties to a dispute to select a decision-maker with expertise in the particular subject matter of the dispute:\textsuperscript{97}

While the civil justice system often selects its triers of fact on the basis that they know little or nothing about the subject of the dispute, a hallmark of arbitration is the presence of one or more decisionmakers [sic] with pertinent knowledge or experience. The theory is that an individual familiar with the commercial context of the dispute, including industry customs and vocabulary, is better suited to dispense justice than laypersons who might be hampered by their relative

\textsuperscript{94} Id. at 1403.
\textsuperscript{95} See Edward Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 Tul.
L. Rev. 1, 3-4, 13-14 (1987) ("Compromise, rather than application of substantive principles, seems the ADR norm . . . ."); Soia Mentschikoff, Commercial Arbitration, 61 Colum. L. Rev. 846, 861 (1961) (stating that almost 90\% of arbitrators surveyed believed that they were free to disregard substantive law if doing so would result in a "more just" decision).
\textsuperscript{96} See, e.g., Dominic J. Campisi, Alternatives to Litigation in Trust and Probate Proceedings, 42 Arbitration J. 30, 31-32 (1987) (summarizing the results of a survey of probate judges concerning techniques to minimize delays caused by litigation); Stanard T. Klinefelter & Sandra P. Gohn, Alternate Dispute Resolution: Its Value to Estate Planners, 22 Est. Plan. 147, 147, 151 (1995) (describing arbitration as "less-expensive and time-consuming than a court fight").
\textsuperscript{97} See, e.g., Wilfred Feinberg, Maritime Arbitration and the Federal Courts, 5 Fordham Int'l L.J. 245, 246 (1982) (commenting that maritime arbitration offers the advantage of arbitrators who have knowledge of maritime commercial relations that few judges possess).
lack of business experience and understanding of trade practices.\(^9\)

Thus, arbitration affords the testator the opportunity to select a decision-maker with relevant expertise. The testator may select an arbitrator who is familiar with the values and beliefs that influenced her in drafting her estate plan. In theory, such an arbitrator should be more appreciative of the actual forces that motivated the drafting of the estate plan and more respectful of the testator’s culture and testamentary choices.\(^9\) Such an arbitrator is, presumably, less likely to discard a testator’s estate plan based on ignorance or disapproval.\(^10\)

III. OVERCOMING OBJECTIONS TO TESTATOR-COMPELLED ARBITRATION

Generally, arbitration results from an agreement between two parties that they will arbitrate an existing dispute or a dispute that may arise in the future from a certain transaction or relationship. Testator-compelled arbitration does not fit this standard concept of arbitration as a dispute resolution mechanism mutually and voluntarily selected by the parties. Thus, one should anticipate the argument that a will contestant should not be held to the testator’s selected means of dispute resolution when the will contestant did not contract to be so bound.\(^10\)

A. Coerced Voluntary Compliance

A first line of defense against this objection to testator-compelled arbitration would be for the testator to seek “voluntary” compliance with her direction to arbitrate. The testator who desires

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\(^9\) See Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 57, 104 (arguing that the decision-maker’s perspective may influence her decision in a case and pointing out that parties to an arbitration who have control over the choice of an arbitrator have the opportunity to select a decision-maker on the basis of her lack of bias); William Mason Emnett, Note, *Queer Conflicts: Mediating Parenting Disputes Within the Gay Community*, 86 GEO. L.J. 433, 441 (1997) (“[M]ediation [of gay co-parents’ claims of custody and visitation rights] enables conflict resolution within the common values shared by the gay community.”).

\(^10\) See Stipanowich, *supra* note 98, at 437 (“Arbitrator expertise should reduce the possibility that the final decision will be arbitrary or ill-informed. Arbitrators with pertinent commercial background and understanding should also be less susceptible to lawyer artifice or emotion.”) (footnote omitted); Emnett, *supra* note 99, at 442 (suggesting that mediation by gay or gay-friendly mediators of gay family disputes “work[s] from a baseline that gay families are legitimate and there is no reason they should be treated differently from heterosexual families”).

that any dispute concerning her estate plan be arbitrated can provide that any person who nevertheless chooses to litigate in court the validity of her will, in disregard of her express wishes, shall lose her devise under the will.\textsuperscript{102} Such an “arbitrate-or-else” clause would function similarly to a standard no-contest clause and would be subject to the principal limitation of a no-contest clause. That is, a testator must devise to the potential will contestant an amount of property that is significant enough to discourage her will challenge.\textsuperscript{103} A will contestant to whom the testator has devised little or no property loses little or nothing under the no-contest clause by challenging the validity of the will.

