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## A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America Symposium

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# A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America

Carli N. Conklin\*

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## I. INTRODUCTION

Current hot topics in arbitration include the role of choice in arbitration, pre-dispute arbitration agreements, religious arbitration, and debates surrounding the constitutionality and efficacy of arbitration under state law.<sup>1</sup> While the specific

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1. In Fall 2015, *The New York Times* published, *Beware the Fine Print*, a three-part series on hot topics in arbitration. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1, available at <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>? (Part I); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 2, 2015, at A1, available at <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (Part II); Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES, Nov 3, 2015, at A1, available at <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> (Part III). See also *Del. Coal. for Open Gov't, Inc. v. Strine (Del. Coal. II)*, 733 F.3d 510 (3d Cir. 2013) (federal court discussion of state arbitration statute).

question of each hot topic is distinct, the public discourse surrounding each question reveals some common themes: *How should we resolve our disputes? Should that process be public or private? What law or norms should apply? Do we have a right to initiate litigation or resolve our disputes by way of a trial? If so, may we waive those rights through contractual agreement? If we may waive those rights, is it beneficial for democratic decision-making, the development of law, the parties in conflict, or the resolution of a dispute for us to do so? To what extent should arbitration adopt or mirror the procedures of litigation or the administrative functions of the court? Is arbitration distinct from litigation? Is arbitration effective, efficient, and/or “good”?*

At the heart of each of these hot topics and the debates they engender lies a single question: “What is arbitration?” This question was at the heart of the Third Circuit’s analysis in *Delaware Coalition for Open Government v. Strine*,<sup>2</sup> a case in which the plaintiff, DelCOG, successfully challenged the constitutionality of Delaware’s newly-created statutory system for arbitration.<sup>3</sup> As part of its analysis and reasoning, the Third Circuit looked to the history of arbitration.<sup>4</sup> Unfortunately, that history was incomplete and, as a result, inaccurate. By taking a broad-brush approach to arbitration history, the Third Circuit failed to consider both the diversity and complexity of arbitration as it has been practiced across American history.<sup>5</sup>

This article seeks to explore that history more in depth by taking a close look at the historical procedures, practices, and policies of arbitration in three states: Kentucky, New Jersey, and Massachusetts. Each state developed a complex system of arbitration that included multiple arbitration procedures drawn from English law. Each state had unique geographic, political, social, religious, or commercial conditions that influenced not only the development of arbitration in that state, but also arbitration practice and the policy goals surrounding its use. A closer look at arbitration in early America reveals that, rather than one history of American arbitration, we have many histories. Considering these varied histories provides us not only with a more complete picture of the diversity and complexity of arbitration in early America, but also with new insights as we—disputants, lawyers, judges, legislators, arbitrators, and policy advocates—debate hot topics in arbitration, today.

Part II will provide an overview of the Third Circuit’s incomplete use of the history of arbitration to support its holding in *Delaware Coalition for Open Government v. Strine*,<sup>6</sup> with a specific emphasis on the problems present in the Court’s historical analysis. Part III will kick off a broader, and more complete, history of American arbitration by exploring the three types of arbitration available in the English legal tradition. Part IV will explain how those three types of English arbitration

2. *Del. Coal. II*, 733 F.3d at 512, 521.

3. *Del. Coal. for Open Gov’t v. Strine (Del. Coal. I)*, 894 F.Supp.2d 493, 494 (D. Del. 2012).

4. *Del. Coal. II*, 733 F.3d at 512, 521.

5. See Carli N. Conklin, *Arbitration Practice, Procedure, and Policy in Historical Perspective*, in EXPLORATIONS IN DISPUTE RESOLUTION SCHOLARSHIP 8-10 (Fall 2015) available at <http://law.missouri.edu/csdr/files/2015/02/csdrpublication-15.pdf> (providing a discussion of where the court went wrong, including the court’s discussion of privacy, connections between arbitration and the courts, and the extrajudicial nature of arbitration). See Thomas J. Stipanowich, *In Quest of the Arbitration Tri-fecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349 (2012-2013) (providing a discussion arguing that the court got it right); David W. Brown, Note, *Let Me In: The Right of Access to Business Disputes Conducted in State Courts*, 2015 J. DISP. RESOL. 207 (same).

6. *Del. Coal. II*, 733 F.3d at 510.

were adopted by, and adapted to, the mainland British colonies in North America and new American states. Part IV also will also highlight the complexity and diversity of arbitration in American history through a discussion of themes common across several states, as well as developments in arbitration procedure, practice, and policy that were distinct within individual states. Finally, Part V will discuss the implications of the broader histories outlined in Parts III and IV, with an emphasis on why that history matters for future law and policy debates on arbitration.

## II. THE DELAWARE BACKDROP (AND WHY IT MATTERS)

The state of Delaware recently passed a statute that allowed its Chancery Court judges to conduct arbitrations, at the request of the parties, for businesses in conflict, where the disputed amount was in excess of \$1 million dollars.<sup>7</sup> The arbitration proceedings were private.<sup>8</sup>

The non-profit organization Delaware Coalition for Open Government (DelCOG) initiated litigation, declaring, among other things, that the arbitration statute was unconstitutional under the First Amendment.<sup>9</sup> Specifically, DelCOG argued that the private nature of the Chancery Court arbitration proceedings violated the public's First Amendment right to open access to proceedings in court.<sup>10</sup>

In the case that ensued, *Delaware Coalition for Open Government v. Strine*,<sup>11</sup> the District Court entered a judgment on the pleadings for DelCOG, holding that the Chancery Court arbitration proceeding “functions essentially as a non-jury trial before a Chancery Court judge. **Because it is a civil trial**, there is a qualified right of access and this proceeding must be open to the public.”<sup>12</sup> The District Court's analysis here is unusual. Instead of utilizing the two-prong “experience and logic” test to determine a question of open access, the District Court simply determined that the arbitration system was comparable to a civil trial and, therefore, must be open to the public.

The Chancery Court judges, including Strine, appealed the District Court's decision and, in 2013, the Third Circuit affirmed.<sup>13</sup> However, the Third Circuit disagreed with the District Court's dismissal of the experience and logic test<sup>14</sup>—and it is here that history comes in to play—summarizing the test, as “[a] proceeding qualifies for the First Amendment right of public access when **“there has been a tradition of accessibility” to that kind of proceeding**, and when **“access plays a significant positive role in the functioning of the particular process in question.”**<sup>15</sup>

7. *Id.* at 512.

8. *Id.* at 512.

9. Del. Coal. for Open Gov't v. Strine (*Del. Coal. I*), 894 F.Supp.2d 493, 494 (D. Del. 2012).

10. *Id.* at 494.

11. *Id.* at 493.

12. *Id.* at 494 (emphasis added).

13. *Del. Coal. II*, 733 F.3d at 510.

14. *Id.* at 514-15.

15. *Id.* at 514 (emphasis added). *Press-Enterprise Co. v. Superior Court of California for Riverside Co.*, 478 U.S. 1, 10, 8 (1986). The examination of the history and functioning of a proceeding has come to be known as “the experience and logic test.” *See, e.g.*, *U.S. v. Simone*, 14 F.3d 833, 838 (3d Cir. 1994). In order to qualify for public access, both experience and logic must counsel in favor of opening the proceeding to the public. *See N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 213-14 (3d Cir. 2002). Once a presumption of public access is established it may only be overridden by a compelling public interest. *Press-Enterprise Co.*, 478 U.S. at 9.

The Third Circuit then applied the experience and logic test to the issues at hand, summarizing its decision as follows:

This appeal requires us to decide whether the public has a right of access under the First Amendment to Delaware’s state-sponsored arbitration program . . . . **Because there has been a tradition of accessibility to proceedings like Delaware’s government-sponsored arbitration** [experience prong], **and because access plays an important role in such proceedings** [logic prong], we find that there is a First Amendment right of access to Delaware’s government-sponsored arbitrations.<sup>16</sup>

The Chancery Court judges filed cert, which the U.S. Supreme Court denied in 2014.<sup>17</sup>

The Third Circuit was correct in utilizing the experience and logic test to address the public access question. The Third Circuit was correct, also, in considering the history of arbitration in its analysis of the “experience” prong of that test. Where the Third Circuit went astray was in failing to consider the diversity and complexity of arbitration as it has been practiced across American history. A more complete history of arbitration would have provided a very different backdrop for the Court’s analysis under the “experience” prong. Since the “experience” prong then informed the Court’s analysis under the “logic” prong, a more complete history of arbitration may have led to a different outcome by the Third Circuit altogether. The discussion below provides three examples of the diversity and complexity of arbitration that were not included in the Court’s overview of arbitration history.

First, the Third Circuit held that arbitration traditionally has been open to the public.<sup>18</sup>

In contrast to the Court’s holding, arbitration in America historically has been a private proceeding.<sup>19</sup> Arbitration has been open to the public only through publication of the award as a judgment of the court or the creation of a public record on appeal. In either scenario, publication occurred only through the advance choice of one or both parties.<sup>20</sup> These procedural realities are mirrored in policy, as the ability to resolve disputes in private has been traditionally (but not uniformly) heralded as one of the greatest benefits of arbitration as a dispute resolution proceeding.<sup>21</sup>

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16. *Del. Coal. II*, 733 F.3d at 512, 521 (emphasis added).

