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Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective Symposium: Introduction

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SYMPOSIUM

Introduction: Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective

*Carli N. Conklin**

The Federal Arbitration Act (FAA), enacted in 1925, provides a framework for how we think about arbitration procedure, practice, and policy in the United States today. Yet, the FAA, and the interpretive lens it provides, are relatively new on the horizon, historically speaking.

William Blackstone included a sophisticated and fairly detailed description of arbitration in his *Commentaries on the Laws of England* (1765-1769).¹ In so doing, Blackstone was not describing a new or alternative form of dispute resolution. Instead, Blackstone was describing a dispute resolution practice that had flourished in England for centuries.² That same practice, like Blackstone's *Commentaries*,

** Dr. Carli N. Conklin is Associate Professor of Law and Senior Fellow in the Center for the Study of Dispute Resolution at the University of Missouri School of Law. I would like to thank the Journal of Dispute Resolution and the Center for the Study of Dispute Resolution at the University of Missouri School of Law for making the Fall 2015 Journal of Dispute Resolution Symposium, Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective, possible. It was a pleasure to work with my fellow symposium authors, whose warm collegiality and insightful scholarship is unmatched. A special thanks goes out to my colleagues Bob Bailey, Assistant Dean Emeritus; Rafael Gely, Director of the Center for the Study of Dispute Resolution; S.I. Strong, Manley O. Hudson Professor of Law; Journal of Dispute Resolution Editor-in-Chief, Ashley Zellmer Sundquist; Associate Editor-in-Chief Alexandra Sheppard; and Laura Coleman and Karen Neylon with the Center for the Study of Dispute Resolution, for their generous assistance in the symposium process. Finally, a warm thanks to Derek Roebuck at the Institute for Advanced Legal Studies (University of London), who is unparalleled both in the breadth and depth of his scholarship on the history of arbitration and in his enthusiasm for the work ahead.*

1. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 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*.

2. Derek Roebuck explores this history, and its Greek and Roman predecessors, in a multi-volume history of arbitration that is both engaging and informative. See DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001); DEREK ROEBUCK & BRUNO DE LOYNES DE FUMICHON, ROMAN ARBITRATION

enjoyed great popularity in the mainland British colonies in North America, where English Common Law was adapted to local circumstances.³ Following the American Revolution, new American state legislatures continued to affirm arbitration, with many states adopting statutory forms of arbitration that were, themselves, reflective of pre-existing English law.⁴ This combination of state-level common law and statutory arbitration shaped the way lawyers, scholars, policy advocates, and, most importantly, disputants thought about and utilized arbitration in the United States throughout the late-eighteenth, nineteenth, and early-twentieth centuries.⁵

It was not until 1925 that Congress passed the Federal Arbitration Act.⁶ Yet, our recent law and policy debates about arbitration (and there are many) tend to look from the FAA forward for an interpretive lens. Viewing arbitration through that lens skews the discourse on arbitration by unnecessarily narrowing both our understanding of arbitration practice and procedure across American history and the scope of the policy arguments we ought to consider when evaluating its use. As the articles below demonstrate, such a narrow focus ultimately skews even our understanding, interpretation, and application of the FAA itself.

The purpose of this symposium edition of the *Journal of Dispute Resolution* is to widen the focus of our present-day discourse on arbitration by exploring the broader histories of arbitration in America, considering not only what arbitration procedure, practice, and policy looked like in early America (and in the earlier legal, cultural, or religious systems from which American arbitration was adopted), but also how those broader histories might contribute to important discussions and developments in arbitration procedure, practice, and policy today. To that end, we

(2004); DEREK ROEBUCK, *EARLY ENGLISH ARBITRATION* (2008); DEREK ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND 1154-1558* (2013); DEREK ROEBUCK, *THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I* (2015).

3. See generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* (2008) (discussing of the adaptation of the English Common Law to the British mainland colonies in North America); JEROLD AUERBACH, *JUSTICE WITHOUT LAW* (1984) (providing a history of dispute resolution in the United States).