A second major limitation of a no-contest clause is that, in a majority of states, courts will not enforce a no-contest clause if the contestant brought her challenge in good faith and with probable cause.\textsuperscript{104} Courts employ this “probable cause” test in an attempt to balance two competing interests. On the one hand, “[b]ecause no contest clauses protect estates from costly, time consuming and vexatious litigation; and serve to minimize family bickering concerning the competence and capacity of the testator, as well as the amounts bequeathed, they are favored by public policy.”\textsuperscript{105} On the other hand, no-contest clauses may discourage meritorious will contests and, in that way, undermine testamentary intent.\textsuperscript{106}

This balancing of public policy interests that grounds the “probable cause” test in the case of a no-contest clause is wholly inapposite with respect to an “arbitrate-or-else” clause. A direction that a legatee shall forfeit her interest should she decline to respect the testator’s wishes with respect to arbitration of will contests should not discourage any truly meritorious will contest. Such a contest may still be brought, albeit in a forum less hostile to the “abhorrent” testator’s testamentary freedom—arbitration.\textsuperscript{107} Indeed, to the extent that such
a forfeiture clause discourages meritless “strike suits” that seek to extort a settlement from the estate, public policy should favor enforcement of such clauses.

**B. The Superior Right of the Testator/Property Owner**

Absent voluntary compliance with the testator’s arbitration direction by the will contestant, a court should stay the will challenge pending forced arbitration. The relative weight of the rights at issue in a will dispute compel this result. The testator’s right to dispose of her property as she sees fit is indisputably superior to the right of an intestate heir or beneficiary under a prior will to receive the testator’s property at her death. Thus, 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.

Quite simply, the testator’s superior rights vis-a-vis the heirs or disappointed legatees stem from the fact that she owns the property in relationship to which the rights are being asserted. The fact that the property owner herself retains the right to defeat the expectations of the heirs-apparent or putative legatees by transferring her property inter vivos supports the conclusion that her rights are superior to the rights, if any, that her heirs-apparent or putative legatees might possess. Moreover, state intestacy schemes are principally concerned with effectuating the decedent property owner’s probable intent rather than with protecting any right that inheres in the status of an heir.

The testator’s devising of her property or the property owner’s acquiescence in the descent of her property at death is, in effect, a gift to her legatees or intestate heirs. Reduced to fundamentals, the state through probate aids individuals in transferring property that is indisputably theirs to the objects of their generosity at death. Thus, the testator retains the rights of one who is donating her property while her legatees and intestate heirs have only the rights of donees until the testator’s gift is completed. The testator’s gift is not completed until her will is accepted for probate or until she is adjudicated to have died intestate. The testator’s right to pass her property at death, therefore, includes the right to direct that arbitration agreement is a species of forum-selection clause: without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance.

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108 See Alexander & Pearson, supra note 78, at 102.
109 See id. at 108.
110 See id. at 98 (“Inheritance through testate or intestate succession . . . is simply a state-supervised gift. Until the gift is completed, the expectant recipient has no greater property rights than the expected recipient of an inter vivos gift.”).
111 Id. at 103.
112 See id.
113 See id. at 102-03, 107.
shall be used to determine whether she died testate and, if so, who her legatees are. Such a direction is well within the property owner’s right to leave a conditional gift to her legatees or heirs, who otherwise have no rights in the testator’s property.\(^{114}\)

Thus, the heir’s or putative legatee’s “rights” in the decedent’s property are wholly derivative of the decedent’s right to pass her property to the persons of her choosing at her death.\(^{115}\) The heir or putative legatee has “rights” in the estate only because the decedent has granted those rights. Hence, the situation of an heir or putative legatee asserting a claim in the estate of a decedent who has directed that such claims be submitted to arbitration is somewhat analogous to that of a party who claims rights arising under an implied contract containing an arbitration clause.\(^{116}\) The individual seeking to vindicate her contract rights should be held to the method of vindication provided for in the contract. In that regard, *Schnelting v. Coors Distributing Co.*\(^{117}\) is informative. In *Schnelting*, the Plaintiff claimed that his former employer had wrongfully discharged him in contravention of rights arising from the employer’s handbook. The court affirmed dismissal of the employee’s claim, finding that the employee had failed to utilize the discharge appeal procedures set forth in the employee handbook.\(^{118}\) The court held that the employee could not rely on the handbook when it worked to his advantage but repudiate the handbook when it worked to his disadvantage; if the employee wished to assert rights arising from the handbook, he must do so in the manner provided therein.\(^{119}\)

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\(^{114}\)See Korn, *supra* note 99, at 90-91 (articulating, but not endorsing, the argument that arbitration is more acceptable the less important the rights at issue).

\(^{115}\)See Langbein, *Substantial Compliance, supra* note 4, at 500 ("The judicially developed constructional presumptions in the law of wills strongly favor validity, further reflecting the subsidiary status of the intestate succession scheme.")