17. *Strine v. Del. Coal. for Open Gov’t*, 134 S.Ct. 1551 (2014).

18. *Del. Coal. II*, 733 F.3d at 521.

19. Jerold Auerbach details the New York Chamber of Commerce’s use of arbitration for the settlement of merchant disputes in 1768 specifically due to the private nature of arbitration: “Merchants preferred informed business experts, sympathetic to commercial imperatives, to inscrutable judges or ignorant juries. Disputes not only disrupted business but, when litigated in public, invited the intrusion of outsiders into private business practices. . . .” JEROLD AUERBACH, *JUSTICE WITHOUT LAW* 33, 49 (1983). According to Auerbach, the colony of New Haven also promoted arbitration as a private dispute resolution model. *Id.* at 27-28.

20. See *infra* Part III.B Reference by Rule of the Court, Part III.C. Statutory Arbitration, and Part IV.B. Distinct Developments (providing examples of publication by parties choosing to appeal the award or to have the award published as an order of the court).

21. AUERBACH, *supra* note 19, at 33.

Second, the Third Circuit relied heavily on the connections between Delaware's arbitration system and the Chancery Court, concluding that the connections between the two resulted in a system that looked more like a civil trial than arbitration.<sup>22</sup> Yet, what the Third Circuit failed to articulate was that arbitration traditionally was very well-connected to the courts, often adopting court practices to further arbitration goals. So, for example, in early America, judges were not prohibited from sitting as arbitrators, although a judge was discouraged from sitting as an arbitrator for a dispute that had been referred to arbitration in the midst of a case that the judge had presided over in litigation.<sup>23</sup> Early American state legislatures passed statutes that specifically provided for the payment of arbitrators, and associated court costs and fees, along the same lines as payment for court costs and fees in civil litigation.<sup>24</sup> Additionally, some arbitration awards could be entered as an order of the court, the same as a judgment in litigation, and clerks were paid to file either.<sup>25</sup> Once the award was made an order of the court, it was enforceable by the contempt power, just like a court judgment in litigation.<sup>26</sup> Finally, arbitrators, like Chancery Court judges, traditionally held a greater freedom to admit evidence and to determine the issues at hand under law or equity.<sup>27</sup> Yet, historically, not one of these similarities, nor all of them combined, transformed an arbitration proceeding into a civil trial. In contrast to the Third Circuit's analysis, the two dispute resolution systems remained distinct.

Third, history came into play in the terminology utilized by the parties to describe arbitration place and process. "Extrajudicial" is a term broadly meaning "outside of court."<sup>28</sup> DelCOG adopted the term "extrajudicial" to describe the historical practice and procedure of arbitration, but defined that term quite narrowly,

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22. *Del. Coal. II*, 733 F.3d at 518.

23. Conklin, *Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 AM. J. LEGAL HIST. 39, 60, n.133 (2006). Disputants' autonomy regarding choice of arbitrator(s) seemed to stem from a strong deference to the disputants' decision to select arbitration to resolve their dispute. See also *Galloway's Heirs v. Webb*, 3 Ky. 326 (Ct. App. 1808) (exemplifying a broader example of a court upholding the disputants' choice of arbitrators, where the disputants' ability to select their own arbitrator extended even to their decision to have the judges in the case act as arbitrators). See *Ewing v. Beauchamp*, 6 Ky. 41, 45 (Ct. App. 1813) (disputants' choice in selecting arbitrators).

24. See Conklin, *Transformed, Not Transcended*, *supra* note 23, at 49, 83-84 (discussing fee provisions in Kentucky and New Jersey). See *An Act for Establishing and Regulating the Fees of the Several Officers and Other Persons Hereafter Mentioned*, 1782 MASS. ACTS 10-15, <http://archives.lib.state.ma.us/handle/2452/103986> (last visited March 4, 2016) (providing Massachusetts's fee provisions).

25. See *infra* Part II.B Reference by Rule of Court, Part II.C Statutory Arbitration (providing discussion of entrance of the award as an order of the court); *supra* text accompanying note (discussing fee schedules).

26. See *infra* Part II.B Reference by Rule of Court, Part II.C Statutory Arbitration (providing discussion of enforceability under the contempt power).

27. *Smith v. Bos. & Me. R.R.*, 16 Gray 521, 523 (Mass. 1860). See Conklin, *Transformed, Not Transcended*, *supra* note 23, at 49, 50-52, 84-85 (for New Jersey and Kentucky). The version of Kentucky's arbitration statute contained in the Revised Statutes of 1852 states that arbitrators "shall take an oath to decide the controversy to them submitted according to law and evidence and the equity of the case, to the best of their judgment, without favor or affection." See C.A. WICKLIFFE ET AL., REVISED STATUTES OF KENTUCKY: APPROVED AND ADOPTED BY THE GENERAL ASSEMBLY, 1851 AND 1852. IN FORCE FROM JULY 1, 1852 129-130 (1852).

28. WEBSTER'S UNIVERSAL UNABRIDGED DICTIONARY 686 (1996) (defining "extrajudicial" as "outside of judicial proceedings; beyond the action or authority of a court").

arguing that the definition of “extrajudicial” was akin to something more like “outside of the courthouse.”<sup>29</sup> Such a narrow definition runs contrary to the diversity of arbitration proceedings across American history. Early America saw three types of arbitration proceedings: Common Law Arbitration, Reference by Rule of the Court, and Statutory Arbitration.<sup>30</sup> As discussed in Part III, the distinctions between the three primarily lie in the timing of the submission to arbitration, the relationship of the submission to litigation, and enforcement of the award.<sup>31</sup> Formality or informality of the process also played a role, with Common Law Arbitration providing disputants with the greatest flexibility in crafting the arbitration procedure.<sup>32</sup> When considering the extrajudicial nature of arbitration in early America, these distinctions matter. It was not the connection to court (such as through submission or enforcement) or even the relationship (or lack thereof) to civil litigation that determined whether or not a dispute resolution proceeding fit the definition of arbitration. It was something else, altogether.

The Third Circuit’s decision in *Delaware Coalition for Open Government v. Strine* and the U.S. Supreme Court’s later denial of cert were met with some surprise among dispute resolution scholars and practitioners.<sup>33</sup> Part of that surprise hinged on what historically has been seen as a key distinction of arbitration, which, in contrast to the Court’s understanding, is the privacy of the arbitration proceeding. In addition, the Court lacked a robust discussion of the variety and diversity of arbitration proceedings—and the relationship of those proceedings to courts and civil litigation—across American history.

### III. ENGLISH ARBITRATION: A COMMON HERITAGE<sup>34</sup>

The English legal tradition included three different types of arbitration, which early Americans, somewhat inaccurately, labeled Common Law Arbitration, Reference by Rule of the Court, and Statutory Arbitration.<sup>35</sup> As will be discussed in

29. See *infra* Part III.B Reference by Rule of the Court, Part III.C. Statutory Arbitration (discussing arbitration as an extrajudicial dispute resolution proceeding that was outside of court (civil or criminal trial) but still heavily connected to the courthouse, especially through Reference by rule of the Court and Statutory Arbitration). See generally Conklin, *Transformed, Not Transcended*, *supra* note 23 (providing a specific discussion of arbitration as extrajudicial in early America).

30. See *infra* Part IV.A, Parts IV.B.1-3 (providing a discussion of each of these three types of arbitration in antebellum, Kentucky, New Jersey, and Massachusetts, generally (IV.A) and respectively (IV.B.1, IV.B.2, IV.B.3)).

31. See *infra* Part III English Arbitration.

32. *Smith*, 16 Gray at 523.

33. I observed these reactions when the Supreme Court’s denial of cert was announced to a mixed crowd of scholars and practitioners during a session on arbitration at the American Bar Association Section on Dispute Resolution’s annual conference in April 2014.

34. The mainland colonies in British North America and new American states looked to English law as handed down through custom or as summarized in Blackstone’s *Commentaries on the Laws of England* (1765-1769), which remained the most popular legal text in the United States through the antebellum period. See JULIUS S. WATERMAN, *Thomas Jefferson and Blackstone’s Commentaries*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 451-457* (David Flaherty ed., 1969) (discussing the popularity of Blackstone’s *Commentaries*).

35. In the English tradition, these three types of arbitration seem to more commonly be labeled arbitration, reference (including reference by rule of the court or reference by order of the court), and arbitration under the Locke statute. It is not clear from the early American cases if the terms reference by rule of the court and reference by order of the court were used synonymously in early America or if the terms were used to distinguish cases submitted to arbitration after litigation had commenced, as permitted by court rules (reference by rule of the court) from cases or parts of cases that were submitted to

Part IV, the mainland British colonies in North America adopted English-style arbitration and, following the American Revolution, each type of arbitration was prevalent throughout the new United States. Part III provides an overview of these three types of arbitration, taking care to highlight both their similarities and their differences.