Several works have addressed the history of arbitration in the American colonies and early American states. See William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L. Q. 193; MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* (1977); Eben Moglen, Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135, 149 (1983); BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* (1987); Carli N. Conklin, *Transformed, Not Transcended: Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 AM. J. LEGAL HIST. 39 (2006); James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 LAW & HIST. REV. 241 (2013); and Carli N. Conklin, *Lost Options for Mutual Gain? The Layperson, the Lawyer, and Dispute Resolution in Early America*, 28 OHIO STATE J. ON DISP. RESOL. 581 (2013). Jerold Auerbach (generally), Morton Horwitz (Massachusetts, New York, Pennsylvania, and South Carolina), and Bruce Mann (Connecticut) describe a breakdown of arbitration that corresponds to a breakdown of community norms and rise of the legal profession. Eben Moglen (New York), William Catron Jones (New York), and Carli Conklin (Kentucky, New Jersey, and Massachusetts) describe a robust system of arbitration that continued throughout the antebellum period. James Oldham and Su Jin Kim describe early American adoption of English models of arbitration, with specific emphasis on the Locke statute, in Pennsylvania and Maryland.

4. Oldham & Kim, *Arbitration in America: The Early History*, *supra* note 3; Conklin, *Lost Options*, *supra* note 3.

5. See generally Wesley A. Sturges, *Common-Law Arbitration and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. LAW. REV. 819 (1961-1962) (discussing the continued existence of common law and statutory arbitration at the state level).

6. 9 U.S.C. § 1 (2012)

brought together scholars in law and history whose combined works restore breadth and depth to our present-day understanding of and debates about arbitration.

Our exploration begins with **Margo Todd's** article, "*For eschewing of trouble and exorbitant expense*": *Arbitration in the Early Modern British Isles*.⁷ Dr. Todd provides valuable insights into binding arbitration in British customary law, arguing that arbitration was favored over litigation in early modern Britain for its community focus, speed, efficacy, and uniformity of procedure. In her discussion, Dr. Todd also counters prevailing histories on arbitration by providing a fresh and nuanced analysis of Chief Justice Coke's ruling on arbitration in *Vinyor's* case (1609).

Francis Boorman takes a close look at Queen Elizabeth I's use of arbitration to address the disputes stemming from an elite couple's marital breakdown in *Arbitration and Elite Honour in Elizabethan England: A Case Study of Bess of Hardwick*.⁸ Dr. Boorman's essay is important for many reasons, not the least of which are his illumination of the monarch's promotion of arbitration, and the important role that reconciliation, honor, and ideas about gender played in the resolution of disputes—and the selection of arbitration as a dispute resolution procedure—in sixteenth-century England.

Derek Roebuck's piece, *The English Inheritance: What the First American Colonists Knew of Mediation and Arbitration*, explores official commissions to mediation and arbitration in seventeenth-century England and private mediations and arbitrations in the same time period, highlighting connections to arbitration in early America. Professor Roebuck's article, which he presented at the Symposium Works-in-Progress Conference, will appear in the Fall 2016 edition of the *Journal of Dispute Resolution*.⁹

James Oldham's keynote address, *The Historically Shifting Sands of Reasons to Arbitrate*,¹⁰ draws comparisons between arbitration practice in eighteenth-century England and in America, providing a rich historical understanding of key attributes that led disputants to select arbitration over litigation as a means of resolving their disputes. As Professor Oldham demonstrates, participants selected arbitration not only for its speed, economy, informality, and finality, but also for its distinct process benefits. Those benefits included participants' ability to take part in the selection of the arbitrator, the benefit of arbitrator expertise in the subject matter of the dispute, confidentiality of the process, the ability to conduct discovery (including the production of sworn witness testimony and relevant documentary evidence), and arbitration's ability to effectively manage and resolve complex cases.

The arbitration practices that were prevalent in both England and the mainland British colonies in North America continued as those colonies transitioned into becoming new American states. In my article, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*,¹¹ I look to the history of

7. Margo Todd, "For eschewing of trouble and exorbitant expense": *Arbitration in the Early Modern British Isles* 2016 J. DISP. RESOL. 7.

8. Francis Boorman, *Arbitration and Elite Honour in Elizabethan England: A Case Study of Bess of Hardwick*, 2016 J. DISP. RESOL. 19.

9. Derek Roebuck, *The English Inheritance: What the First American Colonists Knew of Mediation and Arbitration* 2016 J. DISP. RESOL. (forthcoming 2016).

