For decades, the Supreme Court has expanded the Federal Arbitration Act (FAA) and companies have placed arbitration clauses in hundreds of millions of contracts. This Article examines a less-obvious way in which arbitration’s tendrils are growing. Once, even the broadest arbitration provisions only governed allegations that were somehow connected to the agreement between the parties (the “container contract”). As a result, they often did not cover shocking and unforeseeable misconduct, or parties who did not sign the container contract, or claims that arose after the agreement lapsed. But now businesses are experimenting with what this Article calls “infinite” arbitration clauses: those that mandate arbitration for all disputes between any related party in perpetuity. Moreover, to cut courts out of the loop, drafters are coupling infinite provisions with so-called “delegation” clauses, which give the arbitrator the exclusive right to determine whether to send a cause of action to arbitration.

The Article reveals that courts are divided about whether to take infinite provisions literally. At first, most judges refused to allow companies to compel arbitration in such broad strokes. Yet the Court has recently decided a rash of cases that imply that the FAA overrides judicial hostility to boundless arbitration provisions. Thus, infinite clauses are caught in a tug-of-war between state contract rules that protect individuals from overreaching and the Justices’ view that the FAA makes arbitration agreements bulletproof.

To resolve this conflict, the Article offers a theory about the limits of corporate power to opt out of the judicial system. First, it argues that some infinite provisions are not valid because they attempt to impose arbitration on plaintiffs who did not truly agree to the process. Second, it contends that even when a plaintiff did agree to arbitrate, the robust federal policy in favor of arbitration does not apply to lawsuits
INTRODUCTION

In 2012, Diana Mey added her name to her husband’s AT&T Mobility wireless account.1 To complete the transaction, she signed Mobility’s Customer Agreement on an electronic pad at the cashier’s counter.2 Mobility’s fine print contained an arbitration clause that applied to “all disputes” between Mey and Mobility’s “subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns.”3

Three years later, AT&T, Inc., Mobility’s parent company, acquired DIRECTV Group Holdings, DIRECTV’s parent company.4 Thus, Mobility and DIRECTV became “corporate cousins at least seven times removed.”5

In 2017, DIRECTV made obnoxious telemarketing calls to Mey’s cell phone.6 Mey, whose number was on the Do Not Call Registry, sued DIRECTV for violating the Telephone Consumer Protection Act (TCPA).7 DIRECTV

---

1 Brief of Appellee at 5, Mey v. DIRECTV, LLC, No. 18-1534 (4th Cir. Aug. 20, 2018), 2018 WL 4098110 [hereinafter Mey Appellee’s Brief].
2 Id. at 1, 5.
4 Mey Appellee’s Brief, supra note 1, at 6.
5 Id.
6 Id. at 1.
7 Id.
responded by moving to compel arbitration.\textsuperscript{8} DIRECTV did not contend that Mey had ever been a DIRECTV customer or that there was any agreement between itself and Mey.\textsuperscript{9} Instead, DIRECTV argued that because it was an “affiliate” of Mobility, it was entitled to invoke the arbitration provision in the contract that Mey had formed with Mobility in 2012.\textsuperscript{10}

Figure 1: AT&T’s Corporate Structure\textsuperscript{11}

Michelle Haasbroek was a skincare specialist for Steiner Transocean in the spa on board a cruise ship.\textsuperscript{12} One night, when Haasbroek was off-duty, she was raped and impregnated by a coworker.\textsuperscript{13} Haasbroek sued Steiner for failing to insure her safety, for mistreating her after she reported the incident, and for wrongful birth.\textsuperscript{14} The company sought to enforce the arbitration clause in her

\textsuperscript{8} See Mey v. DIRECTV, LLC, No. 17-00179, 2018 WL 7823097, at *1 (N.D. W. Va. Apr. 25, 2018) (denying a motion to compel arbitration and to stay litigation).
\textsuperscript{9} Mey Opening Brief, supra note 3, at 13-14.
\textsuperscript{10} Id.
\textsuperscript{11} Mey Appellee’s Brief, supra note 1, at 7.
\textsuperscript{13} Id. at 1355-1358.
\textsuperscript{14} Id.
employment contract.\textsuperscript{15} As Steiner noted, even though Haasbroek's allegations were disturbing, she had agreed to arbitrate "[a]ny and all disputes, claims or controversies whatsoever . . . [including] failure to provide prompt, proper and adequate medical care, personal injury, [or] death."\textsuperscript{16}

* * *

In March 2012, Kaylee Heffelfinger opened a checking and a savings account with Wells Fargo Bank.\textsuperscript{17} She filled out and signed an application.\textsuperscript{18}

Unbeknownst to Heffelfinger, she was already a Wells Fargo customer.\textsuperscript{19} Three months earlier, before she had ever contacted the bank, its employees had forged her signature on the paperwork for two phantom accounts.\textsuperscript{20}

Then, in October 2012, Wells Fargo personnel created two more bogus accounts in her name.\textsuperscript{21} This time, the application contained no signature at all.\textsuperscript{22}

\textsuperscript{15} Id. at 1356.
\textsuperscript{16} Id. at 1355.
\textsuperscript{17} Consolidated Amended Complaint Class Action ¶ 64, Jabarri v. Wells Fargo & Co., 2015 WL 13699809 (N.D. Cal. Sept. 23, 2015) (No. 15-02159) [hereinafter Class Action Complaint].
\textsuperscript{18} Id.
\textsuperscript{19} Id. ¶ 65.
\textsuperscript{20} Id.
\textsuperscript{21} Id. ¶ 66.
\textsuperscript{22} Id.
Over the next two years, these sham accounts began to accrue unpaid fees.\(^{23}\) By the time Heffelfinger discovered the fraud, collection agencies were hounding her and her credit score had been ruined.\(^{24}\)

Heffelfinger’s experience was not unique. In 2016, Wells Fargo admitted that its employees had generated 3,500,000 fake accounts in the names of more than 2,000,000 real people.\(^{25}\) The institution faced a torrent of criticism and scrutiny from lawmakers,\(^{26}\) consumer watchdogs,\(^{27}\) and journalists.\(^{28}\) It pushed out its CEO,\(^{29}\) entered into a $105 million consent decree with the

---

\(^{23}\) Id. ¶¶ 67–69.

\(^{24}\) Id. ¶ 68, 78.

\(^{25}\) See Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015, 2016 WL 6646128, ¶ 16, 23 (Sept. 4, 2016) (estimating that the bank had opened 1,534,280 counterfeit deposit accounts and issued 565,443 phantom credit cards); Emily Glazer, Wells Fargo’s Sales-Scandal Tally Grows to Around 3.5 Million Accounts, WALL ST. J. (Aug. 31, 2017, 6:59 PM), https://www.wsj.com/articles/wells-fargos-sales-scandal-tally-grows-to-around-3-5-million-accounts-1504184598 [https://perma.cc/BH4F-QCHC] (noting that the bank later conceded that the “scandal was far broader than it had previously acknowledged”).


Consumer Financial Protection Bureau, and agreed to pay a total of $575 million in fines to states.

But because Wells Fargo’s remedial efforts did not make all of its customers whole, Heffelfinger filed a class action in federal court. Here the bank had an ace up its sleeve. When Heffelfinger had applied for her legitimate accounts in March 2012, she had agreed to the bank’s Consumer Account Agreement. This contract mandated arbitration for “any unresolved disagreement between you and the Bank,” including those “about the meaning, application or enforceability of this arbitration agreement.”

Citing this language, Wells Fargo did not just argue that Heffelfinger had agreed to arbitrate the merits of her lawsuit; rather, the firm contended that Heffelfinger had agreed to arbitrate the very question of whether she had agreed to arbitrate the merits of her lawsuit.

Forced arbitration is a hallmark of the modern American civil justice system. In 1925, Congress passed the Federal Arbitration Act (FAA) to abolish ancient rules that made predispute arbitration clauses unenforceable. In the 1980s, the Supreme Court dramatically expanded the statute, provoking debate about whether private dispute resolution was an elegant alternative to the pathologies of litigation or “do-it-yourself tort

---

30 See Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015, 2016 WL 6646128, at ¶¶ 49, 57 (Sept. 4, 2016) (requiring that Wells Fargo pay $5 million in “redress to [a]ffected [c]onsumers” and $100 million directly to the Bureau as a “civil money penalty”).
32 Class Action Complaint, supra note 17, at ¶¶ 84, 92-142.
33 Defendants’ Notice of Motion and Motion to Compel Arbitration of Plaintiff Kaylee Heffelfinger’s Claims at 1, Jabbari v. Wells Fargo & Co., 2015 WL 13699809 (N.D. Cal. Sept. 23, 2015) (No. 15-02159) [hereinafter “Heffelfinger Motion to Compel”].
34 Id. at 3. (internal quotation marks omitted).
35 Id. at 7-8.
37 See, e.g., Steven A. Meyerowitz, The Arbitration Alternative, ABA J., Feb. 1985, at 78, 79 (explaining that arbitration proponents believe that it is “faster, less costly and more private, informal and confidential than litigation . . . ”).
reform.”\textsuperscript{38} Since 2010, the Justices have gone further, issuing a rash of opinions that have encouraged businesses to use arbitration as a shield against class actions.\textsuperscript{39} Not surprisingly, studies have found arbitration clauses in millions of consumer and employment contracts.\textsuperscript{40}

This Article identifies a subtler way in which arbitration’s shadow is growing. Traditionally, companies only attempted to mandate arbitration of disputes that were connected to the contract that included the arbitration provision (the “container contract”). Thus, until recently, even the broadest arbitration clause only applied to “any controversy or claim . . . arising out of or relating to this agreement.”\textsuperscript{41} Now, however, drafters have become more ambitious. In rising numbers, they have started to experiment with what I call “infinite” arbitration agreements.

Infinite arbitration clauses exhibit one or more of the following characteristics. First, they are “not limited to disputes arising from or related to the transaction or contract at issue.”\textsuperscript{42} For instance, Wells Fargo’s customers agree to arbitrate “[a]ny unresolved disagreement,”\textsuperscript{43} and Steiner’s arbitration clause covers “all disputes, claims or controversies whatsoever.”\textsuperscript{44} Thus, infinite provisions attempt to govern conduct that has nothing to do with the original transaction, such as sexual harassment after the purchase of household goods\textsuperscript{45} or “a punch in the nose during a dispute over medical

\textsuperscript{39} See AT & T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the FAA preempts a state rule that deemed most class arbitration waivers in consumer contracts to be unconscionable); see also, e.g., Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (reversing the National Labor Relations Board’s decision outlawing class arbitration waivers in employment contracts); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238-39 (2013) (extending Concepcion to a similar federal common law rule that often invalidated class arbitration waivers).
\textsuperscript{41} Mehler v. Terminix Int’l Co., No. 397-2390, 1998 WL 893149, at *7 (D. Conn. Sept. 28, 1998) (referring to such a provision as “the paradigm of a broad arbitration clause”), rev’d, 205 F.3d 44 (2d Cir. 2000).
\textsuperscript{43} Heffelfinger Motion to Compel, supra note 33, at 3 (emphasis added).
\textsuperscript{45} See Parm v. Bluestem Brands, Inc., No. 15-3437, 2017 WL 1193993, at *9 n.20 (D. Minn. Mar. 30, 2017) (theorizing that a bank’s arbitration agreement for credit account holders would not apply to an instance of sexual harassment between employees even if one of the employees was a credit account holder of the same bank), rev’d and remanded, 898 F.3d 869 (8th Cir. 2018).
billing.” 46 Second, infinite clauses extend beyond the original contractual partners. Like Mobility’s Customer Agreement—which applies to the parties’ “subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users”—infinite clauses govern all persons or entities with a connection to the container contract. 47 Third, infinite provisions have no sunset date. Although the common law condemns perpetual contracts, infinite clauses “survive the closing of [an] account or termination of any service.” 48 Finally, infinite clauses often appear alongside what the Supreme Court has dubbed “delegation clauses”: terms that give the arbitrator the exclusive right to decide gateway questions of “arbitrability” (whether a claim must be submitted to arbitration). That is, under contracts like Wells Fargo’s, a plaintiff must participate in the arbitration process in order to argue that her complaint falls outside the boundaries of the arbitration clause. 49 Infinite clauses stretch to the horizon and last forever. They are less a contractual provision and more a kind of arbitration servitude.