### A. Arbitration

Early Americans regularly discussed arbitration as a creature of the Common Law, and in so doing they seem to be (somewhat inaccurately) referring not only to the Common Law, but also to arbitration as it had existed in English custom from the Anglo-Saxon period forward. A 1684 English Dictionary defined an arbitrator as “an extraordinary Judge in one or more Causes between party and party, chosen by their mutual consents . . . .”<sup>36</sup> The decision of the arbitrators was called an award and was to include the following: “1. Matter of Controversie [sic]. 2. Submission. 3. Parties to the submission. 4. Arbitrators and 5. Giving up of the Arbitrement [award].”<sup>37</sup>

William Blackstone similarly defined arbitration in his *Commentaries on the Laws of England* (1765-1769):

Arbitration is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrongs, to the judgment of two or more *arbitrators*; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as *umpire*, (*imperator*) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties of the judgment of the court of justice . . . .<sup>38</sup>

A key element of Common Law Arbitration was the timing of the submission, which was prior to the filing of any action in court.<sup>39</sup> According to Blackstone, disputants originally submitted their dispute to arbitration either orally or in writing, although it had become increasingly common for the disputants to enter into arbitration bonds that would require the parties to stand by the arbitration award.<sup>40</sup> A second key element of Common Law Arbitration was enforcement: If either party

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arbitration by court order with party agreement (reference by order of the court). This article will use the phrase reference by rule of the court, as it was the phrase most commonly used in these three states to discuss cases submitted to arbitration after litigation had already commenced.

36. JOHN COWEL, NOMOTHETES, THE INTERPRETER 17 (1684) (“arbitrator”).

37. *Id.* (“arbitrement”).

38. WILLIAM BLACKSTONE, 3 COMMENTARIES 16–17 (1768). Blackstone includes the definition of arbitration in Volume III (“Of Private Wrongs”), Chapter I (Of the Redress of Private Wrongs by the Mere Act of the Parties), Part II (Arbitration) of his *Commentaries*. Blackstone’s definition of arbitration is similar to Richard Burn’s. RICHARD BURN, A NEW LAW DICTIONARY 45–51 (1792). *See also* Mass. *Referee Act* of 1786 (showing the similarities between the forms outlined in Burn’s A NEW LAW DICTIONARY and the forms outlined in the statute). As stated previously, among law books consulted in early America, Blackstone’s was the most popular. *See* WATERMAN, *supra* note 34, at 451–457.

39. BLACKSTONE, *supra* note 38, at 16.

40. *See id.* (discussing submission “by word, or by deed”).

refused to uphold the arbitration award, the other party would need to bring a breach of contract action in court to enforce the arbitration bond.<sup>41</sup>

Arbitration was favored in English law, and its common law requirements were not many.<sup>42</sup> Disputants could submit their dispute to one, two, or three arbitrators.<sup>43</sup> Arbitrators could make determinations on issues of fact and issues of law.<sup>44</sup> Arbitrators could decide all matters in controversy between the disputants, although matters of real estate and criminal matters traditionally had been excluded.<sup>45</sup> In issuing the award, the arbitrators were limited to determining only the causes submitted to them; matters outside of submission would be voided, but the remainder of the award would stand.<sup>46</sup> Awards had to be both “possible and lawful;” arbitrators were not required to apply the law, but they could not contradict it.<sup>47</sup> The award itself was to be “certain and final” and arbitrators could not “reserve any thing [sic] for their future judgment, when the time allowed [for issuing an award] is expired.”<sup>48</sup> If two arbitrators could not agree between themselves, they were to appoint an umpire, and the authority of the two arbitrators would cease on that point.<sup>49</sup>

Courts generally were required to uphold awards “according to the intent of the arbitrators” and were prohibited from overturning awards “unless there was corruption in the arbitrators.”<sup>50</sup> Court deference to the arbitration award was tied directly to the parties’ decision to select arbitration for the settling of their dispute: “for the arbitrators being persons of the parties[’] own choosing, the law presumes that they would choose persons whose understanding and judgment they could rely on.”<sup>51</sup>

### B. Reference by Rule of the Court

English law recognized a second type of arbitration, known as Reference and most often described in early America as Reference by Rule of the Court.<sup>52</sup> In Reference by Rule of the Court, parties to a litigated dispute chose to “refer” their dispute to arbitration, sometimes at the recommendation of the judge overseeing the

41. See Eben Moglen, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135, 139-140 (1983-1984) (providing a discussion of arbitration bonds).

42. The list above contains key provisions. See *Arbitration*, RICHARD BURN, A NEW LAW DICTIONARY 45-51 (more complete listing and discussion). Bryan A. Garner, editor of Black’s Law Dictionary, claims that Burn’s dictionary “appeared during the formative years of American law, and it is a valuable reference for those who want to see how legal terms were understood in the 18th century.” RICHARD BURN, *Introduction to A NEW LAW DICTIONARY*, at i (2003) (1792).

43. Blackstone for 1 and 2; over time, the umpire option coincided with an original submission to 3 arbitrators, instead. BLACKSTONE, *supra* note 38, at 16.

44. BURN, *supra* note 38, at 45 (describing issues of law as “a right in things and actions personal and uncertain”).

45. *Id.*

46. *Id.* at 46.

47. *Id.* at 47.

48. *Id.*

49. RICHARD BURN, A NEW LAW DICTIONARY 47 (1792) (arbitration). Although Burn seems clear on this point, the case law demonstrates that, at times, the final award was issued by the umpire alone, and at other times the final award was issued by the initial two arbitrators and the umpire together.

50. *Id.*

51. *Id.*

52. As discussed previously, some sources refer to this type of reference by the term “Reference by Order of the Court” and thereby distinguish it from statutory reference, which is then described as “Reference by Rule of the Court.” WATERMAN, *supra* note 34, at 451-457.

litigation.<sup>53</sup> Historically speaking, the law utilized different terminology (arbitration, arbitrators, and award for pre-litigation submissions to arbitration; reference, referees, and reports for cases submitted to arbitration after litigation had commenced) to highlight the differences in the timing of the submission.<sup>54</sup> In contrast to Common Law Arbitration, disputants who utilized Reference by Rule of the Court were not required to file a separate action seeking enforcement if one disputant failed to abide by the award.<sup>55</sup> Instead, the report was filed as a judgment of the court and enforced through the contempt power of the court.<sup>56</sup> This enforceability marked one of the greatest benefits of Reference by Rule of the Court and prompted the creation of a third type of arbitration, through the Arbitration Act of 1698.<sup>57</sup>

### C. Statutory Arbitration

Statutory Arbitration is perhaps the most interesting of the three forms of arbitration. In 1697, England undermined the enforcement of Common Law Arbitration awards by eliminating the penalties that could be assessed to disputants who did not comply with the award.<sup>58</sup> This change had the potential of undermining parties' compliance with Common Law Arbitration awards and, as a result, disputants' willingness to submit their disputes to Common Law Arbitration. In response, Parliament passed the Arbitration Act of 1698, commonly known as the Locke statute.<sup>59</sup> Under the 1698 Arbitration Act, disputants who wished to submit their dispute to arbitration could do so by registering with the court, without first commencing any of the steps of litigation. The arbitration award would be returned and made a judgment of the court.<sup>60</sup> It then could be enforced through the court's contempt power.<sup>61</sup>

Thus, the 1698 Arbitration Act combined the benefits of Common Law Arbitration and Reference by Rule of the Court: Disputants could reap the enforcement power previously available only through Reference by Rule of the Court but could do so alongside one of the main benefits of Common Law Arbitration, which was the ability to resort to arbitration without the time and expense that would occur if they were required first to commence litigation. This new form of arbitration was defined in A NEW LAW DICTIONARY (1792) as follows:

There may also be a submission *by rule of court*, which is in pursuance of the statute 9 & 10 *W. c. 15*. [the 1698 Arbitration Act] Whereby the parties

53. *Fairchild v. Adams*, 65 Mass. 549, 550, 553 (1853).

54. See 1 GILES JACOB, *THE NEW LAW DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE ENGLISH LAW 187-206* (1811); *Arbitration*, BLACK'S LAW DICTIONARY (9th ed. 2009); *Reference*, BLACK'S LAW DICTIONARY (9th ed. 2009).

55. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 68 (citing *Overly's Executor v. Overly's Devises*, 58 Ky. 117, 120-22 (1858)) (providing an example of the Kentucky Court of Appeals' discussion of the enforcement problem that existed with Common Law Arbitration).

56. These procedural steps were carried over to the early American tradition.

57. See James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 LAW & HIST. REV. 241, 346 (2013) (discussing the benefits of enforcement without first commencing litigation and history of both English Arbitration Act of 1698 and its counterparts in the new American states).

58. *Id.*

59. *Id.* at 246.

60. *Id.* at 247.

61. *Id.* at 246.

may agree that their submission be made a rule of such of his majesty's courts of record as the parties shall chuse [sic]; which court will thereupon carry the award into execution in the same manner as for contempt of a rule of court.<sup>62</sup>

The mainland colonies of British North America (and the new American states) adopted English arbitration procedures, but adapted those procedures to local circumstances. Such "localization" of the law was permissible so long as colonial law only diverged from, and was not repugnant to, the Common Law.<sup>63</sup> In other words, colonial law was required to uphold the same principles as the Common Law, but could differ in its particular provisions and applications. Colonial law provided the legal infrastructure for each of the new American states, with states commonly including in their constitutions a statement regarding the scope and reach of English Common Law and Acts of Parliament in that state following the American Revolution.<sup>64</sup> Included in that law was English-style arbitration.<sup>65</sup>

Part IV looks to the histories of Kentucky, New Jersey, and Massachusetts to explore the adoption, and adaptation, of English-style arbitration to the colonies and new American states. Part A provides an overview of common themes in the development of arbitration procedures in Kentucky, New Jersey, and Massachusetts. Part B then looks to the ways in which the unique circumstances of each state led

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62. BURN, *supra* note 42, at 46 (arbitration).

63. MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION* (2004) (detailing this policy by which colonial law could diverge from, but not be repugnant to, the Common Law). It may be that all colonies and territories that became new American states in the antebellum period, when Blackstone's *Commentaries* was at its height, developed arbitration based on the English models. This article looks only at Kentucky, New Jersey, and Massachusetts. See Oldham & Kim, *supra* note 57, at 241 *passim* (tracking a similar development in Connecticut and Maryland). Morton Horwitz highlights the development of arbitration in Massachusetts, Pennsylvania, South Carolina, and New York. MORTON HORWITZ, *TRANSFORMATION OF AMERICAN LAW: 1780-1860* (1977). See also BRUCE MANN, *NEIGHBORS AND STRANGERS* (2001) (Connecticut); AUERBACH, *supra* note 18 (early America, generally).

64. The New Jersey Constitution of 1776 stated, "That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." Section XXII, THE N.J. CONST. OF 1776 available at <http://www.state.nj.us/njfacts/njdoc10a.htm>. The Constitution or Form of Government for the Commonwealth of Massachusetts (1780) included a statement of law in Chapter VI, Article VII: "All the laws which have heretofore been adopted, used, and approved in the Province, Colony, or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution." FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, VOL. III KENTUCKY-MASSACHUSETTS* (1909) [hereinafter KY-MASS. CONSTS.] available at <http://oll.libertyfund.org/titles/2676>. The Kentucky Constitution of 1792 stated in Article VIII, Section 6, that "All laws now in force in the State of Virginia, not inconsistent with this constitution, which are of a general nature, and not local to the eastern part of that State, shall be in force in this State, until they shall be altered or repealed by the legislature." *Id.* The Kentucky Constitution of 1799 preserved this provision in Article VI, Section 8. *Id.* Although such a statement would seem to include the common law, Virginia did not include a continuance of the common law in its 1776 constitution. FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, VOL. VII VIRGINIA-WYOMING-INDEX* (1909) available at <http://oll.libertyfund.org/titles/thorpe-the-federal-and-state-constitutions-vol-vii-virginia-wyoming-index>.

65. See BLACKSTONE, *supra* note 38, at 16-17 (discussing arbitration as part of the Common Law of England).

to distinct developments in arbitration practices and policies throughout the antebellum period.

#### IV. ARBITRATION IN EARLY AMERICA: ADOPTION AND ADAPTATION

##### A. Common Themes

Kentucky, New Jersey, and Massachusetts each adopted English-style Common Law Arbitration and Reference by Rule of the Court in the colonial or early American periods.<sup>66</sup> In the 20 years following the American Revolution, each of these states also passed its own version of the Locke statute.<sup>67</sup> And from 1780-1860, legislators, judges, and policy advocates in each of these three states articulated a variety of reasons to favor arbitration as a matter of public policy, with the most common arguments in favor of arbitration including savings in time and money, and arbitration's ability to achieve justice.<sup>68</sup>

One of the most interesting trends that emerges within these three states—and a trend that is important to recognize for the discussion below—is the widespread confusion that existed in regards to terminology. In early America, arbitration was referred to by a wide variety of names, including arbitration, common law arbitration, customary arbitration, arbitration *in pais*, reference, reference by rule of the court, reference by order of the court, statutory arbitration, statutory reference, arbitration by statute, and even appraisal. The terms arbitration and common law arbitration frequently encompassed both English-style Common Law Arbitration and Reference by Rule of the Court. Similarly, the term Reference sometimes was used to describe English-style Reference by Rule of the Court and both Statutory and Common Law Arbitration. The terms customary arbitration and arbitration *in pais* usually, but not always, referred to English-style Common Law Arbitration. Reference by Rule of the Court and Reference by Order of the Court could refer to English-style Reference by Rule of the Court or English-style Statutory Arbitration.

Perhaps the greatest consistency in early American arbitration terminology is its inconsistency. But while the procedural differences between arbitration, reference, and statutory arbitration were real—and held great practical consequences for the disputants<sup>69</sup>—the inconsistencies in terminology seemed to have had little practical effect. Early Americans commonly used “arbitration” as a short-hand way to refer to one or more of these three arbitration procedures, while remaining aware of

66. See *Schooley v. Thorne*, 1 N.J.L. 83 (N.J. Sup. Ct. 1791) (New Jersey); *Baker's Heirs v. Crockett*, 3 Ky. 396, 410-11 (Ct. App. 1808) (Kentucky). See also Conklin, *Transformed, Not Transcended*, *supra* note 23 (discussing all three types of arbitration in Kentucky and New Jersey); Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 OHIO ST. J. ON DISP. RESOL. 581 (2013) [hereinafter *Lost Options*] (discussing all three types of arbitration in Massachusetts). See *infra* Parts IV.B.1 (Kentucky), IV.B.2 (New Jersey), IV.B.3 (Massachusetts).

67. Kentucky in 1795. New Jersey in 1794. Massachusetts in 1786. See *infra* Part IV.B.1 (Kentucky), Part IV.B.2 (New Jersey), Part IV.B.3 (Massachusetts).

68. The benefits to be realized through arbitration's speed, cost savings, and ability to secure justice can be found in antebellum policy debates, statutory language, and case law discussions of arbitration in all three states. See *infra* Part IV.B.1 (Kentucky), Part IV.B.2 (New Jersey), Part IV.B.3 (Massachusetts).

69. For example, a disputant who took part in Statutory Arbitration and then challenged the validity of the award due to flaws in the arbitration procedure would have his claim analyzed in light of the particular procedural requirements listed in the statute, instead of the lesser and much more flexible procedural requirements of arbitration under the Common Law. *Monosiet v. Post*, 4 Mass. 532 (1808).

the differences in the arbitration procedures available to them.<sup>70</sup> Similarly, the states' highest courts often used the term "arbitration" to encompass all three types of arbitration procedures, but were careful to mark procedural differences—including timing of the submission, the arbitration process, and enforcement of the award—as needed in the specific cases that came before them.<sup>71</sup> State courts showed the greatest deference to Common Law Arbitration, often under the reasoning that the parties, themselves, had selected a dispute resolution proceeding that neither required nor allowed court oversight.<sup>72</sup> State courts also exhibited great deference to Reference by Rule of the Court, with some assumption of judicial review, seemingly based on the idea that the submission to arbitration had occurred only after the commencement of litigation and that the arbitration award would take the place of the judgment of the court.<sup>73</sup> Last of all, state courts also showed great deference to Statutory Arbitration, often overtly distinguishing Statutory Arbitration from Common Law Arbitration, and then taking care to determine the outcome of the dispute according to the specific requirements of that state's arbitration statute.<sup>74</sup>

Yet, in spite of these commonalities, arbitration developed in distinct ways in early America. State arbitration systems were influenced by, and often formalized in response to, the unique geographic, political, social, religious, or commercial conditions of the individual states. While these states showed a great similarity in the arbitration procedures they adopted, largely mirroring English law and customs, they showed interesting distinctions both in arbitration practice and in arbitration policy, as articulated through legislation, court opinions, and public policy debates. Part B will explore these distinctions by looking to the historical development of arbitration in three very different states: Kentucky, New Jersey, and Massachusetts.

## B. State-Level Distinctions

### 1. Kentucky Claim-Stakers<sup>75</sup>

The former Virginians who settled Kentucky territory in the mid- to late-1700s brought with them an understanding of English law and legal systems, including arbitration,<sup>76</sup> but it was not until the occurrence of a statewide upheaval over land title disputes that Kentucky passed its version of the Locke statute in 1795.<sup>77</sup>

70. See generally Conklin, *Transformed, Not Transcended*, *supra* note 23 (providing a discussion of the variety of arbitration procedures that fell under the common term "arbitration"); Conklin, *Lost Options*, *supra* note 66 (same).

71. See generally Conklin, *Transformed, Not Transcended*, *supra* note 23 (providing a discussion of state court decisions that combined terminology while parsing procedural differences).

72. *Id.* at 86; *Smith v. Bos. & Me. R.R.*, 16 Gray 521, 523 (Mass. 1860).

73. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 86 (citing *Sherron v. Wood*, 10 N.J.L. 16, 19 (N.J. Sup. Ct 1828)).

74. See *Monosiet v. Post*, 4 Mass. 532 (1808); *Overly's Executor v. Overly's Devisees*, 58 Ky. 117, 119-22 (1858).

75. See Conklin, *Transformed, Not Transcended*, *supra* note 23, at 42-68 (providing a more complete discussion of Kentucky's development as a territory and new American state, with an emphasis on the connection between Kentucky's history and the development of arbitration in Kentucky).

76. *Id.* at 43, 45. See *supra* Part III, English Arbitration: A Common Heritage. See also CHARLES HUMPHREYS, COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 275-276 (1822) (for presence of the Common Law in early Kentucky).

77. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 48.