\(^{116}\)See American Bd. of Comm’rs of Foreign Missions v. Ferry, 15 F. 696, 699-700 (C.C.W.D. Mich. 1883) (reasoning that since parties dealing with each other at arm’s length may agree to be bound by an arbitrator’s decision on a contract dispute, a testator disposing of her property should have the power to designate a person in whom she has confidence to interpret her will); Moore v. Harper, 27 W. Va. 362, 374 (1886) ("Of course, a will is not an agreement between two or more contracting parties, but it is certainly no less binding upon the parties who take a benefit under it than if they had contracted with the testator for that benefit.")

\(^{117}\)729 S.W.2d 212 (Mo. Ct. App. 1987).

\(^{118}\)See *id.* at 214-15.

\(^{119}\)See *id.* at 215; *see also* Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-58 (11th Cir. 1993) (holding that where plaintiff alleges that defendant, through its management of subsidiary, caused subsidiary to violate terms of subsidiary’s agreement with plaintiff, an agreement containing an arbitration clause, plaintiff must arbitrate claims against defendant); McBro Planning & Dev. v. Triangle Elec. Constr., 741 F.2d 342 (11th Cir. 1984) (holding that despite absence of arbitration agreement between plaintiff contractor and defendant construction manager, Plaintiff must arbitrate claims against Defendant where Plaintiff alleged that Defendant tortiously interfered with Plaintiff’s rights arising under a contract between Plaintiff and site owner, which contract contained an arbitration clause); Hughes Masonry v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 841 n.9 (7th Cir. 1981) (holding that subcontractor is equitably estopped from denying construction manager the benefit of arbitration clause in
The Supreme Court of the United States has implicitly recognized this hierarchy of interests in which the rights of the heir or devisee derive from, and are inferior to, the rights of the property owner. In *Hodel v. Irving*, the Supreme Court held for the first time that the Constitution protects a property owner’s right to devise her property to the persons of her choosing. The dispute before the Court in *Hodel* concerned a provision of the Indian Land Consolidation Act of 1983 (“ILCA”) which provided that certain small interests in Native American lands shall escheat to the Native American tribe at the death of the property owner.

Congress enacted the ILCA in response to a problem that Congress itself had created in the nineteenth century when it divided certain Native American tribal lands into individual allotments to be held in trust for Native Americans. Until 1910, Congress allowed the allotted lands to pass at the death of the equitable owner only by the laws of intestate succession of the state or territory where the land was located. Quite often, a property owner would have multiple intestate heirs. Thus, ownership of the allotted lands became increasingly fractionalized over time. This increasing fractionalization made the land difficult to manage and gave rise to economic waste. In response to the fractionalization problem, Congress enacted section 207 of the ILCA which provided:

No undivided fractional interest in any tract of trust or restricted land within a tribe’s reservation or otherwise subjected to a tribe’s jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned its owner less than $100 in the preceding year before it is due to escheat.
In *Hodel*, the Supreme Court held that section 207 amounted to a taking of the landowner’s property without just compensation in violation of the Fifth Amendment. Both the district court and the Court of Appeals for the Eighth Circuit had held that a property owner’s heirs had no vested rights in the decedent’s property prior to her death. The heirs did not reassert, before the Supreme Court, that their own property rights had been taken; rather, they argued that section 207 deprived their ancestors of the right to pass property at death.

The Supreme Court found that section 207 was “extraordinary” in that it virtually abrogated the right of certain property owners to pass their property at death. After noting that “[i]n one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times,” the Court held that the government had engaged in an unconstitutional taking when it provided for such a total abrogation of the right to pass property at death without just compensation.

Significantly, the Court made clear that while the Constitution protects the property owner’s right to pass her property at her death, no similar constitutional protection attaches to the expectations that an intestate heir might have in one day receiving her ancestor’s prop-

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128 See *Hodel*, 481 U.S. at 710; see also *Irving v. Clark*, 758 F.2d 1260, 1264 (8th Cir. 1985) (holding that Irving’s status as an intestate heir conferred “no property right protectible under the fifth amendment taking clause”).

129 See *Hodel*, 481 U.S. at 711. The Court held that the heirs had standing to assert the rights of their decedent ancestors. See id. Obviously, the decedents could not assert claims on their own behalf. A federal statute charged the Secretary of the Interior with prosecuting claims relating to Native American trust property. The Secretary also was charged, however, with defending the constitutionality of the ILCA. The Court found that under these circumstances, the heirs were proper parties for asserting the Fifth Amendment claims of the decedent Native Americans. See id. at 711-12.

130 See *Hodel* 481 U.S. at 716. The Court’s conclusion that section 207 virtually abrogated the property owner’s right to pass her property at her death betrays a fundamental misunderstanding of the utility of will substitutes, such as revocable inter vivos trusts, in effectuating this purpose.