The Article begins by exploring the roots of this phenomenon. It reveals that infinite provisions are the byproduct of a neglected area of doctrinal confusion. Although no law review article has addressed the topic, 50 courts have long struggled with “scope arbitrability”: whether an arbitration clause applies to a specific claim. 51 To be sure, the classic “broad” arbitration

46 Med. Staff of Doctors Med. Ctr. v. Kamil, 33 Cal. Rptr. 3d 853, 857 (Ct. App. 2005) (reasoning that, much like a physical assault in a billing dispute, an arbitration agreement covering medical care would not extend to deliberate destruction of physicians’ professional relationships).


50 Cf. Stephen E. Friedman, The Lost Controversy Limitation of the Federal Arbitration Act, 46 U. RICH. L. REV. 1005 (2012). Friedman’s excellent but overlooked article argues that broad arbitration clauses (which govern claims that “arise out of or relate to” the container contract) exceed the scope of the FAA (which only covers allegations that “aris[e] out of” the underlying agreement). Id. at 1006. As will become apparent in Section II.A, my thesis builds on Friedman’s insight. However, my Article differs from Friedman’s in several important ways. First, and most importantly, Friedman does not address infinite arbitration clauses. Second, Friedman simply assumes that courts “invariably enforce . . . broad [arbitration] provisions.” Id. at 1007. Conversely, I show that the law is not nearly so clear. Third, Friedman uses his descriptive argument to claim that the FAA “appl[ies] only to the arbitration of contract disputes.” Id. at 1037. In contrast, I contend that the statute does not impose any bright-line requirements on the kinds of causes of action that can be arbitrated; rather, it merely insists that an allegation have a nexus with the container contract. See infra Section II.B.

51 King v. Cintas Corp., 920 F. Supp. 2d 1263, 1267 (N.D. Ala. 2013) (“Courts have not provided unified authority on the scope of arbitration clauses.”).
provision casts a wide net.\textsuperscript{52} If a plaintiff sues for breach of contract, wrongful firing, employment discrimination, or violation of consumer protection laws, her allegations “arise out of or relate to” the container contract and therefore trigger its arbitration agreement.\textsuperscript{53} However, in other cases, the link between the complaint and the container contract is less clear. As the Tenth Circuit once mused, what if “two small business owners execute a sales contract including a[n] . . . arbitration clause, and one assaults the other”?\textsuperscript{54} Because of the mutability of phrases like “arise out of” and “relate to,” there is no easy answer. Compounding this problem, scope arbitrability occupies “a gray space of overlapping federal arbitration and state contract law.”\textsuperscript{55} Although the Court has declared that arbitration clauses must be “generously construed as to issues of arbitrability,”\textsuperscript{56} contract doctrine cuts the other way by nullifying unconscionable terms, vindicating an individual’s reasonable expectations, and construing ambiguities against the drafter.\textsuperscript{57} Thus, courts disagree about whether to compel arbitration of claims that seek relief for shocking misconduct, or that are filed by or against nonsignatories, or that are brought after the container contract has lapsed.\textsuperscript{58} In turn, corporations have engineered infinite provisions to try to fill these gaps.

Infinite clauses have further divided the few judges that have confronted them. Although there is “almost no case law addressing such broad arbitration clauses,”\textsuperscript{59} some courts view them skeptically. For example, in Diane Mey’s lawsuit, a federal judge in West Virginia refused to allow DIRECTV to piggyback on Mobility’s arbitration clause.\textsuperscript{60} The court explained that reading the provision literally could spawn absurd results:

If [the plaintiff] were hit by a Mobility delivery van, or if she tripped over a dangerous condition in a Mobility store, her tort claim would have to go to arbitration. If she bought shares of stock in Mobility and later claimed a decrease in share price was the result of corporate malfeasance, her securities-fraud claim would have to go to arbitration. And since the arbitration clause purports to survive termination of the underlying service agreement, this obligation to arbitrate any claim whatsoever against Mobility would last forever.\textsuperscript{61}

\textsuperscript{52} See supra note 41 and accompanying text.
\textsuperscript{53} See infra text accompanying notes 142–144.
\textsuperscript{54} Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1516 (10th Cir. 1995).
\textsuperscript{57} See infra text accompanying notes 123–127.
\textsuperscript{58} See generally infra text accompanying notes 144–168.
\textsuperscript{59} Wexler v. AT & T Corp., 211 F. Supp. 3d 500, 502 (E.D.N.Y. 2016).
\textsuperscript{61} Id. at *6 (citing Wexler, 211 F. Supp. 3d at 502-93).
Accordingly, the court held that the language was "unconscionably overbroad."62 In the same vein, other courts have refused to apply infinite provisions to unforeseeable and outrageous conduct.63

But this jaundiced view of infinite clauses is hard to square with the Court's recent FAA decisions. These opinions admonish lower courts to "rigorously enforce" arbitration agreements according to their terms64 and to ignore any rule that "discriminat[es] on its face against arbitration."65 Taking these instructions to heart, some judges have held that there is nothing sinister about a "clause that requires arbitration of all disputes between the parties."66 For instance, a federal judge in Florida compelled arbitration of Michelle Haasbroek's sexual assault claims.67 Haasbroek asserted that her allegations were unrelated to her employment contract because the attack occurred while "she was off-duty and in a residential area of the ship."68 Yet because the arbitration provision extended beyond "claims arising from, or relating to, employment," the court held that this argument was "irrelevant."69

Meanwhile, the spread of delegation clauses is further muddying the waters. Together, delegation provisions and infinite arbitration clauses almost completely strip courts of jurisdiction over a company. Consider the fate of Heffelfinger's class action against Wells Fargo. A federal judge in California expressed doubts that the bank's arbitration clause governed Heffelfinger's allegations relating to the forged January 2012 accounts.70 As the court noted, because Heffelfinger did not open a legitimate account until March 2012, these claims "may have arisen before she had any voluntary involvement with Wells Fargo."71 Yet citing the delegation clause, the judge held that the arbitrator

62 Id.
63 See, e.g., Aiken v. World Fin. Corp. of S.C., 644 S.E.2d 705, 709 (S.C. 2007); cf. McBride v. St. Anthony Messenger Magazine, No. 02-237, 2003 WL 1903281, at *10 (S.D. Ind. Feb. 6, 2003) (opining that, in general, "it may be unreasonable to understand the parties as intending that any dispute that may arise between them even if unrelated to the Agreement would be subject to arbitration").
64 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).
68 Id. at 1358.
69 Id. at 1360 n.8.
70 See Jabbari v. Wells Fargo & Co., No. 15-02159, 2015 WL 13699809, at *2-3 (N.D. Cal. Sept. 23, 2015) (in an order granting defendants' motion to compel arbitration, noting that the issue is a "close question" and that "it's difficult to imagine that this aspect of the dispute would be subject to the arbitration provision").
71 Id. at *3.
should decide whether Heffelfinger’s allegations fell within the scope of the arbitration provision.\textsuperscript{72}

Against this backdrop, the Article offers a descriptive and normative theory about the limits of infinite clauses. It identifies two situations in which judges can ignore extraordinarily broad arbitration provisions. First, some infinite clauses fail because they try to create contractual consent out of whole cloth. For example, drafters often declare that their arbitration provisions benefit and bind a range of nonsignatories, from their litigation allies to the plaintiff’s relatives to anyone who uses a particular product or service.\textsuperscript{71} But absent unusual circumstances, these people and entities have nothing to do with the container contract. Accordingly, no matter what an arbitration clause says, “federal law does not force arbitration upon a party that never agreed to arbitrate in the first place.”\textsuperscript{74}

Second, the Article argues that another check on infinite clauses is hiding in plain sight. Section 2, the FAA’s centerpiece, instructs courts to enforce a provision “in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract.”\textsuperscript{75} Thus, the statute imposes what I call the “contractual nexus” requirement: it only governs disputes that are tied to in some meaningful way to the parties’ agreement.

This boundary was no accident. Congress modeled the FAA on New York’s pioneering 1920 arbitration statute.\textsuperscript{76} However, New York’s version of § 2 applied across the board to any lawsuit “arising between the parties to the contract.”\textsuperscript{77} In contrast, federal lawmakers chose to narrow the FAA to cases that were tethered to the container contract. Likewise, one draft of the FAA applied to any controversies that were merely grounded in the parties’ general “transaction[s].”\textsuperscript{78} Yet Congress ultimately deleted this phrase, reinforcing the necessity of a contractual nexus.\textsuperscript{79} Therefore, because the FAA’s vigorous pro-arbitration policies often do not apply to ultra-broad arbitration clauses, courts can continue to find that they are unconscionable, construe them against the drafter, or hold that they exceed a person’s reasonable expectations.

This thesis justifies some opinions and might change the outcomes in others. Recall DIRECTV’s attempt to freeride on Mobility’s contract in

\textsuperscript{72} See id. (holding that Wells Fargo’s argument that the dispute fell “within the scope of the arbitration provision” was not “wholly groundless”).

\textsuperscript{73} See infra text accompanying notes 185–186.

\textsuperscript{74} Richmond Health Facilities v. Nichols, 811 F.3d 192, 201 (6th Cir. 2016).


\textsuperscript{76} See S. REP. NO. 68–536, at 3 (1924) (noting that the FAA “follows the lines of the New York arbitration law enacted in 1920”).


\textsuperscript{78} Senate Hearings, supra note 36.

Mey’s lawsuit.\textsuperscript{80} The problem with this gambit is that although Mey agreed to arbitrate future claims against Mobility, she did not agree to arbitrate \textit{any} claims against DIRECTV. To be sure, the common law sometimes estops plaintiffs from avoiding arbitration when they assert claims against nonsignatories who are closely related to a signatory.\textsuperscript{81} But the basis of this rule—that the plaintiff must have understood that she was consenting to arbitrate against these corporate siblings\textsuperscript{82}—does not apply to two entities that were rivals at the time of contracting. Accordingly, the West Virginia federal court correctly held that DIRECTV could not enforce Mobility’s clause.\textsuperscript{83} Conversely, the Florida judge in Michelle Haasbroek’s case should have taken Haasbroek’s argument that her rape claims were unconnected to her employment contract more seriously.\textsuperscript{84} If Haasbroek’s allegations did not “aris[e] out of” the container contract, then they did not fall within the scope of § 2. As a result, the FAA did not apply, and the court was free to find that a clause cannot require arbitration for a lawsuit stemming from events \textit{outside} of a plaintiff’s employment.\textsuperscript{85}

Finally, the Article’s proposals inform the intersection of infinite arbitration clauses and delegation provisions.\textsuperscript{86} These clauses are a potent duo: one demands arbitration for any conceivable claim while the other sends disputes about arbitration \textit{to} arbitration. Moreover, in January 2019, the Court decided \textit{Henry Schein, Inc. v. Archer & White Sales, Inc.}, which further insulated delegation clauses from judicial oversight.\textsuperscript{87} \textit{Henry Schein} overruled a line of precedent dating back to the 1950s that allowed courts to ignore delegation clauses when a defendant’s assertion that a claim fell within the scope of an arbitration agreement was “wholly groundless.”\textsuperscript{88} Nevertheless, despite the Court’s opinion, the Article’s analysis elucidates that delegation

\begin{itemize}
\item \textsuperscript{80} See supra text accompanying notes 1–11.
\item \textsuperscript{81} See infra text accompanying notes 318–324.
\item \textsuperscript{82} See infra text accompanying notes 326–327.
\item \textsuperscript{83} See supra text accompanying notes 60–62.
\item \textsuperscript{84} See supra text accompanying notes 67–69.
\item \textsuperscript{85} Cf. Arnold v. Burger King, 48 N.E.3d 69, 72-73 (Ohio Ct. App. 2015) (refusing to compel arbitration of workplace rape claims in a situation analogous to Haasbroek’s because the claims were outside the scope of the arbitration agreement).
\item \textsuperscript{86} This Article’s discussion of delegation clauses builds off of two previous pieces. First, I have criticized the Court’s view that delegation provisions should be treated exactly like agreements to arbitrate the merits of a dispute. See David Horton, \textit{Arbitration About Arbitration}, 70 STAN. L. REV. 363, 413 (2018). Second, I have demonstrated that arbitrators are more likely than judges to interpret arbitration clauses to permit class proceedings—a result that is troubling because it suggests that arbitrators are guided by their financial incentive to christen a long and lucrative dispute. See David Horton, \textit{Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making}, 68 DUKE L.J. 1323, 1382 (2019).
\item \textsuperscript{87} 139 S. Ct. 524, 528-29 (2019).
\item \textsuperscript{88} Id.; see also infra text accompanying notes 107–109.
\end{itemize}
clauses have limits. Specifically, when a plaintiff argues that she did not agree to arbitrate or that the arbitration clause has expired, no amount of boilerplate can assign this question to the arbitrator. Indeed, because arbitration draws its legitimacy from the parties’ consent, allowing an arbitrator to decide whether the parties consented (or whether their consent is still operational) would be an illogical circle.