Settlers moved to Kentucky territory in search of land, receiving land grants in exchange for military service, obtaining land rights through chartered land companies, or simply surveying and recording their land claims in the land office.<sup>78</sup> As historian Richard Ellis states:

Land was what Kentucky was all about. It was in search of land that the speculator, the planter, and the farmer had dared to venture across the mountains in the first place. And in no other state of the union was there as much confusion over land titles as in Kentucky. . . . As little was known about the geography of Kentucky, the locations of the various grants were only vaguely described. Efforts made to survey the area merely complicated the problem. . . . [O]ver a period of several years, the same terrain of land was often marked off several times, so that what might be designated as an individual lot by one surveyor would be included as different parts of several continuous lots by another. As a result of these overlappings, the state became 'shingled over' with land claims to which two, three, and sometimes even four and five persons held conflicting titles.<sup>79</sup>

As a result of this confusion, it was not uncommon for a settlor to stake claim to land that already was owned by an absentee landowner, who then could sue to eject the settlor.<sup>80</sup> If the landowner won his ejectment suit, the result was devastating for the settlor; all improvements made by the settlor would stay with the land, becoming the absentee landowner's property.<sup>81</sup>

Virginia governed Kentucky territory prior to statehood.<sup>82</sup> In an attempt to remedy the problem, Virginia enacted a statutory process for quieting title and created a land commission to review and resolve conflicting land title claims.<sup>83</sup> The statutory process proved too cumbersome to be effective and, although the commission resolved well over a thousand conflicting land title claims, thousands more remained.<sup>84</sup> After Kentucky became a state in 1792, the uncertainty continued, inhibiting both settlement and agricultural development.<sup>85</sup> Seemingly endless land title conflicts clogged Kentucky state court and federal court dockets, with nearly half of all private suits brought to federal courts in Kentucky from 1789-1816 centering on land title disputes.<sup>86</sup>

Kentucky sought to achieve cheaper, speedier, and final results by granting the Kentucky Court of Appeals original jurisdiction over land title disputes, only to have the Court hand down a 1794 decision that called into question the land title cases previously resolved by the Virginia land commission.<sup>87</sup> The Court's decision

78. *Id.* at 43-44.

79. *Id.* at 47 (quoting RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 139-142 (1971)).

80. *Id.* at 47.

81. *Id.* at 47, 53 n.95.

82. *Id.* at 45.

83. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 45.

84. *Id.*

85. *Id.* at 44-48.

86. *Id.* at 47 n.53.

87. This jurisdiction was granted upon statehood, in Article V, Section 3 of the Kentucky Constitution of 1792, with these stated policy goals: "to do right and justice to the parties, with as little delay and at as small an expense as the nature of the business will allow." *KENTUCKY-MASSACHUSETTS*, *supra* note 64, Article V, § 3. See also Conklin, *Transformed, Not Transcended*, *supra* note 23, at 48.

created new insecurity and instability for landowners who had believed the Virginia land commission's findings to be final.<sup>88</sup> It also created a political firestorm, fueled by landowners' fears that the Court had been influenced by land speculators and lawyers, both of whom stood to gain from conflicting land title claims.<sup>89</sup> In response, the legislature revoked the Court's original jurisdiction over land title disputes<sup>90</sup> and, the next year, passed the 1795 Act Concerning Arbitrations.<sup>91</sup> In 1799, Kentuckians included in their new state constitution a provision requiring the legislature to pass further acts, as necessary, to support arbitration.<sup>92</sup>

For Kentuckians overwhelmed by land title disputes and ready for a system of justice that would be not only cheap, speedy, and just, but also simple and final, arbitration was the answer. Kentucky's calls for a cheap, speedy, and just form of dispute resolution<sup>93</sup> were included in the Preface to the 1795 Act Concerning Arbitrations, which stated that the Act was passed in response to the "enormous expenses [sic]" and "tedious length of time" that caused lawsuits to be an "almost total denial of justice."<sup>94</sup>

In addition to common policy goals of savings in time and money and achieving justice, Kentucky landowners advocated for a government based on a "simple and concise code of laws."<sup>95</sup> Arguments for simplicity were rooted in a strong anti-lawyer sentiment, with ongoing concerns that lawyers unnecessarily complicated the law and then used those legal complications unjustly to gain title to landowners' property.<sup>96</sup> Concerns that the bar had done just that persisted and, in 1849, the *Louisville Journal* looked back on Kentucky's history, stating that "the bar had 'despoiled' the property of the State on behalf of 'land-jobbers'; while themselves 'growing fat and sleek upon the miseries of the farmer'"<sup>97</sup> Under the 1795 Arbitration Act, disputants were able to avoid the use of lawyers and unnecessary legal complications by using arbitrators of their own choosing and enjoying the benefits of court enforcement without first commencing litigation.<sup>98</sup> In 1859, the Court made a strong policy statement in favor of simplicity as it opposed "technical and formal objections" to arbitration awards: "Mere formal objections to awards should be disregarded. The settlement of controversies by arbitration is favored by law, and should be encouraged by sustaining awards, notwithstanding they may be liable

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88. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 48.

89. *Id.*

90. *Id.*

91. *Id.*

92. KENTUCKY-MASSACHUSETTS, *supra* note 64, at Article VI, § 10 of KY. CONST. OF 1799. "It shall be the duty of the general assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by the parties who may choose that summary mode of adjustment." *Id.*

93. See Conklin, *Transformed, Not Transcended*, *supra* note 23, at 46 (quoting RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 143, 147-48 (1969)) (discussing landowners' and Radical Republicans' efforts to establish a circuit court system).

94. WILLIAM LITTELL, STATUTE LAW OF KENTUCKY; WITH NOTES, PRAELECTIONS, AND OBSERVATIONS ON THE PUBLIC ACTS, 327-29 (1809).

95. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 46 (quoting RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS, 125-26 (1969)).

96. *Id.* at 45.

97. *Id.* at 52 (quoting *Louisville Journal*, Oct. 26, 1849).

98. *Id.* at 49.

to technical and formal objections, which do not affect the substantial rights of the parties.”<sup>99</sup>

As the case above highlights, Kentucky’s arbitration proponents argued not only for simplicity, but also for finality, a goal that seemed more achievable in arbitration than in court, where land title judgments once more were subject to appeal. Kentucky’s land title problems continued throughout the nineteenth-century, with debates surrounding the call for a constitutional convention in 1849 including a proposal to grant quiet title to all claimants who had occupied the land for seven years.<sup>100</sup> By the mid-1800s, hundreds of thousands of acres of land still had no owner recorded.<sup>101</sup>

As stated in the 1795 Arbitration Act, the arbitration award was to “become a final end and [decision] of all and every controversy or suit to them so submitted . . . .”<sup>102</sup> Indeed, throughout the antebellum period, Kentucky’s high court judges routinely upheld arbitration awards in the challenges that came before them,<sup>103</sup> whether the arbitration was by Common Law, or Statute,<sup>104</sup> and with an emphasis on the finality Kentucky landholders desired.<sup>105</sup> That finality extended even to cases where both parties wished to overturn the award, with the Court stating in 1816, “The judgment is made as binding as if it were founded on the opinion of the court itself upon the merits of the claims.”<sup>106</sup> To hold otherwise, as the Court argued in 1829, would be to make arbitration “more than useless; and settlements by parties themselves would be idle and unavailing.”<sup>107</sup>

Kentucky’s highest court included a broad policy statement in favor of arbitration’s savings in time (through direct award enforcement) and money, its ability to achieve justice (“correct determination”), and its simplicity and finality in the 1858 case of *Overly’s Executor v. Overly’s Devisees*:

In modern times the submission of controversies to arbitration has been much more encouraged than it was anciently. It has been the policy of the law to favor the settlement of disputes in this manner. It is attended with much less expense than the ordinary litigation in courts of justice, and is just as likely to result in a correct determination of the matters in controversy between the parties. Acts have been passed by the legislature for its encouragement, by permitting the parties to proceed under an order of court, so that the award, when made, could be entered as the judgment of the court, instead of compelling the parties, as at common law, to resort to an action for a failure to perform it . . . . A mere error of arbitrators, either as to law or fact, is no ground for setting aside their award.<sup>108</sup>

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99. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 64 (quoting *Snyder v. Rouse*, 58 Ky. 625 (Ct. App. 1859)).

100. *Id.*

101. *Id.* at 52-53.

102. *Id.* at 52-53 (quoting *The Act Concerning Arbitrations*, 1795 Ky. Acts, Ch. 9).

103. *Id.* at 54-59, 55 n.103.

104. *Id.* at 57-58.

105. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 55-56, 55 n.103, 64.

106. *Id.* at 56 (quoting *Irvine’s Heirs v. Crockett*, 7 Ky. 437, 438 (1816)).

107. *Id.* at 59 (quoting *Callant v. Downey*, 25 Ky. 346, 348 (1829)).

108. *Overly’s Executor v. Overly’s Devisees*, 58 Ky. 117, 120-22 (1858).

Did the availability of arbitration and policies that promoted arbitration for the cheap, speedy, just, simple, and final resolution of disputes make any difference in disputants' selection of a dispute resolution mechanism? The numbers seem to suggest that they did in the area that Kentuckians fought over the most: land titles. Land title disputes comprised the largest known subject of dispute in arbitration cases brought before Kentucky's highest court in the antebellum period.<sup>109</sup>

## 2. *New Jersey Quakers*<sup>110</sup>

Like Kentucky, New Jersey recognized both Common Law Arbitration and Reference by Rule of Court in ways that reflected the English tradition.<sup>111</sup> New Jersey passed its Locke statute, "An Act for [R]egulating References and [D]etermining Controversies by Arbitration" soon after statehood—in 1794, just one year before Kentucky.<sup>112</sup> Where New Jersey diverges from Kentucky is in the distinct policy goals articulated for the use of arbitration in the state. Those goals were connected to New Jersey's long history with Quaker practice, generally, and Quaker arbitration, in particular.