10. James Oldham, *The Historically Shifting Sands of Reasons to Arbitrate*, 2016 J. DISP. RESOL. 41.

11. Carli N. Conklin, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*, 2016 J. DISP. RESOL. 55.

antebellum Kentucky, New Jersey, and Massachusetts to explore not only how English arbitration was adopted by (and adapted to) the British colonies in North America and the new American states, but also how that diversity of arbitration policies, procedures, and practices continued to exist at the state level throughout the antebellum period.

Early American arbitration was reflective not only of English custom and law, but also of the policies and practices of Quakers, who had long utilized arbitration to resolve disputes. F. Peter Phillips' article, *Ancient and Comely Order: The Use and Disuse of Arbitration by New York Quakers*¹² provides a terrific overview of that history, shedding light on Quaker arbitration practice in New York from the eighteenth century through the mid-twentieth century. Phillips identifies key attributes shared by Quaker arbitration and mercantile arbitration—such as maintaining community, applying community-specific standards of conduct to the resolution of disputes, and mutual accountability—arguing that these attributes are distinctive to, and remain essential for, the efficacy of the arbitration process.

Imre Szalai takes a historical perspective on the passage of the FAA in his article, *Exploring The Federal Arbitration Act Through The Lens Of History*.¹³ Professor Szalai not only describes the historical context within which the FAA was passed, looking at the wide variety of social, political, economic, and military events that influenced its passage, but also explains why that history matters. Professor Szalai demonstrates how a rich understanding of the FAA's history challenges the Supreme Court's interpretation of the FAA, informs current debates over arbitration, and provides a richer understanding of the role that arbitration plays in the legal system today.

Hiro Aragaki also looks to the history of the FAA as he brings new insights to current debates surrounding arbitration in his article, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*.¹⁴ Professor Aragaki explores the historical context surrounding the enactment of the FAA, revealing that arbitration's primary advantage over litigation at the passage of the FAA was not autonomy or efficiency, which are oft-heralded as arbitration's primary benefits today. Instead, Professor Aragaki argues that arbitration's primary advantage over litigation was then—and should still be today—arbitration's ability to achieve justice.

Jill Gross's article, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*,¹⁵ brings a historical perspective to securities arbitration, the primary process used by the securities industry to resolve disputes. Professor Gross challenges current investor and industry distrust of securities arbitration by revealing the reasons behind the securities industry's early designation of arbitration for the resolution of investor disputes. As Professor Gross demonstrates, these reasons include not only speed, efficiency, and fairness, but also, and more

12. F. Peter Phillips, *Ancient and Comely Order: The Use and Disuse of Arbitration by New York Quakers*, 2016 J. DISP. RESOL. 81.

13. Imre Szalai, *Exploring The Federal Arbitration Act Through The Lens Of History*, 2016 J. DISP. RESOL. 117.

14. Hiro Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 143.

15. Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 173.

importantly, arbitration's unique ability to protect investors, build trust and credibility, and thereby encourage investors to use the securities exchanges exchange system.

As these articles demonstrate, the history of arbitration is both broad and deep. It includes the wide variety of reasons that led individuals to choose arbitration in seventeenth- and eighteenth-century Scotland and England, and the ways in which historic English practice was adopted by and adapted to the mainland North American colonies and the new United States. It includes the English monarch encouraging arbitration to resolve marital disputes, Quakers and merchants utilizing arbitration to resolve disputes while preserving community, and the use of arbitration to protect investors in the securities industry. It involves arbitration under the 1925 Federal Arbitration Act, state-level common law and statutory models of arbitration, and process elements that have attracted an impressive variety of private individuals, consumers, industries, and religious groups to arbitration for centuries. A broad look at the history of arbitration indicates that individuals and organizations have chosen arbitration to resolve their disputes not only out of a desire for speed, economy, and finality, but also out of a desire for community, expertise, accountability, evidence, credibility, trust, and justice.

In short, the history of arbitration is as nuanced and diverse as the reasons why people may choose arbitration to resolve their disputes. Looking beyond the FAA—to the diversity of arbitration policies, practices, and procedures that existed in the United States before the FAA and to those that have continued or developed since its enactment—provides us with an opportunity to inform our current debates with a more complete (and complex) understanding of this centuries-long legal tradition. I hope you will join us in that pursuit