The Article contains two Parts. Part I provides background. It explains that courts have struggled to decide whether certain lawsuits fall within the scope of an arbitration clause. It then shows how businesses responded to this doctrinal uncertainty by creating infinite provisions. Part II identifies two ways in which courts can regulate infinite clauses. It asserts that infinite provisions can neither produce contractual assent by *ipse dixit* nor govern disputes that are unrelated to the container contract. Finally, it uses these insights to suggest answers to the puzzles raised by ultra-broad arbitration agreements.

I. SCOPE WARS

This Part begins by revealing that judges disagree about how far arbitration provisions can stretch. It then demonstrates that companies have started trying to navigate around this doctrinal fog by dramatically expanding their agreements to arbitrate. Finally, it describes the looming showdown between the judges that have pushed back against infinite clauses and the Court’s muscular interpretation of the FAA.

A. Conventional Arbitration Clauses

“Scope arbitrability”—the question of whether a dispute falls within the coverage of an arbitration clause—has long been “an issue about which courts disagree.” This Section describes why the topic is so challenging.

The conventional story about the rise of the FAA begins with the proposition that courts were once cynical about arbitration. As is well-known, the common law contained special rules, known as the “ouster” and “revocability” doctrines, which made it hard to obtain specific performance of a predispute arbitration agreement. These measures reflected the fear

89 Jones v. Halliburton Co., 583 F.3d 228, 240 (5th Cir. 2009).
80 Under the ouster doctrine, judges refused to allow private parties to contract around a court’s jurisdiction. See, e.g., Kill v. Hollister (1746) 95 Eng. Rep. 532 (KB) 532 (“But the agreement of the parties cannot oust this Court.”). The revocability rule permitted a party to withdraw its assent to arbitrate at any time before the arbitrator issued an award. See, e.g., Vynior’s Case (1609) 77 Eng. Rep. 597 (KB) 597 (“Where a man is bound by bond to stand to, abide by, and perform . . . the award of an arbitrator, he may countermand the authority of the arbitrator.”).
that extrajudicial tribunals were “instrument[s] of injustice” that “deprive[d] parties of rights.”

Nevertheless, during this period, judges actually favored arbitration in one way. Merchants and members of trade associations often submitted existing disputes to arbitration. After the hearing, the losing party sometimes asked a court to vacate the award on the grounds the arbitrator had “exceeded [her] powers” by ruling on a matter that the parties had not agreed to arbitrate. Courts did not look kindly on these attempts to rekindle a dormant dispute. Indeed, they required “the party complaining [to] clearly show that the authority granted [under the agreement to arbitrate] has been exceeded.”

As the North Carolina Supreme Court recognized in 1911, this approach meant that the common law “put a[] liberal and comprehensive construction” on contracts to arbitrate.

In 1925, this practice became less anomalous when Congress passed the FAA. Section 2 of the statute sweeps away the cobwebs of the common law by making predispute arbitration clauses specifically enforceable:

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

By doing so, lawmakers attempted to place arbitration clauses “upon the same footing as other contracts.” But as commentators would eventually

91 Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845) (No. 14,065). In addition, arbitration may have been “seen as an economic threat to English judges, whose incomes often depended on fees from disputants.” Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 CALIF. L. REV. 577, 600 (1997).

92 See, e.g., Katherine Van Wezel Stone, Rustic Justice: Community and Coercion Under the Federal Arbitration Act, 77 N.C. L. REV. 931, 971-72 (1999) (noting that arbitration systems in the early twentieth century in the United States typically “utilized a panel of arbitrators drawn from the trade association’s membership and counseled the arbitrators to apply their knowledge of the trade to bring about an equitable resolution to the dispute.” (footnotes omitted)).


94 Republic of Colombia v. Cauca Co., 106 F. 337, 349 (C.C.D. W. Va. 1901), aff’d, 113 F. 1020 (4th Cir. 1902), rev’d, 190 U.S. 524 (1903); cf. Leslie v. Leslie, 24 A. 319, 321 (N.J. Ch. 1892) (“[I]t has become a settled principle of jurisprudence that awards are to be expounded favorably, and every reasonable intendment made in their support.”).

95 Robertson & Creed v. Marshall, 71 S.E. 67, 68 (N.C. 1911); see also Bush v. Davis, 34 Mich. 190, 198 (1876) (“[T]he award shall be presumed within the submission unless the contrary expressly appears.”); Hinkle v. Harris, 34 Mo. App. 223, 224 (Ct. App. 1889) (“The presumption is that the arbitrators did not exceed the powers given them . . . .”).


97 Id. § 2.

recognize, § 2’s mix of state and federal law “invite[s] trouble.”

On one hand, the FAA requires arbitration agreements to comply with rules that govern “any contract,” and thus makes state law the touchstone for determining arbitrability. On the other hand, the statute partially federalizes the same issue by eclipsing any rule that resurrects the ouster and revocability doctrines by expressing suspicion of arbitration.

Then, after the FAA’s enactment, three points crystallized about interpreting arbitration provisions. First, even the broadest clause could not cover the elementary question of whether the parties had consented to arbitrate in the first place. Because arbitration stems from agreement, allowing arbitrators to rule on this issue would be a spectacular exercise in bootstrapping. In addition, if an arbitrator determined that a litigant did not assent to arbitrate, she would paradoxically undercut her own authority to render any judgment at all.

Second, when a plaintiff argued that one of her claims fell outside the ambit of the clause, the presumption was that courts, not arbitrators, resolved

---


100 See 9 U.S.C. § 2 (2018) (“[A]n agreement . . . to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

101 See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 986 (2d Cir. 1942) (“The [FAA] does not cover an arbitration agreement sufficiently broad to include a controversy as to the existence of the very contract which embodies the arbitration agreement.”). This point requires some elaboration. Under what is known as the “separability doctrine,” every contract that contains an arbitration provision is, in fact, two contracts: the container contract and the agreement to arbitrate. See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006). Thus, when a party asserts a defense to enforcement of the container contract such as duress, she has not challenged the enforceability of the arbitration provision, which kicks in and sends the claim to arbitration. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (holding that if the container contract contains an arbitration clause, an arbitrator should decide a party’s assertion that the container contract was induced by fraud). Although separability remains hazy, it can be understood as a default rule that assumes that parties who have assented to a contract containing an arbitration clause intend to have the arbitrator resolve all conflict between them, including disputes over whether their seeming consent to the container contract is authentic. See Alan Scott Rau, Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions, 14 AM. REV. INT’L ARB. 1, 29 (2003). Yet because arbitration agreements cannot validate themselves, this logic does not apply when a party argues that she never truly agreed to arbitrate. For example, courts—not arbitrators—enjoy jurisdiction over issues such as (1) “[container] contract formation,” Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287, 296 (2010); (2) lack of mental capacity, Spahr v. Secco, 330 F.3d 1266, 1273 (10th Cir. 2003); and (3) fraud in the factum (where a party misled another about whether she was entering into a contract), Sightler v. Remington Coll., No. 15-2733, 2015 WL 4495945, at *3 (M.D. Fla. July 21, 2015).

102 Cf. Kulukundis Shipping Co., 126 F.2d at 986 (“If the issue of the existence of the [container contract] were left to the arbitrators and they found that it was never made, they would, unavoidably (unless they were insane), be obliged to conclude that the arbitration agreement had never been made.”).
the issue. In fields such as maritime and labor law, judges and scholars had opined that it might be possible—as counterintuitive as it sounds—for litigants to agree to arbitrate the issue of whether an arbitration clause applied to a specific cause of action. This practice, which acquired the migraine-inducing nickname of “arbitrating arbitrability,” capitalized on the fact that arbitrators are often industry insiders and therefore can bring their expertise to bear on the task of contract interpretation. Nevertheless, a contract needed to be explicit in order to entrust scope arbitrability to the arbitrator. As the Court later explained, judges “should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.”

Third, even when this “clear and unmistakable” test was satisfied, some judges refused to allow arbitrators to hear claims of scope arbitrability that were “wholly groundless.” Suppose an arbitration clause (1) exempted intentional tort claims and also (2) empowered the arbitrator to decide matters of scope arbitrability. If the plaintiff then sued for intentional torts and the defendant moved to compel arbitration, a judge might refuse to submit the arbitrability question to arbitration. Doing so prevented the

---

103 Sections 3 and 4 of the FAA require courts to ensure that the parties entered into a valid agreement to arbitrate that covers the plaintiffs’ claims. See 9 U.S.C. § 3 (2018) (allowing courts to stay litigation pending the outcome of arbitration only if they are “satisfied” that the matter “is referable to arbitration”); id. § 4 (tasking courts with resolving “issue[s]” about “the making of the arbitration agreement”); see also AT&T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 649 (1986) (“Whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court.” (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964))).

104 See Metal Prods. Workers Union, Local 1645 v. Torrington Co., 358 F.2d 103, 105 (2d Cir. 1966) (asserting that “the parties may voluntarily submit arbitrability to an arbitrator” where there is a “clear demonstration” of the parties’ intent “to have an arbitrator decide arbitrability” (internal quotation marks and citation omitted)); Eugene F. Scoles, Review of Labor Arbitration Awards on Jurisdictional Grounds, 17 U. CHI. L. REV. 616, 623 (1950) (“[T]here appears no reason why the parties may not submit the issue of arbitrability to arbitration.”).


parties from wasting their time arbitrating a frivolous assertion that a cause of action fell within the scope of the arbitration agreement.110

But scope arbitrability became more complex near the end of the twentieth century. Worried that the judiciary was buckling under the weight of the so-called “litigation explosion,”111 the Court began to expand the FAA. In Southland v. Keating, the Justices held that § 2 of the statute preempts state law.112 Shortly thereafter, the Court invalidated a Montana law that required arbitration clauses to be conspicuous,113 California legislation that exempted wage disputes from arbitration,114 and an Alabama rule that precluded specific performance of an arbitration clause.115 The Court reasoned that because the FAA sought to abolish hostility to arbitration, states can neither “singl[e] out arbitration provisions for suspect status”116 nor pass “laws applicable only to arbitration provisions.”117 Banks, credit card issuers, employers, retailers, and service providers began to recognize the benefits of creating their own dispute resolution schemes.118 Forced arbitration clauses became a routine part of consumer and employment contracts, provoking heated debate about the privatization of the justice system.119

110 See Am. Stores Co. v. Johnston, 171 F. Supp. 275, 277 (S.D.N.Y. 1959) (“When it appears that a claim of arbitrability is frivolous or patently baseless it would . . . defeat the contractual intent of the parties to compel arbitration.”).
111 Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 5–6 (1983) (collecting assertions by commentators that American society has become more litigious).
113 See Doctor’s Assoc’s. v. Casaro, 517 U.S. 681, 687 (1996) (“Montana’s [statute] directly conflicts with § 2 of the FAA because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute . . . .”).
114 See Perry v. Thomas, 482 U.S. 483, 491 (1987) (“This clear federal policy places § 2 of the Act in unmistakable conflict with California’s [statutory] requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.”).
115 See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (noting that “the Federal Arbitration Act preempts state law” because “Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases”).
116 Doctor’s Assoc’s., 517 U.S. at 687.
117 Id.
118 Companies went to great lengths to try to foist arbitration upon both new and existing customers. See, e.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) (featuring an arbitration clause that was placed in a shipping container); Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 275 (Ct. App. 1998) (involving an arbitration clause in a monthly bill).
These changes made § 2’s blend of federal and state law schizophrenic. The Court announced that the FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”\footnote{Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).} For example, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Court held that an arbitration clause in an automobile distribution agreement governed antitrust claims that did not arise directly from the container contract.\footnote{Fellows v. Bd. of Trs. of Welborn Clinic, 63 F. Supp. 2d 942, 944 (S.D. Ind. 1998).} The Justices opined that when it came to delineating the scope of an arbitration clause, “the parties’ intentions control, but those intentions are generously construed as to issues of arbitrability.”\footnote{Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 287 (Ct. App. 1998) (“If the uncertainty is not removed by . . . other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it.”).} Yet some lower courts pushed back. Determined to protect their own jurisdiction, they reasoned that arbitration provisions ultimately are contracts, and, in interpreting such agreements, . . . courts are to apply state contract law.\footnote{Id. at 626.} In turn, this maneuver allowed them to exempt claims from arbitration by using an array of contract rules that “favor[] the underdog.”\footnote{See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000) (indicating that an arbitration agreement is unconscionable where it does not satisfy a “modicum of bilaterality” of benefits and burdens between the two parties).} Scores of courts held that all or part of an arbitration clause was unconscionable: offered on a take-it-or-leave-it basis, buried in a maze of text, and unduly harsh.\footnote{See, e.g., Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 287 (Ct. App. 1998) (“If the uncertainty is not removed by . . . other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it.”).} Likewise, judges drew on the doctrine of contra proferentem and construed ambiguities in arbitration clauses against the drafter.\footnote{5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 306 (Joseph M. Perillo ed., rev. ed. 1998).} Finally, several courts held that consumers and employees “are not bound to unknown terms which are beyond the range of reasonable
expectation.” When arbitrability was on the table, the Court’s proclamations pointed in one direction and contract principles steered in the other.