New Jersey had a large Quaker population and arbitration shows up early on in New Jersey history, with Quaker Meetinghouse records detailing the practice of arbitration to resolve disputes in the late-seventeenth and early-eighteenth centuries.<sup>113</sup> Records from the 1681 Yearly Meeting include an order "that if any differences do arise betwixt any two persons that profess Truth, that they do not go to law before they first lay it before the particular Monthly Meeting that they belong unto."<sup>114</sup> The 1719 Yearly Meeting records encouraged arbitration within the Quaker community even more clearly, stating that, in the event that parties could not resolve a dispute among themselves, "either the overseers or other discrete, judicious friends" were to "admonish and persuade the parties to choose referees or arbitrators."<sup>115</sup> Quakers were prompted to resolve disputes first "in our friendly way," only going to court as needed to have the result "confirmed by a judgment."<sup>116</sup>

Quaker dispute resolution did not consist solely of arbitration but, instead, reflected a multi-layered dispute resolution process outlined in the Gospel of Matthew:

Moreover, if thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou has gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to

109. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 48.

110. See *id.* at 69-98 (providing a more complete discussion of the connections between New Jersey's Quaker history and the development of arbitration in New Jersey).

111. *Id.* at 73, 81, 87-88 nn.295-96.

112. *Id.* at 81.

113. *Id.* at 71-73.

114. *Id.* at 74 (quoting EZRA MICHENER, A RETROSPECT OF EARLY QUAKERISM; BEING EXTRACTS FROM THE RECORDS OF PHILADELPHIA YEARLY MEETING AND THE MEETINGS COMPOSING IT 266 (1860)). New Jersey Quakers attended the Burlington and Philadelphia Meetings. This text comprises the records of both.

115. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 75 (quoting EZRA MICHENER, A RETROSPECT OF EARLY QUAKERISM; BEING EXTRACTS FROM THE RECORDS OF PHILADELPHIA YEARLY MEETING AND THE MEETINGS COMPOSING IT 270 (1860)).

116. *Id.* (quoting EZRA MICHENER, A RETROSPECT OF EARLY QUAKERISM; BEING EXTRACTS FROM THE RECORDS OF PHILADELPHIA YEARLY MEETING AND THE MEETINGS COMPOSING IT 268 (1860)).

hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as an heathen man and a publican.<sup>117</sup>

The process began with negotiation (“go and tell him his fault between thee and him alone”). If unsuccessful, negotiation would be followed by mediation (“take with the one or two more”). If mediation did not succeed, the disputants were to bring their dispute before the Monthly Meeting (“tell it unto the church”) so that one or more members of the Quaker Meeting could be selected to arbitrate the dispute.<sup>118</sup> If one or both parties refused to arbitrate, they would “be dealt with as one disorderly, and that regards not peace either in himself or in the Church, and that slights the love, order, and unity of the brethren. And, after due admonition, if he or she persists therein, let such be disowned . . . .”<sup>119</sup>

The Quaker community specifically encouraged disputants to follow these steps in the resolution of their disputes, with the stated goal of preserving or restoring harmony and relationships, with such goals often tied to the welfare of the community.<sup>120</sup> New Jersey Quakers took this process seriously, as evidenced by Monthly Meeting records, which include submissions to arbitration both before and after the commencement of litigation and, much more infrequently, the disowning of Quakers who refused to arbitrate.<sup>121</sup>

Perhaps due to this Quaker influence, New Jersey enacted arbitration statutes early on. The region that later would combine to become the state of New Jersey was first split into West and East sections.<sup>122</sup> West Jersey passed the first arbitration statute in the colonies in 1682, requiring arbitration for disputes under a certain amount, and East Jersey passed an arbitration law in 1688.<sup>123</sup> In 1794, New Jersey then enacted its version of the Locke statute, “An Act for [R]egulating References and [D]etermining Controversies by Arbitration.”<sup>124</sup>

New Jersey’s promotion of arbitration in the antebellum period exhibited familiar policy goals of savings in time and money, justice, certainty or finality (so important to Kentuckians), and (as we will see in Massachusetts) the promotion of trade.<sup>125</sup> But New Jersey also exhibited policy goals that were more particular to the Quaker backdrop of its arbitration development, namely an emphasis preserving or restoring harmony and community welfare and the right of disputants to choose arbitration for the resolution of their disputes.

For example, in the 1791 case of *Schooley v. Thorne*, the Court upheld Common Law Arbitration, emphasizing both disputants’ right to choose arbitration and arbitration’s ability to help disputants to amicably resolve their differences:

**Every party clearly has a right to agree to submit his cause to other judges than those the law has appointed for him. The utility of these amicable references has been perceived and encouraged by the legislature,**

117. *Matthew* 18:15-17 (King James).

118. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 75-76.

119. *Id.* at 76 (quoting EZRA MICHENER, A RETROSPECT OF EARLY QUAKERISM; BEING EXTRACTS FROM THE RECORDS OF PHILADELPHIA YEARLY MEETING AND THE MEETINGS COMPOSING IT 270 (1860)).

120. *Id.* at 75-76; AUERBACH, *supra* note 18, at 30.

121. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 76-77.

122. *Id.* at 71.

123. *Id.* at 79.

124. *Id.* at 81.

125. *Id.*

but it is a common law right, which grew into notice **under the encouragement of the courts.**<sup>126</sup>

As highlighted above, the New Jersey court viewed the judicial and legislative branches as the encouragers of this amicable method of dispute resolution, much as Quakers had encouraged individuals to resolve their disputes by “the friendly way.”<sup>127</sup>

The Preface to New Jersey’s 1794 Arbitration Act evidenced similar goals, stating, “it hath been found by experience, that references made by rule of the court, have contributed much to the advancement of justice and **the ease of the people.**”<sup>128</sup> Ease was defined in 1755 as “quiet; rest; undisturbed tranquility; no solicitude [anxiety].”<sup>129</sup> The Preface then highlighted the purposes of the Act: “to promote trade, **to facilitate the means of accommodation,** to expedite the determination of controversies, and to render the awards of arbitrators the more effectual.”<sup>130</sup>

The language “to facilitate the means of accommodation” is particularly interesting given Samuel Johnson’s 1755 definition of accommodation as: “composition of a difference, reconciliation, adjustment.”<sup>131</sup> Both “composition of a difference” and “adjustment” are synonymous with “settlement.”<sup>132</sup> But reconciliation means “renewal of friendship” and has a broader connotation of harmony and community welfare drawn from the Latin *reconciliare*: “to bring together again; regain; win over again, conciliate.”<sup>133</sup>

126. *Id.* at 86 (quoting *Schooley v. Thorne*, 1 N.J.L. 83 (N.J. Sup. Ct. 1791)) (emphasis added).

127. See Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 123 (Brandi Besalke Ed.), [http://johnsonsdictionaryonline.com/?page\\_id=7070&i=123](http://johnsonsdictionaryonline.com/?page_id=7070&i=123) (last modified Dec. 6, 2012) (discussing amicable as synonymous with friendly).

128. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 81 (quoting *An Act for [R]egulating References and [D]etermining Controversies by Arbitration*, ACTS OF THE NINETEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY (Dec. 2, 1794)).

129. See Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 670 (Brandi Besalke Ed.), [http://johnsonsdictionaryonline.com/?page\\_id=7070&i=670](http://johnsonsdictionaryonline.com/?page_id=7070&i=670) (last modified Dec. 6, 2012) (ease); Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 1879 (Brandi Besalke Ed.), [http://johnsonsdictionaryonline.com/?page\\_id=7070&i=1879](http://johnsonsdictionaryonline.com/?page_id=7070&i=1879) (last modified Dec. 6, 2012) (solitude).

130. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 81 (quoting *An Act for [R]egulating References and [D]etermining Controversies by Arbitration*, ACTS OF THE NINETEENTH GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY (Dec. 2, 1794)).

131. Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 1706 (Brandi Besalke Ed.), <http://johnsonsdictionaryonline.com/?p=1706> (last modified Feb. 1, 2014).

132. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 82 (Brandi Besalke Ed.), <http://johnsonsdictionaryonline.com/?p=13703> (last modified May 22, 2014) (defining adjustment in definition #1 as “regulation; the act of putting in method; settlement”). SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 430 (Brandi Besalke Ed.), [http://johnsonsdictionaryonline.com/?page\\_id=7070&i=430](http://johnsonsdictionaryonline.com/?page_id=7070&i=430) (last modified Dec. 6, 2012) (defining composition in definition #8 as “compact; agreement; terms on which differences are settled”).

133. See Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE: A DIGITAL EDITION OF THE 1755 CLASSIC BY SAMUEL JOHNSON 1654 (Brandi Besalke Ed.), [http://johnsonsdictionaryonline.com/?page\\_id=7070&i=1654](http://johnsonsdictionaryonline.com/?page_id=7070&i=1654) (last modified Dec. 6, 2012) (reconciliation). ONLINE ETYMOLOGY DICTIONARY (Douglas Harper, ed. 2016) [http://www.etymonline.com/index.php?term=reconcile&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?term=reconcile&allowed_in_frame=0) (last visited Mar. 26, 2016) (*reconciliare* under “reconcile”).