131 Id. at 716.

132 See id. at 717; see also *Babbitt v. Youpee*, 519 U.S. 234, 244 (1997) (holding that despite amendments to section 207 that were not considered by the Court in *Hodel*, section 207 still “severely restricts the right of an individual to direct the descent of his property” and, thus, still amounted to a taking without compensation).

The *Hodel* and *Youpee* cases themselves illustrate the pervasive nature of cultural bias in the law. In striking down the ILCA, the Supreme Court did not give weight to tribal property rights or the right of tribe members to inherit their tribal culture and community land. Rather, without regard to these minority values, the Court gave effect to the majoritarian norm favoring individual property rights. See AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 83-84 (1995) (noting that the *Hodel* Court elevated individual property rights over whatever benefits the tribe might have derived from the ILCA); Rebecca Tsosie, American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity, 22 L. & Soc. INQUIRY 359, 371 (1997) (commenting that in *Hodel*, the Court “displayed a willingness to sacrifice group claims to property to the Anglo-American norm of individual private property rights”).
erty. Indeed, the Court made clear that the state may constitutionally abolish descent by intestacy altogether.\textsuperscript{133}

C. The Separability of the Testator’s Arbitration Direction from Her Testamentary Scheme

Some commentators have argued that “[t]o apply will provisions mandating ADR in [the context of an execution, mental capacity, undue influence or fraud challenge] would be tautological, using a provision in a challenged document to validate the document itself.”\textsuperscript{134} That is to say, an arbitrator whose authority to adjudicate a will dispute derives from a clause in the will itself should have no authority to decide a claim that the will is invalid on grounds of improper execution, lack of mental capacity, undue influence or testamentary fraud. Such a view would give the arbitrator the sole authority to interpret the will’s provisions but not to hear challenges to the will’s validity.

The doctrine of separability, however, commands that the arbitrator should have the authority to adjudicate an execution, capacity, undue influence or fraud claim against the will so long as such a challenge is not specifically directed against the arbitration provision in the will.

The separability doctrine is a legal fiction pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts. In addition to the contract really alleged to have been formed [the container contract], the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms.\textsuperscript{135}

In \textit{Prima Paint Corp. v. Flood & Conklin Manufacturing Co.},\textsuperscript{136} the United States Supreme Court held that the Federal Arbitration Act

\textsuperscript{133}See \textit{Hodel}, 481 U.S. at 718 (“Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs upon pain of escheat. It may be appropriate to minimize further compounding of the problem [of fractionalization] by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate a [devisee] to prevent escheat to the Tribe.”) (citation omitted); \textit{see also} \textit{Shapira v. Union Nat’l Bank}, 315 N.E.2d 825 (Ohio Ct. C.P. 1974) (“Basically, the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or [constitutionally] protected. . . .”).

\textsuperscript{134}See, \textit{e.g.}, Klinefelter & Gohn, supra note 96, at 151.


\textsuperscript{136}388 U.S. 395 (1967).
("FAA") adopts a separability scheme, in the absence of contrary direction from the parties to the agreement. In Prima Paint, one party to a consulting agreement presented the Court with the claim that the agreement should be rescinded because the other party to the contract had induced agreement through fraud. The agreement contained a clause mandating arbitration of "[a]ny controversy or claim arising out of or relating to th[e] [a]greement." The issue before the Court was whether the federal court or an arbitrator should adjudicate the fraudulent inducement claim.

The Court focused on section 4 of the FAA which provides that a federal court, "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, ... shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." The Court interpreted this language to mean that the arbitration clause is severable from the rest of the contract—meaning that a court shall have the authority to adjudicate the fraudulent inducement claim only if the claim is one that the arbitration clause itself, as opposed to the entire container contract, was induced through fraud. "[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." The Court found support for its conclusion not only in the "plain language" of the FAA, but also from its purpose that parties to a contract who select arbitration as the means for resolving their disputes gain the advantage of a procedure that is "speedy and not subject to delay and obstruction in the courts." The Petitioner in Prima Paint did not allege that the other party to the agreement had fraudulently induced it to agree to arbitrate disputes arising from the container agreement; therefore, the Court held that an arbitrator, and not a federal judge, must decide the fraudulent inducement claim. Federal courts have applied the separability doctrine of Prima Paint to enforce arbitration clauses in the face of a variety of contract-based challenges to the container contract.