The law has never figured out how to solve this conflict. For the past three decades, judges have attacked questions of scope arbitrability by applying a formalistic rubric that begins by classifying a provision as either “narrow” or “broad.” Even this threshold step has sown division. In the Ninth Circuit and, arguably, in the Second Circuit, a clause that merely requires arbitration for disputes “arising under” the container contract is “narrow[].” In contrast, the First, Third, Fourth, and Eleventh circuits treat the exact same language as “broad.” Likewise, all jurisdictions agree that an agreement to arbitrate claims “concerning” or “arising out of or relating to” a contract is “broad.”

“Narrow” provisions, which are relatively rare, govern allegations “relating to the interpretation and performance of the contract itself.”

127 Broemmner v. Abortion Servs. of Phoenix, Ltd., 840 F.2d 1013, 1017 (Ariz. 1992) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (AM. LAW INST. 1981)); see also RESTATEMENT (SECOND) OF CONTRACTS, supra, § 211 cmt. e (“Courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it.”).

128 See, e.g., Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367-68 (11th Cir. 2005) (“Thus, in determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts. The ‘federal policy favoring arbitration, however, is taken into consideration even in applying ordinary state law.” (quoting Cooper v. MRM Inv. Co., 367 F.3d 493, 498 (6th Cir. 2004)). Compare Huffman v. Hilltop Cos., 747 F.3d 391, 396-97 (6th Cir. 2014) (“Where ambiguity in agreements involving arbitration exists, such as here, the strong presumption in favor of arbitration applies . . . .”, with Solis v. Evins, 951 S.W.2d 44, 51 (Tex. App. 1997) (holding, in the arbitration context, that “[w]e must, of course, resolve uncertainties in favor of” the nondrafting party).

129 Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co., 118 F.3d 619, 621 (8th Cir. 1997).

130 Cape Flattery Ltd. v. Titan Maz., LLC, 647 F.3d 914, 921 (9th Cir. 2011); see also Tracer Res. Corp. v. Nat’l Envtl. Servs. Co., 42 F.3d 1292, 1295 (9th Cir. 1994) (holding that “arising under” has “limited scope”). In In re Kinoshita, 287 F.2d 921, 922-23 (2d Cir. 1961), the Second Circuit held that a clause that governed “any dispute or difference [that] should arise under” the contract was “narrow.” However, the Second Circuit has since backtracked from Kinoshita. See S.A. Minerauco Da Trindade-Samitri v. Utah Int’l, Inc., 745 F.3d 190, 194 (2d Cir. 1984) (declining to overrule In re Kinoshita but “confining it to its precise facts”). Accordingly, in the Second Circuit, “only the precise language in Kinoshita would evince a narrow clause.” Louis Dreyfus Negocios S.A. v. Bystad Shipping & Trading Inc., 252 F.3d 218, 225 (2d Cir. 2001).


133 Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1438, 1464 (9th Cir. 1983). Alternatively, parties sometimes create ad hoc “narrow” clauses by using idiosyncratic language that
Accordingly, narrow clauses do not cover conduct that is divorced from the underlying agreement between the parties, such as claims for conversion, tortious interference, unfair competition, unjust enrichment, misappropriation of trade secrets, breach of a different contract, and statutory violations. This is true even if the dispute “would not have arisen ‘but for’ the parties’ agreement.”

Conversely, “broad” provisions, which are much more common, create a powerful “presumption of arbitrability” and “extend[] to ‘collateral matters.’” To be arbitrable under a broad clause, a claim need only “have[e] a significant relationship to the [container] contract” or “at least ‘touch matters’ related to [it].”

Unfortunately, there is vast confusion about how the “significant relationship” and “touch matters” tests apply to real-world facts. This indeterminacy shines through when a consumer or employee accuses a defendant of grave wrongdoing. In some jurisdictions, a claim only falls within the aegis of a broad clause if the defendant’s actions were “an
Infinite Arbitration Clauses

immediate, foreseeable result of the performance of contractual duties." Consider Clay v. New Mexico Title Loans, Inc., which began when Harry Clay used his truck as security for a loan that featured a broad arbitration clause. After Clay defaulted, an agent of the lender went to repossess the vehicle, got into an altercation with Clay, pulled out a gun, and shot Clay in front of his young daughter. Clay, who was paralyzed, sued the lender under a variety of theories, including breach of the loan agreement and negligent hiring. A New Mexico appellate court ordered arbitration of Clay’s contract claims, but exempted his tort allegations, reasoning that the provision did not cover causes of action that were “unrelated to the agreement [or] out of the context of the agreement.”

Yet other judges are more willing to find that similar claims are arbitrable. Their version of the “significant relationship” or “touch matters” tests simply asks whether the container contract plays a prominent role in the complaint. For example, in Fazio v. Lehman Brothers, Inc., Frank Gruttadauria, a Cleveland stockbroker, worked for several investment houses that subjected their clients to broad arbitration clauses. Over the course of his career, Gruttadauria illegally withdrew $54 million to fund a Ponzi scheme. When his customers learned of his deception, they sued his employers for fraud and violation of securities laws. The trial court refused to enforce the arbitration clauses because Gruttadauria’s behavior “could not have been within the reasonable contemplation of the Plaintiffs when they signed the alleged account agreements.” The Sixth Circuit reversed, holding that the allegations

---

145. Telecom Italia, SpA v. Wholesale Telecom Corp., 248 F.3d 1109, 1116 (11th Cir. 2001). Seen this way, a broad provision cannot govern actions that were “not contemplated by the parties when the contract was made.” Seifert v. U.S. Home Corp., 750 So. 2d 633, 640 (Fla. 1999).
147. Id. at 891–92.
148. Id. at 892.
149. Id. at 896. Likewise, in Sutton v. Hollywood Entertainment Corp., 181 F. Supp. 2d 504, 506 (D. Md. 2002), Robert Sutton, who was African American, went to rent a movie at Hollywood Video. A clerk misidentified Sutton as the “black male” who had just robbed the store, causing him to be arrested in a humiliating fashion. Id. at 506–07. The court held that the broad arbitration clause in Sutton’s video store rental agreement did not apply to his tort claims. Id. at 511–12. The court acknowledged that “the terms of the contract suggest that the parties are compelled to arbitrate matters related to matters such as the rental fees, repairs, replacements of videos.” Id. at 511. “For example,” the court noted, “logical claims to be arbitrated might include matters such as a dispute over dishonored checks written by the customer or destruction of rented videos by the customer.” Id. at 511–12. The court found that Sutton’s claims did not fall into those categories, stating that “claims such as those alleged here—malicious prosecution, false imprisonment, etc.—are completely independent of, let alone significantly related to, the membership agreements for video rentals.” Id. at 512.
150. 340 F.3d 386, 391, 396 (6th Cir. 2003).
151. Id. at 391–92.
152. Id. at 391–92.
“touch[ed] matters’ covered by the [agreement]” because it would be impossible to tell the story of the case without mentioning the container contract.

Three recurring fact patterns have generated especially unpredictable results. First, courts are torn over whether to compel arbitration of an employee’s tort claims against an employer stemming from a sexual assault committed by a co-worker. Federal judges in Florida, New York, and Texas have held that these allegations trigger a broad arbitration clause in the employment agreement. The logic here is that even if a work-based attack was heinous, the mere fact that it was work-based meant that it “related to or arose from” the underlying contract. Indeed, as one judge put it, “these claims do not merely touch on [the plaintiff’s] employment, they are entirely based on her employment.” However, the Fifth and Eleventh Circuits and state courts in California, Kentucky, and Mississippi have disagreed.

Focusing less on the setting and more on the deplorable nature of the wrongdoing, they announced that “rape does not ordinarily arise out of the employment context” and that an arbitration provision’s “scope certainly stops at [the plaintiff’s] bedroom door.”

Second, courts disagree about the arbitrability of tort claims related to death. Suppose an employee, medical patient, or nursing home resident signs

---

154 Fazio, 340 F.3d at 395 (second brackets in original) (quoting Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987)); see also Natale v. Frantz Ward, L.L.P., 110 N.E.3d 829, 832 (Ohio Ct. App. Apr. 12, 2018) (holding that plaintiff’s claim for intentional infliction of emotional distress fell under broad arbitration clause in his partnership agreement because “a court would necessarily have to refer to the partnership agreement to understand the facts underlying his claim”).


157 Barker, 541 F. Supp. 2d at 887 (emphasis added).

158 See Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1219 (11th Cir. 2011) (finding that an employee’s claims of sexual assault were “not an immediate, foreseeable result of the performance of the parties’ contractual duties” and were thus “not within the scope of the arbitration clause” (internal quotation marks omitted)); Jones v. Halliburton Co., 583 F.3d 228, 241 (5th Cir. 2009) (“Jones’ allegations [of sexual assault] do not touch matters related to her employment, let alone have a significant relationship to her employment contract.” (internal quotation marks omitted)); Abou-Khalil v. Miles, No. 037752, 2007 WL 1589456, at *2 (Cal. Ct. App. June 4, 2007) (“[T]he law is clear that sexual assault is not normally within the course and scope of employment.”); Hill v. Hilliard, 945 S.W.3d 948, 952 (Ky. Ct. App. 1996) (refusing to “expand the arbitration agreement” to include claims of rape, assault, and battery that were “independent of the employment relationship”); cf. Doe v. Hallmark Partners, 227 So. 3d 1052, 1056-58 (Miss. 2017) (holding that the plaintiff was not required to arbitrate sexual assault tort claims despite a “broad” arbitration clause).

159 Hill, 945 S.W.3d at 952.

160 Jones, 583 F.3d at 239.
a contract that contains an arbitration clause and then is killed by the drafter’s negligence. Many states recognize a cause of action for wrongful death, in which the decedent’s family sues to recover damages for their own economic and emotional harm. However, wrongful death complaints come in two different varieties. In some states, such a claim flows “directly from the claim possessed by the decedent, had he or she lived.” As a result, such a lawsuit is “derivative,” meaning that the victim’s relatives “stand in the position of their decedent” and are bound by the arbitration agreement in the container contract. But elsewhere, “[a] wrongful death action is not a transmitted right nor a survival right but is created and vested in the statutorily designated survivors at the moment of death.” Accordingly, in these states, a plaintiff is not a party “to the initial agreement containing an arbitration clause [and] is not bound by the clause in her independent cause of action for the wrongful death.” Thus, courts have not spoken with a single voice about the arbitrability of wrongful death claims.

---

161 See, e.g., Andrew Jay McClurg, It’s a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 56 NOTRE DAME L. REV. 57, 62-63 (1990) (cannassing the development of these laws). The decedent’s estate can also assert a survival action, which attempts to recover damages for the decedent’s medical costs or pain and suffering. See, e.g., Kiser v. Schulte, 648 A.2d 1, 4 (Pa. 1994). Survival actions are arbitrable because the decedent “agreed to arbitrate his claims against the company, whether brought during his life or after his death.” Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Oh. 2007); see also Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co., 367 F. Supp. 2d 71, 718 (E.D. Pa. 2005) (holding that decedent’s administrator “merely stands in her shoes” and is thus bound by an arbitration clause that the decedent signed); In re Golden Peanut Co., 298 S.W.3d 629, 631 (Tex. 2009) (“If [the decedent] had sued for his own injuries immediately before his death, he would have been bound to submit his claims to arbitration.”).

162 THI of New Mexico at Hobbs Ctr., LLC v. Spradlin, 532 F. App’x 813, 817 (10th Cir. 2013).


164 Finney v. Nat’l Healthcare Corp., 193 S.W.3d 393, 395 (Mo. Ct. App. 2006). Because this version of the claim arises out of the wrongful death nature, it is “in no way related to the [container] agreement.” McCall ex rel. Estate of McCall v. SSC Montgomery S. Haven Operating Co., No. 14-388, 2015 WL 2360323, at *11 (M.D. Ala. Aug. 6, 2015). Likewise, in some states, “[a] loss of consortium claim is also a statutorily created independent claim that accrues to the spouse. Therefore, just as a decedent cannot bind his heirs to arbitrate a wrongful death claim, the decedent also cannot bind his heirs to arbitrate a loss of consortium claim.” Life Care Ctrs. v. Neblett, No. 14-00124, 2014 WL 7179652, at *3 (W.D. Ky. Dec. 17, 2014) (internal citations omitted); accord Roth, 886 N.W.2d at 613 (holding that “the [decedent’s] child owns the . . . consortium claim”).