Perhaps the most prominent way in which the New Jersey courts continued to encourage this amicable method of dispute resolution throughout the antebellum period was by continually upholding the right of the disputants to agree to submit their dispute to arbitration instead of the courts of law. As seen previously, the court in *Schooley v. Thorne* (1791) upheld the right of a disputant to “agree to submit his cause to other judges other than those the law has appointed for him.”<sup>134</sup> The 1794 Arbitration Act stated it was open to “all persons” who mutually agreed to submit their dispute to the court for arbitration.<sup>135</sup> After the passage of the 1794 Act, the court went out of its way to reaffirm disputants’ choice of any one of the three different arbitration procedures now available to them—Common Law Arbitration, Reference by Rule of the Court, or Statutory Arbitration<sup>136</sup>—stating that the legislature had not eliminated Common Law Arbitration when it created Statutory Arbitration and emphasizing that disputants who wished to use Common Law Arbitration could not be compelled by the court to choose Statutory Arbitration, with its accompanying court oversight, instead.<sup>137</sup>

The policy goals of preserving and protecting harmony and community welfare that were articulated by the New Jersey legislature and court are reflective of those same goals within the Quaker community. The New Jersey courts and legislature also evidenced an overarching goal of keeping these amicable methods of dispute resolution available to all disputants, both in the policy language they incorporated into the 1794 Arbitration Act and in the cases that followed.

### 3. *Massachusetts Merchants and Maritime Risk-Takers*<sup>138</sup>

Massachusetts law on arbitration developed within an economy marked by a strong merchant community. Like Kentucky and New Jersey, Massachusetts recognized both Common Law Arbitration and Reference by Rule of Court from the English legal tradition.<sup>139</sup> But Massachusetts passed its version of the Locke statute much earlier—in 1786—and in response to law and policy debates that, as in Kentucky, were fueled by strong anti-lawyer sentiment.<sup>140</sup>

Where Kentucky’s anti-lawyer sentiment was centered around ongoing land title disputes—and fears that lawyers would take “one half of your land to defend your right to the other”—anti-lawyer sentiment in Massachusetts centered on the state’s late-eighteenth century economic crisis<sup>141</sup> and an early-statehood battle surrounding the rise of the Massachusetts Bar and formalization of the legal profession.<sup>142</sup> One of the most prominent opponents of the legal profession in eighteenth-

134. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 86 (quoting *Schooley v. Thorne*, 1 N.J.L. 83, 87 (N.J. Sup. Ct. 1791)).

135. *Id.* at 81-82.

136. *Id.* at 85-88, 87-88 n.295, 88 n.296.

137. *Id.* at 86.

138. See Conklin, *Lost Options*, *supra* note 66, at 42-68 (providing a more complete discussion of policy debates surrounding arbitration in antebellum Massachusetts, with an emphasis on merchants).

139. See *An Act to Impower [sic] Justices of the Peace to Summon Witnesses, 1734-1744 PROVINCE LAWS* 132, <http://archives.lib.state.ma.us/bitstream/handle/2452/118081/1743acts0024.txt?sequence=1&isAllowed=y> (last visited Mar. 8, 2016) (summarizing Common Law Arbitration and Reference by Rule of the Court in colonial Massachusetts).

140. Conklin, *Lost Options*, *supra* note 66, at 585-87.

141. *Id.* at 585-86.

142. *Id.* at 586-89.

century Massachusetts also was one of the most vocal proponents of arbitration: Benjamin Austin.<sup>143</sup> According to Austin,

[t]he ‘order’ of lawyers . . . So far from being a ‘necessary,’ are in most cases a useless body. As the laws can be better executed without them; and as they are of late so rapidly increasing in all parts of the Commonwealth, . . . it is become absolutely necessary, as we regard the welfare of the community, that the people direct their Representatives to lay before the Legislature, the present pernicious practice of this ‘order,’ that some measure may be adopted effectually to stop them in their dangerous progress.<sup>144</sup>

The measure that Austin recommended in response to that threat, and the measure that the legislature enacted, was arbitration.<sup>145</sup>

Massachusetts passed its Locke statute, “An Act for Rendering the Decision of Civil Causes, As Speedy, and As Little Expensive As Possible” (commonly known as The Referee Act) in 1786.<sup>146</sup> The policy goals of saving time and money, also common to Kentucky and New Jersey, were expressed right in the title. Massachusetts arbitration supporters also called for simplicity, consistency, and community welfare, with a theme of justice running throughout.

Where Kentucky arbitration supporters argued for simplicity as a way to protect their land from the claims of “land-jobbers and lawyers,” Massachusetts arbitration supporters argued for simplicity in opposition to the rise of the legal elite and a corresponding formalization of the law and legal system, which they believed would lead to unnecessary complexity and limitations on the layperson’s ability to resolve his own disputes.<sup>147</sup> They argued for a simple system of justice, based on their belief that the common law easily could be known by layperson and lawyer, alike, and therefore easily could be applied to the resolution of disputes by layperson arbitrators in arbitration proceedings.<sup>148</sup> They advocated for clear laws, which could be easily known and understood, and a simpler administration of justice that could be navigated by laypersons without the help of trained lawyers.<sup>149</sup> Proposals to simplify and then codify the common law formed one prong of that proposal.<sup>150</sup> Proposals to almost entirely replace litigation with arbitration formed another.<sup>151</sup>

Arbitration was hailed as promoting not only simplicity, but also the benefits of consistency in outcome, as it gave merchants, in particular, the ability to choose arbitrators who, unlike judges, were well-versed in commercial law.<sup>152</sup> Arbitrators’

143. *Id.* at 590.

144. *Id.* at 583 (quoting BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE 10-11 (Adams and Nourse 1786), *microformed on Early Am. Imprints*, Ser. I, no. 19481 (Am. Hist. Imprints)).

145. *Id.* at 590-92.

146. Conklin, *Lost Options*, *supra* note 66, at 592. *An Act for Rendering the Decision of Civil Causes, as Speedy, and as Little Expensive as Possible*, 1786 MASS ACTS 55-57, The State Library of Massachusetts Electronic Repository, <http://archives.lb.state.ma.us/actsResolves/1786/1786acts0021.pdf> (last visited Mar. 8, 2016).

147. Conklin, *Lost Options*, *supra* note 66, at 592, 599-600.

148. *Id.* at 601-02.

149. *Id.*

150. *Id.* at 591 n.53.

151. *Id.*

152. *Id.* at 624 n.268.

familiarity with commercial law may explain one of the most interesting aspects of arbitration in Massachusetts, which was the sophisticated use of arbitration to resolve insurance disputes, particularly those involving shipwrecks, which often included arbitrators' valuation of both the damaged ship and its cargo.<sup>153</sup> Interestingly enough, arbitration's opponents also tapped into the policy goals of consistency, arguing that the rapidly-formalizing legal profession—with its trained lawyers and publication of judicial opinions—was better equipped than layperson arbitrators to foster consistency in legal rulings and development of the law, especially commercial law.<sup>154</sup>

In addition to simplicity and consistency, Massachusetts proponents of arbitration cited community welfare as a reason to support arbitration. But where New Jersey's promotion of community welfare reflected the Quaker goals of preserving and restoring harmony, Massachusetts arbitration supporters advocated specifically on behalf of those disputants who were denied justice because they were unable to afford the long delays of a complex legal system.<sup>155</sup> They believed such disputants necessarily would be at a disadvantage if faced with litigation against a represented opponent, and they promoted arbitration as a way of removing this power imbalance in the resolution of disputes.<sup>156</sup> Furthermore—and in keeping with his policy arguments promoting the welfare of the community—Austin argued that if not for lawyers seeking fees, "[t]he paltry litigious causes amongst neighbors would not exist: Harmony and benevolence would more generally prevail, and agreeable to my motto, 'Mutual passions, mutual charms might lend, And each to each be neighbour, father, friend.'"<sup>157</sup>

In 1786, Austin stated that the observations included in his pamphlet campaign "were solely intended for the public good."<sup>158</sup> As discussed above, those observations included a call to almost completely replace litigation with arbitration in order to promote cheaper and speedier access to justice, provide a simpler justice system that did not require legal representation, create consistency in rulings, and support community welfare. Nearly 30 years after the passage of the arbitration statute, Massachusetts saw a reissue of Austin's 1786 pamphlet campaign supporting arbitration over litigation.<sup>159</sup> The reissue contained some edits, including this preface at the beginning of the 1814 edition:

What solid Joy it is, for a virtuous man, in the practice of the law, to think he has received a talent from God which makes him the sanctuary of

153. See *Erick v. Johnson*, 26 Mass. 193 (1810) (involving arbitration to resolve claims resulting from shipwrecks or other damage to ships and their cargo); *Newburyport Marine Ins. Co. v. Oliver*, 8 Mass. 402 (1812) (same); *Homes v. Avery*, 12 Mass. 134 (1815) (same), *Hall v. Franklin Ins. Co.*, 9 Pick 466 (1830) (same), *Richardson v. Suffolk Ins. Co.*, 3 Metcalf 573 (1842) (same), *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray 192 (1856) (same).

154. Conklin, *Lost Options*, *supra* note 66, at 602, 605-07.

155. *Id.* at 600, 624. See generally AUERBACH, *supra* note 18, at 33 (highlighting the goal of community welfare among the merchant community in colonial America).