138 Prima Paint, 388 U.S. at 398.
139 See id. at 396-97.
141 See Prima Paint, 388 U.S. at 403-04.
142 Id. at 404.
143 Id.
144 See id. at 406-07.
145 See, e.g., Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 477 (9th Cir. 1991) (holding that the district court failed to follow Prima Paint "in considering the contract as a whole to determine the threshold question of whether [a party to the contract containing an arbitration agreement] may enforce the arbitration agreement"); Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir. 1987) (holding that the issue of the illegality of the contract should be decided by the arbitrator where the parties seeking to avoid arbitration "do not challenge the legality of the arbitration provision itself, but [instead challenge] the
The FAA governs the enforcement of any arbitration "contract evidencing a transaction involving commerce." This is so regardless of whether the action to enforce the arbitration agreement is brought in state court or federal court. The Supreme Court has held that Congress's use of this peculiar language "involving commerce" signaled Congress's "intent to exercise [its] commerce power to the full." Thus, even the most tenuous connection with interstate commerce will bring an arbitration clause within the scope of the FAA.

Although state law generally governs probate matters, it would seem that a will "evidencing a transaction involving commerce" should fall within the scope of the FAA. Therefore, a testator seeking to take advantage of the FAA's separability doctrine would be well advised to include in her will at least a token bequest to an out-of-state individual, corporate or charitable beneficiary or to name as executor of the estate an out-of-state person or corporate fiduciary.

The separability doctrine may apply, however, even where a court finds that the FAA does not cover the arbitration clause at issue. State arbitration law governs those relatively few arbitration agreements that remain outside the scope of the FAA. Thirty-four states and the District of Columbia have enacted the Uniform Arbitration Act ("UAA") to govern arbitration agreements outside the scope of the FAA. Section 2 of the UAA contains a provision paralleling
section 4 of the FAA, which the Supreme Court interpreted as providing for separability. 132 Nearly all of the state courts that have addressed the separability issue under their state’s version of the UAA subsequent to the Supreme Court’s decision in Prima Paint have chosen to adopt the separability rule articulated in that case: that a party to an agreement that contains an arbitration clause may not bypass arbitration by alleging that the container contract was induced by fraud or suffers from some other fatal flaw. 133

Moreover, courts in several states that have not adopted the UAA have nevertheless adopted the separability doctrine. 134 The rea-


[133] See Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251, 257 (Cal. 1983); Two Sisters, Inc. v. Gosh & Co., 370 A.2d 1020 (Conn. 1976);
soning of the New York Court of Appeals is typical: "Judicial intervention, based upon a nonseparability contract theory in arbitration matters prolongs litigation, and defeats . . . two of arbitration’s primary virtues, speed and finality."\(^{155}\)

**D. The "Culturally Biased" Arbitrator and the "Engagement to Capitulate" Test**

Another concern with allowing the testator to appoint an arbitrator who is familiar with the testator’s culture to adjudicate the validity of the testator’s will, is that the arbitrator designated by the testator may be presumed to be biased in favor of the testator and against any person challenging the will. Professor Stephen Ware has aptly described the general problem:

> [B]ias may be hard to separate from expertise. One of the oft-touted advantages of arbitration is that the case is heard by experts. This is a particularly strong advantage in technical areas—like medicine—where the facts may be incomprehensible to laypeople. Those who can understand the facts will be found disproportionately among specialists in the field, i.e., those with a presumed bias. Judicial resistance to arbitrator bias in these cases may be the equivalent of judicial resistance to competent decisionmaking.\(^{156}\)

Section 10 of the FAA provides that a court may vacate an arbitration award "[w]here there was evident partiality or corruption in the arbitrators, or either of them."\(^{157}\) The UAA contains a parallel provision.\(^{158}\) Both the FAA and the UAA, however, also contain provisions that direct the court to enforce the arbitrator selection proce-

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\(^{158}\) See UNIF. ARBITRATION ACT § 12(a)(2) ("Upon application of a party, the court shall vacate an award where . . . [t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.").
dures agreed to by the parties.\footnote{See 9 U.S.C. § 5; UNIF. ARBITRATION ACT § 3.} Section 5 of the FAA, for example, provides that “[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.”\footnote{See supra Part III(B).} Moreover, it is settled law that the parties to an arbitration agreement may authorize arbitration by an arbitrator who labors under an appearance of bias.\footnote{See e.g., In Re Astoria Med. Group, 182 N.E.2d 85, 87 (N.Y. 1962) (“It is indisputable, as a general proposition, that the parties to an arbitration contract are completely free to agree upon the identity of the arbitrators and the manner in which they are to be chosen. . . . In point of fact, even in cases where the contract expressly designated a single arbitrator who was employed by one of the parties or intimately connected with him, the courts have refused to disqualify the arbitrator on the ground of either interest or partiality.”); see also Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”).} The issue then becomes whether the testator alone may authorize arbitration by a biased arbitrator.