165 Finney, 193 S.W.3d at 397; see also Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 234 Ariz. 18, 316 P.3d 607, 614 (Ct. App. 2014) (holding that a wrongful death claim against a nursing home not arbitrable because it “is independently held by the decedent’s statutory beneficiaries”); Norton v. United Health Servs. of Ga., Inc., 785 S.E.2d 437, 440-41 (Ga. App. 2016) (“[T]here is no evidence that [decedent’s] wrongful death beneficiaries entered into an agreement to arbitrate their separate distinct claims.”), rev’d, 797 S.E.2d 825 (Ga. 2017); Carter v. SSC Odin Operating Co., 976 N.E.2d 344, 355-58 (Ill. 2012) (refusing to hold wrongful-death action plaintiff to decedent’s arbitration agreement); Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 600 (Ky. 2012)
Third, it can be unclear whether arbitration clauses outlive the container contract. In general, when a deal terminates, so do the parties’ rights and obligations. But if the duty to arbitrate ended along with the agreement, parties could game the system and guarantee themselves a judicial forum simply by waiting to sue until the day after the contract lapsed. Thus, the Court has held that claims brought after the container contract has expired are presumptively arbitrable if they feature (1) facts that occurred before the contract ended, (2) rights that vested under the arrangement, or (3) obligations that were supposed to “survive[] expiration of the remainder of the agreement.”

Not every case slots neatly into one of these categories. For example, a federal court in Mississippi held that an arbitration clause in an employee’s initial hiring paperwork did not apply when he worked for Red Lobster from 2002 until 2003, quit, worked for Red Lobster again from 2006 until 2013, quit, and then sued for sexual harassment. Likewise, in the credit, distribution, lease, and subscription contexts—where the parties sometimes continue to interact after the container contract terminates—“an arbitration agreement may survive . . . with respect to certain claims, but not others.”

To conclude, courts struggle with whether broad arbitration clauses cover egregious acts, apply to nonparties, and persist beyond the termination of the container contract. As I discuss next, businesses have begun to try to draft around these pockets of doctrinal chaos.

---

166 See, e.g., Poore v. Simpson Paper Co., 566 F.3d 922, 927 (9th Cir. 2009) (“[W]here the contract at issue has expired, the parties are 'released . . . from their respective contractual obligations' and any dispute between them cannot be said to arise under the contract” (citation omitted)).

167 Litton Fin. Printing Div. v. N.L.R.B., 501 U.S. 190, 206 (1991). Initially, the Court had announced that “where the dispute is over a provision of [an] expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.” Nolde Bros. v. Local No. 338, Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243, 255 (1977). Later, the Court clarified that this presumption of arbitrability only applies to “disputes arising out of the relation governed by contract.” Litton, 501 U.S. at 204.


B. Infinite Arbitration Clauses

This Section reveals that companies have tried to patch the holes in broad clauses by mandating arbitration for every dispute between any associated parties for eternity. Courts first gave these infinite clauses the cold shoulder by applying traditional principles of contract interpretation and the unconscionability defense. However, the Court’s recent cases have unsettled the law by implying that the FAA preempts any state rule that discriminates against arbitration.

1. The Rise of the Infinite Clause

Shortly after the dawn of the new millennium, arbitration clauses metastasized. For one, companies stopped confining their provisions to claims that “arose out of or related to” the container contract.\(^\text{170}\) For example, when AT&T acquired Cingular and formed Mobility\(^\text{171}\)—an entity that boasts almost 147,000,000 customers\(^\text{172}\)—it revamped its arbitration clause to cover “all disputes and claims.”\(^\text{173}\) Sprint soon followed suit, changing its 70,000,000 arbitration provisions to cover “ANY (we really mean ANY) disagreements.”\(^\text{174}\) Ultra-broad arbitration provisions began to appear in employment contracts.\(^\text{175}\)

---

\(^{\text{170}}\) To be clear, infinite arbitration clauses are not a twenty-first century innovation. See \textit{In re Canadian Gulf Line}, 98 F.2d 711, 712 (2d Cir. 1938) (featuring a maritime contract that required arbitration of “any dispute . . . between the Owners and the Charterers”). However, it is only in the last decade or so that infinite clauses have gone mainstream.


\(^{\text{175}}\) \textit{See, e.g., Lemmon v. Lincoln Prop. Co.}, 307 F. Supp. 2d 1352, 1353 (M.D. Fla. 2004) (“I agree that any claim dispute or controversy between myself and the Company shall be submitted to and determined exclusively by binding arbitration . . . .”).
bank account paperwork,176 agreements to rent cars177 or equipment,178 and even applications to join the Church of Scientology.179 Some were verbose, like a loan that insisted on arbitration for “all disputes, claims, or controversies whether based upon any prior, current, or future agreement, loan, account, service, activity, transaction (proposed or actual), event or occurrence (‘Disputes’) whether individual, joint, or class in nature, including contract and tort disputes and any other matter at law or equity.”180 Others were simple, such as the cruise line that required its employees to arbitrate “all . . . disputes”181 and the for-profit university that informed its students that “any dispute between us shall be submitted to [a]rbitration.”182

Businesses also began enlarging arbitration clauses along other dimensions. Recall that many jurisdictions exempt wrongful death claims from arbitration because the plaintiffs in such a case—the decedent’s relatives—never signed the container contract.183 Companies attempted to write their way around this hurdle by stating that the arbitration agreement govern[s] “all persons whose claim is derived through or on behalf of the [signatory], including any parent, spouse, sibling, child, guardian, executor, 176 See, e.g., Regions’ Motion to Compel Arbitration and to Stay Proceedings at 3, Regions Bank v. Douglas, 2012 WL 5400040 (S.D. Miss. Nov. 5, 2012) (No. 12-00523) (quoting an arbitration clause that applies to “any dispute, disagreement, claim or controversy . . . regardless of when the dispute arose” (emphasis omitted)).
177 See, e.g., Terms and Conditions, Hertz, https://www.hertz.com/rentacar/member/enrollment/displayTermsAndConditions [https://perma.cc/qV6f-UUEV] (last updated Oct. 31, 2019) (“Except for claims for property damage, personal injury, or death, ANY DISPUTES BETWEEN US MUST BE RESOLVED ONLY BY ARBITRATION OR IN A SMALL CLAIMS COURT ON AN INDIVIDUAL BASIS . . . .”).
178 Appellants’ Brief at 3–4, Granger v. Rent-A-Center, Inc., 503 S.W.3d 295 (Mo. Ct. App. 2016) (No. 79584), 2016 WL 3771603. This case entailed arbitration agreements for rental of a television and a refrigerator; the former described “claims” as “any claim, dispute, or controversy between you and us that in any way arises from the RPA or the leased property . . . .” and the latter provided that “claims shall be interpreted as broadly as the law allows, and means any dispute or controversy between you and Rent-A-Center, its officers, directors, employees, or agents . . . .” Id. (citations omitted).
179 See Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 13-220-27, 2015 WL 10844160, at *10 (M.D. Fla. Mar. 13, 2015) (“[S]hould any dispute, claim, or controversy arise between me and the Church . . . . I will pursue resolution of that dispute, claim or controversy solely and exclusively through Scientology’s Internal Ethics, Justice and binding religious arbitration procedures . . . .” (internal quotation marks and citation omitted)).
183 See supra text accompanying notes 164–165.
legal representative, administrator, or heir." Likewise, firms offered to lend their arbitration rights to a rainbow of nonsignatory defendants, such as their "members, shareholders, or subsidiary or parent or affiliated companies, and its or their officers, directors, employees, and agents." And to ensure that their arbitration clauses endured after the container contract expired, drafters included language specifying that the commitment to arbitrate "survives the termination of your service with us" or "is indefinite."  

Finally, businesses added another layer of private dispute resolution by requiring disputes about the arbitrability of a particular lawsuit to be decided in arbitration. Through delegation clauses, they gave the arbitrator the exclusive right to decide whether a dispute fell within the scope of an arbitration clause. From banking to employment to telecommunications, companies mandated arbitration not just for substantive claims, but for arbitrability issues as a preliminary matter). Courts routinely find that merely referencing an arbitration provider incorporates these rules by reference and thus functions as a delegation clause. See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1282-83 (10th Cir. 2017) (holding, when the arbitration agreement provided that "arbitration shall be administered by JAMS and conducted in accordance with its Streamlined Arbitration Rules and Procedures . . . except as provided otherwise herein," the parties had thus "incorporated the JAMS Rules into their Agreement" and "intended for an arbitrator to decide issues of arbitrability" (emphasis omitted)); Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015) ("[W]e hold that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.").
2. Judicial Skepticism

Initially, judges pushed back against infinite language. The poster child for this movement was *Smith v. Steinkamp*, a 2003 Seventh Circuit decision. Sheila Smith took out a payday loan from Instant Cash and signed an agreement “to arbitrate ‘all disputes’ between the [p]arties.” A month later, Smith borrowed from Instant Cash again, but did not sign an arbitration agreement. Eventually, Smith sued Instant Cash, arguing that the second loan violated state usury law and RICO. Instant Cash moved to compel arbitration, arguing that Smith’s lawsuit was a “dispute[.]” between the [p]arties and thus triggered the first loan’s arbitration clause. Speaking through Judge Posner, the court rejected this interpretation by listing the absurd consequences it would spawn:

> If Instant Cash murdered Smith in order to discourage defaults and her survivors brought a wrongful death suit against Instant Cash . . . , Instant Cash could insist that the wrongful death claim be submitted to arbitration. For that matter, if an employee of Instant Cash picked Smith’s pocket when she came in to pay back the loan, and Smith sued the employee for conversion, he would be entitled to arbitration of her claim. It would make no difference that the conversion had occurred in Smith’s home 20 years after her last transaction with Instant Cash.

In addition, Judge Posner added that an agreement “to arbitrate disputes arising out of future agreements . . . might be thought unconscionable.”

Although several courts followed *Smith’s* footsteps, they disagreed on precisely what was objectionable about infinite provisions. Some ran with Judge Posner’s suggestion and held that mandating arbitration for complaints that were attenuated from the container contract would be unconscionable. For example, in *Valued Services of Kentucky, LLC v. Watkins*, Floyd Watkins received a payday loan from Check Advance that contained an infinite clause. When the balance became due, Watkins went to Check Advance and

---

190 318 F.3d 775 (7th Cir. 2003).
192 *Smith*, 318 F.3d at 777.
193 Id. at 776.
194 *Smith* Reply Brief, supra note 191.
195 *Smith*, 318 F.3d at 777.
196 Id. at 778. Judge Posner also noted that the arbitration agreement only applied to the first loan and the parties “prior . . . agreements.” Id. at 777 (emphasis added). In turn, this suggested that the arbitration clause did not cover the second loan, which came later. Id. Ultimately, though, he “[d[id] not put too much weight on this point” and remarked that the defendant might lose even if “the word ‘prior’ had not appeared” in first loan’s arbitration agreement. Id. at 777-78.
told the manager that he needed three more days to raise the funds. The manager pushed a button that locked her office door, refused to open it, telephoned her boss, and said, “I have a black guy over here that refuses to pay his bill and he’s not going to leave until he does.” Watkins, who was detained until the police arrived, sued Check Advance for false imprisonment. A Kentucky appellate court held that enforcing the infinite provision would be grossly unfair, comparing it to ordering “arbitration had defendants sent 2 men to plaintiff’s house to break his legs because he was behind in his payment.”

Other judges reached the same result under rules of contract interpretation. For instance, in *Aiken v. World Finance Corp.*, the South Carolina Supreme Court created what became known as the “outrageous torts” exception to the FAA. Richard Aiken borrowed money from World Finance. Aiken’s contract mandated arbitration for claims “arising out of any prior or future dealings between lender and borrower.” Two years after Aiken had paid off his debt, World Finance personnel used Aiken’s social security number to take out loans in his name and steal the proceeds. When Aiken sued for negligent hiring, World Finance argued that his lawsuit “arose out of” the parties’ “prior dealings” because his finance application gave the rogue employees “access to [his] information in order to carry out their crimes.” Without denying that the plain language of the arbitration clause covered Aiken’s complaint, the state high court refused to send the case to arbitration. Instead, the justices held that “even the most broadly-worded arbitration agreements” do not govern conduct that is so extreme that it is “unforeseeable to a reasonable consumer in the context of normal business dealings.”