156. Conklin, *Lost Options*, *supra* note 66, at 602.

157. *Id.* at 600 (quoting BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE 19 (Adams and Nourse 1786), *microformed on Early Am. Imprints*, Ser. I, no. 19481 (Am. Hist. Imprints)).

158. *Id.* at 610 (quoting BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE 12 (Adams and Nourse 1786), *microformed on Early Am. Imprints*, Ser. I, no. 19481 (Am. Hist. Imprints)).

159. *Id.* at 610.

the unfortunate, the protector of justice, and enables him to defend the lives, fortunes, and honour of his countrymen. – Rollin<sup>160</sup>

The opening quotation to the 1814 reissue of Austin’s pamphlet campaign reflects once more the theme of community welfare, but this time identifies the lawyer as promoting, not opposing, the common good. In his prefatory comments, Austin went on to say, “the practice within the bar has become more congenial to the happiness of the society.”<sup>161</sup> What changed? Massachusetts undertook substantial legal reform, and self-regulation of the Bar, in the years following the passage of The Referee Act.<sup>162</sup> Perhaps Austin believed, in 1814, that the policy goals that led him to advocate almost exclusively for arbitration in 1786—speed, affordability, access to justice, simplicity, consistency, and community welfare—now had been achieved.

Part of that achievement may have been due to Massachusetts’ strong support of arbitration throughout the antebellum period. In addition to the 1786 Referee Act, Massachusetts passed An Act for Rendering Law Less Expensive, which required justices of the peace to recommend arbitration to disputants who came before them.<sup>163</sup> Massachusetts continued to uphold Common Law Arbitration, Statutory Arbitration, and Reference by Rule of the Court throughout the antebellum period.<sup>164</sup> In 1853, the court in *Fairchild v. Adams* considered the “nature and conclusiveness of awards,” coming out strongly in favor of arbitration:

The tendency of modern jurisprudence is, to give force, conclusiveness, and effect to all awards, where there is no corruption or misconduct on the part of the referees, and where no deception has been practised upon them. Parties have a right, if they please, to refer all questions between them to arbitration; *voluntis non fit injuria*, . . . A decision of a court of competent jurisdiction, is merely a statement that such is the law of the land, and the presumption is, that where the law has once been so declared it will be again. That is the foundation of our system of precedents. But the parties have as good a right to say, that they will choose their own judges in their own case, as to resort to the regular tribunals, and it is presumed they will choose persons of competent capacity and sufficient legal skill. The conclusions of the arbitrators upon questions of law or of fact must stand upon the same grounds . . .<sup>165</sup>

## V. IMPLICATIONS FOR ARBITRATION LAW AND POLICY DEBATES

This article began with an overview of the Third Circuit’s use of the history of arbitration in its application of “experience and logic test” as it considered the First

160. *Id.* at 610-11 (quoting BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE 61 (Belcher, 1814), *microformed on* Early Am. Imprints, Ser. II, no. 30716, 43116, 31753 (Am. Hist. Imprints)).

161. *Id.* at 611 (quoting BENJAMIN AUSTIN, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE 61 (Belcher, 1814), *microformed on* Early Am. Imprints, Ser. II, no. 30716, 43116, 31753 (Am. Hist. Imprints)).

162. Conklin, *Lost Options*, *supra* note 66, at 611-13.

163. *Id.* at 613-14.

164. *Id.* at 617-18.

165. *Fairchild v. Adams*, 65 Mass. 549, 550, 553 (1853).

Amendment open access question raised by the plaintiff in *Delaware Coalition for Open Government v. Strine*. Unfortunately, and as the prior discussion demonstrates, the Third Circuit utilized an incomplete history of arbitration under the “experience” prong and that history then informed the Court’s decision-making under the “logic” prong. What remains unclear is what the Court might have decided under the “logic” prong if its prior reasoning in the “experience” prong had been based on a more complete and nuanced understanding of arbitration procedure, practice, and policy across American history. A closer look at the history of arbitration, as it existed first in eighteenth-century England, and then in antebellum Kentucky, New Jersey, and Massachusetts, raises several themes that would be important to remember should questions about the history of arbitration arise again.

First, the term “arbitration” in early America described not a single arbitration procedure, but three different arbitration procedures, each of which had its roots in the English legal tradition and each of which disputants could utilize for the resolution of their dispute. Those three procedures differed in ways that matter for how we think about arbitration today. Common Law Arbitration took place wholly apart from litigation while Reference by Rule of the Court was available only after litigation had commenced. Statutory Arbitration sought to meld the best aspects of these two systems and did it well; Kentucky, New Jersey, and Massachusetts each passed an arbitration statute in the eighteenth-century that, although expanded and modified, informed statutory arbitration procedure and practice throughout the antebellum period.<sup>166</sup>

Second, state-level arbitration statutes not only outlined procedures for arbitration under the statute, but also encouraged its use through provisions that were drawn from, and in some cases reliant upon, the courts. As discussed above, such provisions included fee schedules for arbitration that mirrored those of civil litigation, acknowledging the arbitrator(s) power to subpoena witnesses, and court enforcement of the arbitration award as a judgment of law.

Third, while there are a great many commonalities within the arbitration procedures of these three states, the policy reasons that led to the adoption of those procedures differed quite a lot. Kentuckians were motivated to find a cheap, speedy, just, simple, and final way to resolve their land title disputes.<sup>167</sup> New Jersey arbitration was influenced by over a century of arbitration theory and practice within the New Jersey Quaker community.<sup>168</sup> Thus, New Jersey arbitration supporters focused on arbitration’s affordability, efficiency, and ability to achieve just and final results, while also highlighting the very Quaker arbitration goals of building harmony and preserving community welfare.<sup>169</sup> Massachusetts passed its arbitration statute in the midst of political debates marked by strong anti-lawyer sentiment and coupled its calls for efficiency and affordability with calls for simplicity, consistency, and community welfare.<sup>170</sup> The Massachusetts merchant community—longstanding users of arbitration to settle their disputes— were split on the policy

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166. Conklin, *Transformed, Not Transcended*, *supra* note 23, at 68, 95-96 (Kentucky and New Jersey); Conklin, *Lost Options*, *supra* note 66, at 628 (Massachusetts).

167. *See supra* Part IV.B.1.

168. *See supra* Part IV.B.2.

169. *See supra* Part IV.B.2.

170. *See supra* Part IV.B.3.

debates, with goals of consistency and uniformity drawing some merchants to arbitration and others to the rising legal profession.<sup>171</sup> Massachusetts also saw the use of arbitration in the maritime insurance industry.<sup>172</sup>

Fourth, the policy reasons that drove the adoption of arbitration statutes also were reflected in arbitration practice and in judicial opinions upholding arbitration awards. Land title disputes not only led to the passage of Kentucky's first arbitration statute, but also formed the largest known subject of dispute in arbitration cases that made their way to the state's highest court in the antebellum period. New Jersey was influenced by Quaker goals of harmony and community welfare, and New Jersey's highest court judges identified harmony and community welfare among their reasons for supporting and upholding arbitration throughout the antebellum period.<sup>173</sup> The Massachusetts fight over laypersons and lawyers in the legal profession led to a public policy promotion of arbitration in place of litigation, but the end result of that policy battle was a reformed dispute resolution system that included both litigation and arbitration, combining some of the best attributes of both, as exemplified within the merchant community and maritime insurance industries.

Fifth, a close look at arbitration history reveals that many of our modern-day debates about arbitration are simply old questions in a new setting. Whether we are questioning the role of disputants' consent to submit their dispute to arbitration, connections between arbitration and the courts, the role of "experts," durability and finality of the award, standards of appeal, court deference to arbitration awards, the use of religious arbitration, the role of evidence, access to justice, or the efficiency, affordability, or efficacy of the arbitration proceeding, we do so knowing that these questions, and the policy struggles that engender them, have a long place in our nation's history. While we would not expect or desire even the most careful historical research to prescribe our answers to the very serious law and policy questions that underlie the debates surrounding arbitration's current "hot topics," we may find that a more complete view of arbitration in American history could stimulate, clarify, and better inform our analysis as we, today, consider these questions anew.

## VI. CONCLUSION

Recent years have seen a resurgence in the passage of state-level statutory arbitration systems—like the system at issue in *Delaware Coalition for Open Government v. Strine*. While these systems appear to be innovative departures from the 1925 Federal Arbitration Act (FAA), they often share many of the characteristics of arbitration as it had been practiced, in a variety of forms, at the state level from the 1700s forward. If we want to fully understand the nature of arbitration across American history—and the experience prong of the open access test requires that we do—we ought to look beyond the more recent form of arbitration that has been practiced under the FAA and gain a clearer understanding of the diversity of arbitration practices and procedures that have existed across American history.

While a closer look at the history of arbitration might not immediately validate any given state's statutory arbitration scheme—and, for both law and policy reasons, we may not want it to—a closer look could at least ensure that the history

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171. See *supra* Part IV.B.3.

172. See *supra* Part IV.B.3; *supra* note 154 and accompanying text.

173. See *supra* Part IV.B.2.

relied upon in assessing the constitutionality of any such scheme would be accurate. Such accuracy is vital to avoiding not only misconceptions about the nature of arbitration in American history, but also the potential negative ramifications such misconceptions might hold for the future existence and stability of a variety of arbitration models for parties to choose from in resolving their disputes.