This Article has argued that a property owner’s testamentary freedom should encompass the right to compel unilateral arbitration of any dispute concerning the validity of her will. This power to direct arbitration derives from the testator’s superior rights in her property vis-à-vis her heirs and putative legatees who wish to assert a claim to that property.\footnote{See, e.g., Broemmer v. Abortion Servs. of Phoenix, 840 P.2d 1013, 1017 (Ariz. 1992) (“If failure to explain to plaintiff that the agreement required all potential disputes, including malpractice disputes [relating to the quality of gynecological care], to be heard only by an arbi-} Nevertheless, public policy should preclude the testator from unilaterally compelling arbitration before an arbitrator who is so biased that the arbitration is unlikely to provide a meaningful opportunity for the will contestant to present her case and prevail on the merits. This requisite fairness does not derive, however, from any rights that inhere in the will contestant. Rather, the interests of the testator and, indeed, the state, in ensuring that the testator’s true dispositive wishes are given effect require that any challenge to the testator’s putative estate plan be adjudicated in an unbiased forum.

Given this requisite safeguard of an unbiased arbitrator, the next task is to explicate a principle that would allow for identification of an arbitrator sufficiently informed of the “abhorrent” testator’s minority culture yet sufficiently neutral to allow for a meaningful will contest. Settled arbitration law suggests such a principle.

Arguments that an institutional or professional bias on the part of the arbitrator has tainted the arbitration process have found some favor in the courts.\footnote{See supra Part III(B).} One of the most important cases addressing this
issue is Graham v. Scissor Tail, Inc., in which the Supreme Court of California declared that an arbitration clause contained in what it found to be a contract of adhesion was unconscionable. The court vacated an arbitrator's award where the arbitration agreement designated an arbitrator who "by reason of its status and identity, is presumptively biased in favor of one party." 

In Graham, a musical artist and a concert promoter entered into several similar contracts for the promotion of an upcoming concert tour. The contracts contained an arbitration clause that provided for arbitration of any disputes arising from the contracts before the International Executive Board of the American Federation of Musicians ("AFM"). The musician was a member of the AFM; the concert promoter was not. The court conceded that California's Arbitration Act recognized the rights of the parties to submit their dispute to an arbitrator of their choosing, even if the arbitrator whom the parties selected "by reason of [a] relationship to a party or some similar factor, can be expected to adopt something other than a 'neutral' stance in determining disputes." Nevertheless, the court agreed with the promoter that, in light of the fact that the arbitration agreement was contained in a contract of adhesion, "to allow the [AFM] to sit in judgment of a dispute arising between one of its members and a contracting nonmember is so inimical to fundamental notions of fairness as to require nonenforcement [of the arbitration agreement]." This was so because such an arbitration procedure would deprive the promoter "of any realistic and fair opportunity to prevail in a dispute under [the contract's] terms."

The Graham court grounded its reasoning on an earlier New York case—In Re Cross & Brown Co. In that case, the court was presented with an arbitration agreement between an employee and his employer which provided that:

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165 See id. at 167-68.
166 See id. at 167-74.
167 Id. at 176.
168 Id. at 176.
169 Id. at 173-74.
170 Id. at 176.
It is further agreed between the respective parties hereto that any dispute or difference as to any matter in this contract contained shall be settled by submitting the same to arbitration to the Board of Directors of the party of the first part (the employer), whose decision shall be final.  

In considering whether such an arbitration agreement should be enforced, the court began with the pronouncement that:

[a] well-recognized principle of "natural justice" is that a man may not be a judge in his own cause. Irrespective of any proof of actual bias or prejudice, the law presumes that a party to a dispute cannot have that disinterestedness and impartiality necessary to act in a judicial or quasi-judicial capacity regarding that controversy.

Applying this principle to the arbitration agreement at hand, which made the employer the arbitrator of any dispute arising under the contract of employment, the court found that the arbitration agreement was in fact "not a contract to arbitrate, but an engagement to capitulate." The court ruled that a party to a contract may not serve as the arbitrator of disputes arising under that contract. "Apart from outraging public policy, such an agreement is illusory; for while in form it provides for arbitration, in substance it yields the power to an adverse party to decide disputes under the contract." The court held, therefore, that the arbitration agreement at issue was void on its face.