Finally, other courts ignored infinite language without explaining their holdings. *Rust v. Carriage Services* provides a memorable example. The Rusts purchased a crypt in a mausoleum to hold the remains of a relative (the

198 Id. at 258.
199 Id.
200 Id. at 259.
201 Id. at 261, 265.
203 Id. at 707.
204 Id. (emphasis omitted).
205 Id.
206 Id. at 707-08.
207 Id. at 710.
208 Id. at 709; see also *Arnold v. Burger King*, 48 N.E.3d 69, 72, 78 (Ohio Ct. App. 2015) (relying on *Aiken* to refuse to compel arbitration of workplace rape claim even though arbitration agreement covered “events outside the scope of [the plaintiff’s] employment” (emphasis omitted)).
“crypt contract”). Their agreement with the cemetery did not contain an arbitration clause. Years later, the couple bought a commemorative bench from the same graveyard and signed a contract that required them to arbitrate “any controversy or claim arising between the parties” (the “bench contract”). The couple then visited their relative’s crypt and made a horrifying discovery: “[T]he body in the crypt above their decedent’s was interred in a way that caused the crypt to leak decaying human remains out of the crypt and onto the crypt containing Rusts’ decedent.” According to the Rusts, “when they visited their decedent’s crypt, . . . they touched the liquid in an effort to determine what the substance was, and . . . became physically ill when they realized what they had touched.” The Rusts sued for negligent treatment of human remains and negligent infliction of emotional distress, and the cemetery tried to invoke the arbitration clause in the bench contract. A divided Oklahoma appellate court denied the motion, reasoning that the lawsuit arose from the crypt contract, not the bench contract. But as the dissent pointed out, the majority simply did not address the brute fact that “the arbitration provision is not limited to disputes arising out of the contract containing the arbitration clause,” but rather “applies to any dispute between the parties.”

Accordingly, until 2010, although the law was embryonic, most courts believed that arbitration agreements “cannot cover every type of dispute that might arise.” But as I explain next, that would soon change.

3. The Arbitration Revolution

In the last decade, the Court has revolutionized the field of forced arbitration. As the Justices expanded the degree to which the FAA preempts state law, they may have implicitly overruled the lower court cases that refused to enforce infinite language. Likewise, by embracing delegation provisions, the Court has made it easier for companies to entrust arbitrators with deciding the very issue of whether a dispute falls within the scope of an arbitration clause.

---

210 Id. at 807.
211 Id.
212 Id. (emphasis omitted).
213 Id. at 808 n.5.
214 Id.
215 Id. at 808.
216 Id. at 808-09.
217 Id. at 809 (Buettnet, J., dissenting).
218 RN Sol., Inc. v. Catholic Healthcare W., 81 Cal. Rptr. 3d 892, 902 (Ct. App. 2008).
a. Preemption

The backdrop for the Court’s recent cases is the intersection of the FAA and class actions. For decades, businesses and chambers of commerce had condemned the class device for allowing plaintiffs’ lawyers to combine thousands of nuisance lawsuits into a single complaint and then wield “blackmail” settlement pressure.219 But as the Justices ramped up the FAA, businesses saw a cure for this scourge.220 In the late 1990s and early 2000s, they started inserting class action waivers into their forced arbitration clauses and arguing that their customers and employees had agreed not only to arbitrate, but to do so on an individual basis.221

Then, in the mid-2000s, this attempt at private law reform hit a speed bump. Recall that § 2 allows courts to strike down arbitration clauses under traditional contract law (i.e., any “grounds [that] . . . exist at law or in equity for the revocation of any contract”).222 In 2005, the California Supreme Court invoked this principle in § 2 in Discover Bank v. Superior Court, an influential decision holding that class arbitration waivers are unconscionable when applied to many low-value consumer claims.223 Soon more than a dozen jurisdictions endorsed this logic, reasoning that because few plaintiffs will actually prosecute their own small dollar grievances, class arbitration waivers unfairly immunize drafters from liability.224

However, in 2011, the U.S. Supreme Court held in AT&T Mobility LLC v. Concepcion that the FAA preempts Discover Bank and its progeny.225 The Court conceded that unconscionability is a “ground[] . . . for the revocation of any contract” under § 2.226 Nevertheless, the Justices determined that Discover Bank’s use of the doctrine violated the FAA’s goal of “enforc[ing] . . . arbitration agreements according to their terms so as to facilitate streamlined

---

219 See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).
221 See Margaret Mannix, No Suits for You, U.S. NEWS & WORLD REP., June 7, 1999, 58, 60 (“Many arbitration clauses state that consumers cannot file class-action lawsuits—a key reason the clauses are spreading so quickly.”).
223 113 P.3d 1100, 1100-12 (Cal. 2005).
224 See Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 275 (Ill. 2006) (“[T]he plaintiff’s only reasonable, cost-effective means of obtaining a complete remedy [was] as either the representative or a member of a class.”); David Horton, Federal Arbitration Act Preemption, Purposivism, and State Public Policy, 101 GEO. L.J. 1217, 1237 n.165 (2013) (collecting cases in jurisdictions that endorsed this logic).
226 Id. at 341 (internal quotation marks and citations omitted).
According to the Court, Discover Bank undercut this goal by insisting that classwide arbitration be available for small claims, which made the dispute resolution process slower and more formal. Although Concepcion dealt with the singular setting of class actions and arbitration, it also broke new ground by finding that an entrenched principle like unconscionability could be preempted. Thus, some judges and commentators read the opinion to stand for the bold proposition that any state law that “has a disproportionate impact on arbitration agreements” must bow to the FAA.

Then, on the heels of Concepcion, the Court brought FAA preemption into the realm of contract interpretation in DIRECTV, Inc. v. Imburgia. In 2004, DIRECTV added a class arbitration waiver to its customer agreement. A year later, Discover Bank came down, making it likely that DIRECTV’s provision was unconscionable in certain states. But if a court invalidated the class arbitration waiver, DIRECTV strongly preferred to litigate class claims in court, where there was less danger of getting stung by a massive judgment with no meaningful appellate review. Therefore, the company addressed this contingency through a “blow up clause,” which declared that “if the ‘law of your state’ makes the waiver of class arbitration unenforceable, then the entire arbitration provision ‘is unenforceable’.”

In 2008, a class of California plaintiffs sued DIRECTV for charging an illegal early termination fee. The case was still percolating through the legal system in 2011, when the Court decided Concepcion and shielded many class arbitration waivers from judicial review. Nevertheless, in 2014, a California appellate court held that DIRECTV’s class arbitration waiver was invalid “under the law of the California Supreme Court’s now-defunct Discover Bank opinion. In turn, under the blow up clause, “the entire arbitration agreement [wa]s unenforceable.”

---

227 Id. at 344.
228 Id. at 347-49.
229 Mortensen v. Bresnan Comms, LLC, 722 F.3d 1151, 1162 (9th Cir. 2013); see also Arpan A. Sura & Robert A. DeRise, Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations, 62 U. KAN. L. REV. 403, 408 (2013) (arguing that Concepcion “threatens to jeopardize a bevy of facially neutral contract laws as they are applied to arbitration agreements”).
232 See supra text accompanying notes 223–224.
234 Id. at 192.
235 Id. at 193.
236 Id. at 194.
237 Id. at 198.
The Supreme Court reversed.\(^{238}\) The Justices admitted that “the interpretation of a contract is ordinarily a matter of state law to which we defer,”\(^ {239}\) but held that the state appellate panel had grossly distorted the meaning of the blow up clause.\(^ {240}\) Specifically, the Court noted that there was no authority for the view that the phrase “the law of your state” included “state laws authoritatively held to be invalid.”\(^ {241}\) Thus, the Court held that California appellate court had flouted federal law by failing to “place arbitration contracts ‘on equal footing with all other contracts.’”\(^ {242}\)

Concepcion and DIRECTV imperil the decisions that refused to enforce infinite language. To make this point concrete, consider In re Jiffy Lube International, Inc., Text Spam Litigation, an early and oft-cited opinion rejecting infinite language.\(^ {243}\) A class of consumers sued Heartland Automotive Services, Inc., which operates hundreds of Jiffy Lube franchises.\(^ {244}\) The plaintiffs alleged that Heartland had violated the TCPA by harvesting their phone numbers when they received oil changes and sending them spam text messages.\(^ {245}\) However, at least one plaintiff had signed a Jiffy Lube “pledge of satisfaction” that required him to arbitrate “any and all disputes, controversies or claims between Jiffy Lube\(^ {2}\) and you.”\(^ {246}\) A California district court held that this unlimited obligation to arbitrate did not govern the complaint for two reasons.\(^ {247}\) First, it opined that an arbitration provision that “is not limited to disputes arising from or related to the transaction or contract at issue . . . would clearly be unconscionable.”\(^ {248}\) Second, it observed that it would be unreasonable to interpret the arbitration provision to encompass a statutory violation that had so little in common with the contract.\(^ {249}\)

However, the Court’s recent opinions suggest that the FAA trumps this logic. For example, Concepcion held that a court cannot apply the unconscionability doctrine in a way that discriminates against arbitration.\(^ {250}\) Jiffy Lube and other opinions have concluded that infinite provisions are

\(^{239}\) Id. at 468.
\(^{240}\) Id. at 469.
\(^{241}\) Id.
\(^{242}\) Id. at 471 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).
\(^{243}\) 847 F. Supp. 2d 1253, 1262-63 (S.D. Cal. 2012). Although Jiffy Lube was decided shortly after Concepcion, the ramifications of the Court’s decision had not yet set in, as evidenced by the fact that Jiffy Lube does not discuss Concepcion in depth at all.
\(^{244}\) Id. at 1255.
\(^{245}\) Id. at 1255-56.
\(^{246}\) Id. at 1262.
\(^{247}\) Id. at 1262-63.
\(^{248}\) Id. at 1262-63.
\(^{249}\) Id. at 1263.
\(^{250}\) See supra text accompanying notes 226–229.
grossly harsh because they govern conduct that “could not have been foreseen by [the plaintiff] when he signed that agreement.” Arguably, this use of the unconscionability doctrine draws the very inference that Concepcion prohibits: that there is something inherently troubling about private dispute resolution. Indeed, even if the breadth of an infinite clause is surprising, it simply means that a plaintiff must arbitrate a claim that she thought she might litigate. Deeming such an arrangement to be “unfair” treats arbitration as tainted and inferior. Accordingly, at least one court has noted that holding that an infinite clause “is unconscionably broad would be in tension with Concepcion.”

*Jiffy Lube*’s other ground for annulling infinite language might not fare better. In the same breath as its unconscionability rhetoric, *Jiffy Lube* also observed that, given the narrow subject matter of the “pledge of satisfaction” and the unrelated nature of the company’s wrongdoing, “it is doubtful whether [reading the arbitration clause to cover all issues ‘arising’ out of or relate[d] to] would encompass the claims here.” Seen through this prism, principles of contract interpretation can exempt unforeseeable causes of action from the seemingly-limitless reach of an infinite clause. But after *DIRECTV*, this reasoning is suspect. Indeed, the South Carolina Supreme Court, which invented the “outrageous torts” exception to the FAA, recently came within one vote of abolishing it because it is “‘unique,’ and ‘restricted’ to the field of arbitration.”

Not coincidentally, in the last two years, some courts have ordered arbitration of claims that have little to do with the container contract. For example, in 2018, the Eighth Circuit enforced infinite language in *Parm v. Bluestem Brands, Inc.* Bluestem, an online retailer, allows shoppers to buy goods with credit accounts that are serviced by a bank. The relationship between the bank and its borrowers is governed by a separate contract that mandates arbitration for any claim involving “the actions of yourself, us or third parties.” When a class of plaintiffs contended that Bluestem had charged illegal fees, Bluestem argued that it was entitled to enforce the arbitration provision in the standalone agreement between the plaintiffs and

---

253 *Jiffy Lube*, 847 F. Supp. 2d at 1263.
256 898 F.3d 869, 878 (8th Cir. 2018).
258 Id. at *9.
the bank.259 The plaintiffs protested that this interpretation would breed bizarre results, such as mandating arbitration for "a car accident between a consumer and . . . the third-party courier who delivers the [Bluestem] packages, or . . . a situation where a lender’s employee sexually harassed another employee and the latter had a credit account subject to the agreement.”260 The Eighth Circuit was not persuaded, reasoning that “[t]he glaring issue with these hypotheticals is that they in no way inform the question before the court.”261 Thus, perhaps feeling pressure from the Court, the appellate panel launched a counteroffensive to the opinions that have rattled off the perverse consequences of ultra-broad arbitration agreements.

b. Delegation

As noted above, a delegation clause permits the arbitrator to decide whether a claim falls within the scope of a valid agreement to arbitrate.262 The Court has recently laid the foundation for the widespread use of these provisions. First, in Rent-A-Center, West, Inc. v. Jackson, Rent-A-Center, a furniture leasing company, required its workers to sign an arbitration agreement that gave the arbitrator the exclusive power to resolve disputes about its “interpretation, applicability, enforceability or formation.”263 Antonio Jackson, a former employee, sued Rent-A-Center for discrimination.264 What followed was a veritable badminton match. Rent-A-Center moved to compel arbitration.265 Jackson responded by arguing that the “arbitration agreement as a whole” was unconscionable because it limited discovery and required him to pay half of the arbitrator’s fees.266 And Rent-A-Center volleyed back by asking the court to enforce the delegation clause and allow the arbitrator to decide Jackson’s unconscionability challenge.267

The Court held that Jackson needed to arbitrate the very issue of whether the agreement to arbitrate his lawsuit was binding.268 The Justices relied heavily on the initial portion of § 2, which makes “[a] written provision . . . to settle by

259 Id. at *10.
260 Parm, 898 F.3d at 878.
261 Id.
262 See supra text accompanying notes 49, 188–189.
264 Id. at 65.
266 Opposition to Motion to Compel Arbitration and for Attorney Fees at 5, Jackson, 2007 WL 7030394 (No. 07-0050).
267 Reply Points and Authorities in Support of Motion to Dismiss Proceedings and Compel Arbitration at 2–3, Jackson, 2007 WL 7030394 (No. 07-0050).
268 Jackson, 561 U.S. at 72, 75–76.
arbitration a controversy . . . valid, irrevocable, and enforceable.” In a pivotal maneuver, the Court reasoned that a delegation clause is its own self-contained “written [arbitration] provision” within the meaning of the statute:

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement . . . . An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. 270

In turn, the view that delegation provisions are sovereign arbitration clauses doomed Jackson’s efforts to remain in court. 271 Jackson had only asserted that the agreement to arbitrate his substantive claims was unconscionable. 272 As a result, he had waived his right to contend that the delegation clause—a separate agreement to arbitrate whether he had agreed to arbitrate his substantive claims—was tainted. 273

Rent-A-Center created additional incentives for drafters to use infinite clauses. As noted previously, courts had traditionally refused to permit arbitrators to entertain “wholly groundless” arguments that an arbitration clause encompassed a particular claim. 274 But the double-barreled combination of delegation provisions and infinite language seemed to eliminate this exception. After all, how could a defendant’s argument that an agreement to arbitrate “all disputes” applies to a particular claim be “wholly groundless”?

Nevertheless, in Douglas v. Regions Bank, the Fifth Circuit applied the “wholly groundless” exception to an infinite clause. 275 The facts of Douglas are hard to believe. In 2002, Shirley Douglas opened a checking account with Union

269 Id. at 67 (quoting 9 U.S.C. § 2 (2018)).
270 Id. at 68, 70.
271 Id. at 72-73.
272 See id. at 72 (“Nowhere in his opposition to Rent-A-Center’s motion to compel arbitration did [Jackson] even mention the delegation provision.”).
273 Id. at 72-74. As mentioned previously, see supra note 101, the separability doctrine allows arbitrators to decide challenges to the validity of the container contract, while courts decide challenges to the arbitration clause itself. Rent-A-Center extended this “Russian nesting dolls” approach even further by casting delegation provisions as independent arbitration clauses: contracts within contracts within contracts. Jackson, 561 U.S. at 85 (Stevens, J., dissenting). I have criticized this maneuver in Horton, supra note 86, at 408-12.
274 See Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006) (noting that the court should deny a party’s request for a stay if the arguments are "wholly groundless"); Turi v. Main Street Adoption Servs., LLP, 633 F.3d 496, 511 (6th Cir. 2011) (requiring that arguments "are at least arguably covered by the agreement" to go to the arbitrator); see also supra text accompanying notes 108–110.
275 757 F.3d 460, 464 (5th Cir. 2014).
Planters Bank. In her agreement with the institution contained a delegation clause and an arbitration provision that covered “the relationships . . . resulting from this [a]greement” and included a survival clause. Less than a year later, Douglas closed her account. In 2005, Union merged with Regions Bank. In 2007, Douglas was injured in a car accident, filed a tort claim, and received a settlement. In 2010, one of Douglas’s lawyers deposited the proceeds into his client trust account—which happened to be at Regions—and then stole it.

Douglas sued Regions for negligently failing to prevent the crime. Regions moved to compel arbitration under Douglas’s 2002 signature card with Union Planters. Douglas responded that her lawsuit against Regions did “not touch the Union Planters account in any way or relate back to her Union Planters account” that had ended nearly a decade ago. But Regions replied that the delegation clause in Douglas’s Union Planters contract expressly assigned matters of “scope” to the arbitrator.

Two members of a Fifth Circuit panel rejected Regions’ argument as “wholly groundless.” Judge Smith and Higginsons explained that no reasonable arbitrator could find a link between Douglas’s negligence claim against Regions and her 2002 checking account with Union Planters. As the majority saw it, “the events leading to Douglas’s claim—a car accident, a settlement, and embezzlement of the funds through an account that a third party held with the bank—have nothing to do with her checking account opened years earlier for only a brief time.”

But not everybody agreed. The opinion provoked a strong dissent from Judge Dennis, who cautioned that “the ‘wholly groundless’ test appears to be contrary to Supreme Court precedent.” On cue, in 2017, the Tenth and

---

277 Douglas, 757 F.3d at 465 (Dennis, J., dissenting).
278 Regions Bank’s Motion to Compel Arbitration and to Stay Proceedings at 1, Douglas, 2012 WL 5400040 (No. 12-00523).
279 Douglas, 757 F.3d at 461.
280 Id.
281 Id.
282 Id.
283 Id.
284 Plaintiff’s Memorandum of Authorities, supra note 276, at 9.
285 Motion to Compel Arbitration, supra note 278, at 3.
286 Douglas, 757 F.3d at 464.
287 Id.
288 Id.
289 Id. at 468 (Dennis, J., dissenting).
Eleventh Circuits cited similar concerns to “decline to adopt the ‘wholly groundless’ approach.”

On January 8, 2019, the Supreme Court resolved this dissensus with *Henry Schein, Inc. v. Archer & White Sales, Inc.* Archer and White sued Henry Schein for antitrust violations, seeking damages and an injunction. However, Archer and White’s claims were subject to a delegation clause and an arbitration provision that exempted “actions seeking injunctive relief.” The Fifth Circuit refused to allow the arbitrator to decide scope arbitrability, holding that “[w]e see no plausible argument that the arbitration clause applies here to an ‘action seeking injunctive relief.’” Speaking through Justice Kavanaugh, the Court reversed. Justice Kavanaugh relied heavily on the text of the FAA, which “does not contain a ‘wholly groundless’ exception.” Also, he expressed concern about the amorphousness of the rule, warning that it “would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless.” Thus, the Court abolished the venerable “wholly groundless” exception to arbitration about arbitration.

II. REGULATING INFINITE CLAUSES

Part I established that the widespread use of infinite clauses and delegation provisions are amplifying the discord of scope arbitrability. Accordingly, this Part offers a blueprint for the many courts that are now (or soon will be) grappling with limitless commitments to arbitrate. It argues that

---

290 Belnap v. Iasis Healthcare, 844 F.3d 1272, 1286 (10th Cir. 2017); Jones v. Waffle House, 866 F.3d 1257, 1269 (11th Cir. 2017) (“We join the Tenth Circuit in declining to adopt what has come to be known as the wholly groundless exception.”).
291 139 S. Ct. 524, 528 (2019).
292 Id. at 526.
293 The container contract did not include an express delegation clause; instead, it merely incorporated the rules of the American Arbitration Association. Id.; cf. supra note 189 and accompanying text (explaining how courts have construed this language to empower the arbitrator to decide arbitrability).
296 Henry Schein, 878 F.3d at 497.
297 Id.
298 Id. at 531.
even after Concepcion, DIRECTV, Rent-A-Center, and Henry Schein, judges can continue to nullify some infinite arbitration clauses and delegation provisions. It brings these insights to bear on several nasty splits in authority, such as the status of nonparties, FAA preemption, survival, and the boundary between arbitral and judicial power.

A. The Limits of Infinite Language

This Section explains why infinite language is not always enforceable. It demonstrates that boundless arbitration clauses can suffer from two defects. The first arises from what I call “agreement challenges.” In these cases, the plaintiff argues that she either has not assented to the container contract, or has not assented to arbitrate with a particular defendant, or has not assented to arbitrate for the rest of her life. Although companies have tried to anticipate these objections through creative draftsmanship, they cannot overcome the bedrock principle that “[i]f a party has not agreed to arbitrate, the courts have no authority to mandate that he do so.”299

In a second group of disputes, which I call “scope challenges,” the plaintiff admits that she has agreed to arbitrate with the defendant, but asserts that her allegations do not fall within the ambit of the arbitration clause. In this milieu, I contend that certain claims are so detached from the container contract that § 2 of the FAA does not apply to them.

1. Agreement Challenges

One reason courts can refuse to enforce infinite language is simple: the plaintiff has not assented to arbitrate. It is well established that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”300 Some infinite clauses violate this maxim by attempting to manufacture the indispensable element of contractual consent.

The clearest example of corporations trying to conjure assent out of thin air involves nonsignatory plaintiffs. In general, “only the parties who enter into a contract have rights and obligations under that contract . . . .”301 However, the FAA absorbs “‘traditional principles’ of state law [that] allow a contract to be enforced by or against nonparties.”302 For example, the third party beneficiary doctrine binds a nonsignatory to an arbitration clause if the

parties “intended, upon execution of the contract, to bestow a direct, as opposed to incidental[,] benefit upon [the party].”\(^\text{303}\) For this to occur, the agreement must either clearly showcase the parties’ intent to benefit the nonsignatory\(^\text{304}\) or advance her interests in some tangible way.\(^\text{305}\)

As several courts have recognized, drafters should not be able to satisfy this test simply by declaring their desire to bind vast, open-ended groups of individuals. For example, wireless, cable, and Internet service providers mandate arbitration not just for the account holder, but for all “users”\(^\text{306}\) or anyone who operates one of the provider’s devices.\(^\text{307}\) Yet as a federal judge in Missouri recently found, these oblique references do not prove that the contractual partners truly meant to confer benefits on numerous unnamed third parties.\(^\text{308}\) Likewise, recall that hospitals, nursing homes, and employers in risky industries have extended the duty to arbitrate to a signatory’s “parent, spouse, sibling, child, guardian, executor, legal representative, administrator or heirs.”\(^\text{309}\) Courts in jurisdictions that treat wrongful death claims as independent have ignored this language.\(^\text{310}\) As the Kentucky Supreme Court has explained, the mere fact that a contract says that a nonparty is bound does not make it true:

\(^{303}\) Daphne Auto., LLC v. E. Shore Neurology Clinic, Inc., 245 So. 3d 599, 604 (Ala. 2017) (quoting Custom Performance, Inc. v. Dawson, 57 So. 3d 90, 97 (Ala. 2010)). Companies also often use the doctrine of equitable estoppel to try to bind nonsignatory plaintiffs. That rule applies “when the signatory to a written agreement containing an arbitration clause must rely on the terms of the . . . agreement in asserting its claims against the nonsignatory.” Am. Bankers Ins. Grp. v. Long, 453 F.3d 623, 627-28 (4th Cir. 2006) (quoting Brantley v. Republic Mortgage Ins. Co., 424 F.3d 392, 395-96 (4th Cir. 2005)). Because equitable estoppel is rooted in the plaintiffs’ conduct—not the text of the contract—it is not relevant for my purposes.

\(^{304}\) See Tucker v. Vincent, 471 S.W.3d 787, 796 n.5 (Mo. Ct. App. 2015) ("To be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party . . . ."). Although “[t]he absence of the third party’s name from the contract is not fatal . . . the record must provide evidence that the party’s identity was ascertainable from either the terms of the contract or the circumstances surrounding its creation," Sakyi v. Estee Lauder Cos., 308 F. Supp. 3d 366, 384 (D.D.C. 2018) (internal quotation marks and citations omitted).