In Graham, the Supreme Court of California refined and extended the principle of Cross & Brown Company:

[A] contractual party may not act in the capacity of arbitrator—and a contractual provision which designates him to serve in that capacity is to be denied enforcement on grounds of unconscionability. We have also indicated that the same result would follow, and for the same reasons, when the designated arbitrator is not the party himself but one whose interests are so allied with those of the party that, for all

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172 Id. at 575.
173 Id.
174 Id. at 576.
175 Id.
176 See id.
practical purposes, he is subject to the same disabilities which prevent the party himself from serving.\textsuperscript{177}

The \textit{Graham} court found that the interests of the AFM were so closely aligned with the interests of the musical artist, whose rights and obligations against the promoter it was adjudicating, that public policy would not allow the AFM to sit as arbitrator. The AFM is a labor union whose primary objective is to advance the interests of its members with respect to terms and conditions of employment. Such compensation issues were at the heart of the dispute between the AFM-member musical artist and the non-member promoter.\textsuperscript{178}

By its very nature, therefore, a labor union addresses disputes concerning compensation arrangements, between its members and third parties with [its own] interests [being] identical to those of the affected members; to suppose that it would do otherwise is to suppose that it would act in a manner inconsistent with its reason for being.\textsuperscript{179}

Under the rule of \textit{Graham}, then, public policy would forbid enforcement of a testator's arbitration clause where the testator attempts to appoint an arbitrator whose interests are disproportionately aligned with the presumed interests of the testator. The most obvious application of this rule would be to dismiss any arbitrator with a financial interest in the validity of the estate plan. Thus, any devisee under the will or anyone closely aligned with a devisee under the will should not be allowed to serve as arbitrator of a challenge to the will. Indeed, courts generally have been unforgiving of financial bias on the part of an arbitrator.\textsuperscript{180} For example, the fact that an arbitrator has failed to disclose to the parties that she "has a substantial interest in a firm which has done more than trivial business with a party" is grounds for vacatur under section 10 of the FAA.\textsuperscript{181}

\textsuperscript{178}See id. at 177-78.
\textsuperscript{179}Id.
\textsuperscript{180}See, e.g., Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88, 94-95 (R.I. 1991) (holding that party-appointed arbitrator’s practice of charging a contingent fee of 10 percent of any award can be grounds for vacating award).
\textsuperscript{181}Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 151-52 (1968) (White, J., concurring); see also Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995) (vacating arbitration award in favor of Merrill Lynch on grounds of "evident partiality" where arbitrator failed to disclose that his employer had a "substantial" ongoing business relationship with Merrill Lynch); CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon II(A)(1) (prepared jointly by the ABA and the American Arbitration Assoc. 1977) (providing that arbitrator should disclose "[a]ny direct or indirect financial or personal interest in the outcome of the arbitration").
That the testator shared a common minority culture with the arbitrator, however, should not alone disqualify the arbitrator from adjudicating the will contest. Although such a shared culture can be expected to give rise to greater understanding between the arbitrator and the testator, the arbitrator’s interest in the dispute might remain quite attenuated. Such a broad disqualification based on presumed cultural bias logically extended to other types of disputes would, for example, suggest that a female arbitrator may not fairly adjudicate a dispute regarding property division upon dissolution of a marriage or a female employee’s claim of heterosexual sexual harassment. Indeed, unless one is willing to posit that minority-culture arbitrators are meaningfully more culturally biased as compared with arbitrators from the majority culture, such inter-cultural disputes could be fairly arbitrated, under such a broad disqualification rule, only before panels on which none or all of the cultural subgroups is represented.

Even if one were to accept the argument that public policy should forbid enforcement of an arbitration award with respect to a will where the sole arbitrator was appointed by the testator, there is a second arbitration scheme that would allow the testator to influence the composition (and, thus, the values and knowledge) of the adjudicating body and that would appear to be above judicial reproach on grounds of arbitrator bias. A common arbitration provision provides that both parties to a contract dispute shall have the right to appoint an arbitrator to the arbitration panel, and those two party-appointed arbitrators shall select a third, “neutral” arbitrator to complete the three-person arbitration panel. Courts have repeatedly blessed such a “tripartite” arbitration scheme in the face of challenges by the losing party at arbitration that a party-appointed arbitrator showed “evident partiality.” The applicable rule is that “[a]n arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial.” Moreover, where each party to the dispute has appointed an arbitrator, one may presume that bias on the part of

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182 See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759-60 (11th Cir. 1993); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) (stating that parties who adopt a tripartite arbitration scheme “can ask no more impartiality than inheres in the method they have chosen”); Tate v. Saratoga Sav. & Loan Ass'n, 265 Cal. Rptr. 440, 445 (Cal. Ct. App. 1989) (“Courts have repeatedly upheld agreements for arbitration conducted by party-chosen, nonneutral arbitrators, particularly when a neutral arbitrator is also involved.”); In Re Astoria Med. Group, 182 N.E.2d 85, 86-87 (N.Y. 1962) (upholding corporate party’s appointment of a member of its board of directors to tripartite arbitration panel against challenge of bias). But see Edmund E. Garrison, Inc. v. International Union of Operating Eng’rs, 283 F. Supp. 771, 772-73 (S.D.N.Y. 1968) (holding that party may not appoint himself arbitrator on tripartite arbitration panel when the agreement so specifies).
one party-appointed arbitrator will be offset by bias on the part of the other party-appointed arbitrator.\textsuperscript{184}

\textit{Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.}\textsuperscript{185} is an instructive case. The arbitration agreement in \textit{Sunkist} provided that the arbitration panel would consist of one arbitrator appointed by each of the two parties to the dispute with a third arbitrator to be appointed by the two party-appointed arbitrators—a typical tripartite arbitration scheme.\textsuperscript{186} The plaintiff-appointed arbitrator, subsequent to his appointment and prior to the arbitration hearing, met to help prepare the Plaintiff's case with Plaintiff's counsel, consultants and fact witnesses.\textsuperscript{187} After the arbitration hearing, the arbitration panel, in a two-to-one decision, entered an award in favor of the Plaintiff.\textsuperscript{188} The Defendant moved to vacate the award under section 10 of the FAA on the grounds that the plaintiff-appointed arbitrator's pre-hearing contact with the Plaintiff's counsel, experts and witnesses constituted "evident partiality and prejudicial conduct."\textsuperscript{189}

The United States Court of Appeals for the Eleventh Circuit reiterated its earlier holding that any conduct on the part of a neutral arbitrator "that creates a 'reasonable appearance of bias' warrants setting aside an arbitration award on the ground of 'evident partiality'."\textsuperscript{190} Nevertheless, the court held that the arbitrator's pre-hearing conduct in this case did not merit vacatur of the award precisely because neither party reasonably expected or intended the plaintiff-appointed arbitrator to be a "neutral." The court found that the arbitrator's "conduct [was] not only unobjectionable, but commonplace." So long as the party-appointed arbitrator "consider[s] the evidence of record in good faith and with integrity and fairness" he does not demonstrate evident partiality.\textsuperscript{191}

Thus, the testator who wishes to protect her estate plan from majoritarian cultural norms through compelled arbitration of any will

\textsuperscript{184}See Tate, 265 Cal. Rptr. at 445 ("It is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases.").

\textsuperscript{185}10 F.3d 753 (11th Cir. 1993).

\textsuperscript{186}See id. at 755.

\textsuperscript{187}See id. at 756, 759.

\textsuperscript{188}See id. at 756.

\textsuperscript{189}Id. at 758.

\textsuperscript{190}Id. (citations omitted).

\textsuperscript{191}Id. at 759.

\textsuperscript{192}Id. at 760. See also CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VII(A)(1) (preparing jointly by the ABA and the American Arbitration Asso. 1997) (providing that party-appointed arbitrators "may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith with integrity and fairness"). But see Metropolitan Property Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 893 (D. Conn. 1991) (holding that allegation that party-appointed arbitrator met with party that appointed him prior to his appointment to discuss the merits of that party's defenses and to examine documentary evidence provided a reasonable basis for finding evident partiality and arbitrator misconduct).
dispute before an arbitrator of her choosing has a second option. She
would be prudent to direct that, in the event that a court refuses to
enforce such an arbitration scheme, any dispute concerning her estate
must be settled before a tripartite arbitration panel. The panel could
be composed of one arbitrator appointed by the testator, one arbitrator
chosen by the party challenging the will, and a third arbitrator se-
lected by the two party-appointed arbitrators. Provided that the tes-
tator thoughtfully selects her party-appointed arbitrator, such an arbi-
tration panel can be expected to be sufficiently respectful of the tes-
tator’s values and beliefs, such that the danger to the “abhorrent” tes-
tator of having her estate plan discarded should be significantly re-
duced.

IV. CONCLUSION

Traditional adjudication may disadvantage cultural minorities
even when they seek to vindicate legal rights arising under neutral
law. For example, testamentary freedom may be unfairly abridged
when the trier of fact uses doctrines intended to protect testamentary
freedom to redistribute the “abhorrent” testator’s probate estate to a
legal spouse or close blood relations in line with the trier of fact’s
majoritarian values and choices.

Arbitration provides a means for cultural minorities to opt out of
a legal forum that is often biased against them. Testator-compelled
arbitration can ensure that the nonconforming testator enjoys the same
testamentary freedom as those who conform to majoritarian cultural
norms. An arbitrator selected by a minority-culture testator because
she respects the testator’s values and beliefs is more likely to under-
stand and respect the testator’s dispositive choices than is the average
trier of fact composed principally or exclusively of persons from the
majority culture.

Unilaterally-compelled arbitration itself raises several issues of
fairness. Principal among these fairness issues is the question of ar-
bitrator bias. However, because the testator owns the property at is-
ue, she ought to enjoy the right to condition succession to that prop-
erty on acceptance of her chosen method of dispute resolution. This
should be so as long as the arbitrator’s interests are not so closely
aligned with those of the testator that the arbitration is unlikely to
provide a meaningful opportunity for the will contestant to prevail on
the merits.