\(^{305}\) See, e.g., Suh v. Superior Court, 105 Cal. Rptr. 3d 585, 594 (Ct. App. 2010) (holding that the plaintiffs were not third party beneficiaries because “[t]here is no evidence . . . that plaintiffs actually derived any benefits” from the contract); RESTATEMENT (SECOND) OF CONTRACTS § 302, cmt. a, Reporter’s Notes (instructing courts to “consider the circumstances surrounding the transaction as well as the actual language of the contract”).


\(^{307}\) E.g., Sprint Terms and Conditions, supra note 174.

\(^{308}\) See James Shackelford Heating & Cooling, LC v. AT&T Corp., No. 17-663, 2017 WL 6813715, at *3 (W.D. Mo. Nov. 21, 2017) (explaining that the mere fact a party derives an incidental benefit from a contract does not necessarily make it an intended third party beneficiary).

\(^{309}\) Lawrence v. Beverly Manor, 273 S.W.3d 515, 526 (Mo. 2009) (en banc).

\(^{310}\) See supra text accompanying notes 164–165.
[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract’s procedural provisions, including arbitration clauses, merely by being referred to in the contract. . . . Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another.311

Indeed, because “nonpart[ies] never agree[] to [a] contract’s terms,” these infinite clauses try to generate synthetic consent.312

The absence of an agreement to arbitrate also explains why the FAA does not preempt these holdings. Predictably, firms are citing Concepcion and DIRECTV313 and arguing that § 2 “require[s] arbitration of . . . wrongful-death claims.”314 In fact, in March 2018, a district court in Massachusetts opined that refusing to enforce arbitration clauses against nonsignatories violates the statute because it “has the indirect but practical effect of singling arbitration agreements out for special treatment.”315 This logic is flawed. Arbitration agreements are just words on a page unless a plaintiff has assented to the contract. As the Sixth Circuit has noted, disputes involving nonsignatory plaintiffs are “not about preemption”; rather, they are “about consent.”316 Without assent to arbitrate, the FAA never enters the picture.

The analysis with respect to some nonsignatory defendants is similar. Suppose Plaintiff P signs a contract with Entity A that contains an arbitration provision. Later, P sues A, Executive B (who works for A), and Firm C (a subsidiary of A). In general, because nonparties “cannot enforce [arbitration provisions] against one who is a party,”317 B and C must defend P’s lawsuit in

311 Ping v. Beverly Enters., Inc., 376 S.W.3d 581, 599-600 (Ky. 2012); see also Richmond Health Facilities v. Nichols, 811 F.3d 192, 197 (6th Cir. 2016) (“That the Agreement purports to extend to wrongful-death claims makes no difference.”); Duenas v. Life Care Ctrs. of Am., Inc., 336 P.3d 763, 771-72 (Ariz. Ct. App. 2014) (holding that “express language in the agreement purporting to bind the statutory heirs to arbitrate their wrongful death claims” is not enforceable (quoting Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 n.5 (Ariz. Ct. App. 2014))); Bybee v. Abdulla, 189 P.3d 40, 49 (Utah 2008) (“While the intention to bind [the plaintiff] is clear, it is less apparent that the obligation to arbitrate was a ‘separate and distinct benefit’ bestowed by [the signatories] on her.”).


315 Richmond Health Facilities, 811 F.3d at 201.

court. After all, \( P \) may have agreed to arbitrate with \( A \), but she never agreed to arbitrate with \( B \) and \( C \).

The leading exception to this rule is alternative estoppel,\(^{317}\) and businesses are increasingly relying on infinite language to try to invoke it.\(^{318}\) Alternative estoppel applies when (1) the plaintiff’s claims are “intertwined” with the container contract and (2) a nonsignatory defendant has “a close relationship with a signatory.”\(^{319}\) One way to satisfy the “close relationship” prong is to show that “the non-signatory party is ‘linked textually’ to the underlying contract.”\(^{320}\) Accordingly, drafters are trying to build “textual[]” bridges to a dizzying array of nonparties.\(^{321}\) For example, Citibank’s arbitration agreement covers “[c]laims made . . . against anyone connected with [Citibank].”\(^{322}\) Through Citibank’s rewards program and branded cards, the company partners with Amazon, Best Buy, ExxonMobil, The Home Depot, L.L. Bean, Jet Blue, Macy’s, Sears, Shell, and Virgin Atlantic.\(^{323}\) Thus, at least on paper, a single arbitration clause can span enormous sectors of the business world.

However, deferring to the contractual text would flout “the black letter rule that the obligation to arbitrate depends on consent.”\(^{324}\) Indeed, the basis for alternative estoppel is a contract “implied in fact”: the conclusion that two defendants are so entwined that by agreeing to arbitrate against the signatory, the plaintiff tacitly “extend[ed] its agreement to arbitrate to [the nonsignatory].”\(^{325}\) It would be a rank fiction to construe the act of opening a

---

\(^{317}\) Alternative estoppel, a variation of equitable estoppel, is the idea that a plaintiff must arbitrate any claim that either (i) relies heavily on the terms of the container contract, Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 528 (5th Cir. 2000), or (2) alleges that a nonsignatory and a signatory engaged in concerted wrongdoing, Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423, 1433 (M.D. Ala. 1997), abrogated by Davis v. S. Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002).

\(^{318}\) Nonsignatories also try to invoke arbitration clauses based on incorporation by reference, assumption, agency, alter ego, and third-party beneficiary principles. See In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005) (recognizing these as the “theories, arising out of common principles of contract and agency law, that may bind non-signatories to arbitration agreements”).


\(^{320}\) Temple v. Best Rate Holdings LLC, 360 F. Supp.3d 1289, 1310 (M.D. Fla. 2018) (quoting Choctaw Generation Ltd. P’ship v. Am. Home Assurance Co., 271 F.3d 403, 407 (2d Cir. 2001)). A “close relationship” also exists if the plaintiff “understood the extent of the non-signatory’s involvement with respect to the signatories’ relationship.” Id.

\(^{321}\) Id.


line of credit as agreeing to arbitrate against airlines, big box stores, online retailers, and oil companies.\(^{326}\)

This insight animates \textit{Wexler v. AT \& T Corp.}, one of the most interesting contemporary opinions dealing with infinite language.\(^{327}\) In 2008, Dr. Eve Wexler went online and signed up for wireless service with AT&T Mobility, LLC ("Mobility").\(^{328}\) Dr. Wexler’s contract included an arbitration clause that covered “all disputes and claims” that she might have with Mobility or its “affiliates.”\(^{329}\) In 2014, Dr. Wexler began to receive harassing calls and text messages from AT&T Corporation ("AT&T Corp.") related to the account of a stranger named Paul MacPherson.\(^{330}\) Dr. Wexler filed a class action suit against AT&T Corp. for violating the TCPA.\(^{331}\) AT&T Corp. asked a federal judge in New York to compel arbitration under Mobility’s contract because the plain meaning of “affiliate” is “[a] corporation that is related to another corporation by shareholdings or other means of control,” and both AT&T Corp. and Mobility “are wholly-owned subsidiaries of AT&T Inc.”\(^{332}\) The court denied the motion, reasoning that Dr. Wexler had not objectively manifested an intent to arbitrate with AT&T Corp.:

Notwithstanding the literal meaning of the clause’s language, no reasonable person would think that checking a box accepting the “terms and conditions” necessary to obtain cell phone service would obligate them to arbitrate literally every possible dispute he or she might have with the service provider, let alone all of the affiliates under AT&T Inc.’s corporate umbrella—including those who provide services unrelated to cell phone coverage.\(^{333}\)

\(^{326}\) See White, 189 F. Supp. 3d at 493 (rejecting a Citibank rewards partner’s attempt to invoke the “anyone connected with [Citibank]” language); Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 640 (Tex. 2018) (reasoning that alternative estoppel typically applies when there is at least “some corporate affiliation between a signatory and nonsignatory, not just a working relationship”). But see Moss v. BMO Harris Bank, N.A., 24 F. Supp. 3d 281, 289-91 (E.D.N.Y. 2014) (holding that banks that facilitated illegal payday loans were closely related to the lenders and thus could invoke alternative estoppel), \textit{motion for relief from judgment granted}, 114 F. Supp. 3d 61 (E.D.N.Y. 2015), \textit{aff'd sub nom.} Moss v. First Premier Bank, 835 F.3d 260 (2d Cir. 2016).

\(^{327}\) 211 F. Supp. 3d 500, 504 (E.D.N.Y. 2016).

\(^{328}\) Defendant AT&T Corp.’s Memorandum in Support of Its Motion to Compel Arbitration at 1-2, \textit{Wexler}, 211 F. Supp. 3d 500 (No. 15-0686), 2015 WL 5998751 [hereinafter AT&T’s Motion to Compel].

\(^{329}\) \textit{Id.} at 2.


\(^{331}\) \textit{Amended Complaint—Class Action, Wexler,} 211 F. Supp. 3d 500 (No. 15-0686), 2015 WL 1883842.

\(^{332}\) AT&T’s Motion to Compel, \textit{supra} note 328, at 8 & n.7 (quoting \textit{Affiliate}, \textit{BLACK’S LAW DICTIONARY} (9th ed. 2009)).

\(^{333}\) \textit{Wexler,} 211 F. Supp. 3d at 504.
The reasoning is spot-on. AT&T, Inc. is the parent of a staggering ninety-eight separate firms, from Ameritech to HBO to Yellowpages.com.\textsuperscript{334} Thus, AT&T Corp.’s theory that Mobility’s arbitration provision “includes all members of the AT&T corporate family”\textsuperscript{335} stretches “agreeing” to arbitrate past the breaking point.

Finally, survival provisions raise questions about the duration of the plaintiff’s consent to arbitrate. Even if the plaintiff sues for wrongdoing that occurred after the agreement expired, the existence of survivorship language has been dispositive.\textsuperscript{336} For example, in Townsend v. Pinnacle Entertainment, Inc., Kim Townsend entered into a two-year employment contract with Pinnacle, a casino, in April 2007.\textsuperscript{337} The contract included an arbitration clause that stated that it “shall survive the expiration of this Agreement.”\textsuperscript{338} After the contract lapsed in April 2009, Townsend continued to work for Pinnacle.\textsuperscript{339} In November 2009, Pinnacle dismissed Townsend, and she sued for wrongful termination.\textsuperscript{340} The Third Circuit sent her claim to arbitration, explaining that the survival provision “evidences the intent of the parties to arbitrate all disputes arising out of the employment relationship between Ms. Townsend and Pinnacle, not simply those which arise during the term of the 2007 Agreement.”\textsuperscript{341}


\textsuperscript{335} Wexler, 211 F. Supp. 3d at 504; accord Revitch v. DirecTV, LLC, No. 18-01127, 2018 WL 4030550, at *13 (N.D. Cal. Aug. 23, 2018) (rejecting DirecTV’s attempt to invoke Mobility’s arbitration clause as one of Mobility’s “affiliate[s]” because the parties “did not intend to enter into an agreement that would cover the claim asserted against DirecTV in this action”).

\textsuperscript{336} See Crooks v. Wells Fargo Bank, N.A., 312 F. Supp. 3d 932, 938 (S.D. Cal. 2018) (“[B]y its express terms, even if the Contract was terminated as a result of Plaintiff’s bankruptcy discharge, the arbitration provision survives.”); Wütanen v. Midland Funding LLC, No. 17-534, 2017 WL 7035757, at *3 (W.D. Mich. Oct. 26, 2017) (compelling arbitration of Fair Debt Collection Practices Act claim that allegedly arose after the termination of a credit agreement “because the arbitration provision contains an explicit survival clause”); Treinish v. BorrowersFirst, Inc., No. 17-1371, 2017 WL 3971854, at *1 (N.D. Ohio Sept. 8, 2017) (ordering arbitration of TCPA and state consumer protection claims “because the arbitration provision survives any alleged termination and compels Plaintiff to arbitrate”). However, the absence of an arbitration-specific survival provision does not always exempt a plaintiff’s post-expiration claims from arbitration. See Huffman v. Hilltop Cos., 747 F.3d 391, 398 (6th Cir. 2014) (compelling arbitration even though arbitration was not mentioned as a duty that survived the termination of the agreement). But see Stevens-Bratton v. TruGreen, Inc, 675 F. App’x 563, 570-71 (6th Cir. 2017) (relying in part on the absence of survival clause to hold that plaintiff’s TCPA claim based on post-expiration phone calls did not “arise under the contract”).

\textsuperscript{337} 457 F. App’x 205, 206 (3d Cir. 2012).

\textsuperscript{338} Id.

\textsuperscript{339} Id.

\textsuperscript{340} Id.

\textsuperscript{341} Id. Confusingly, courts sometimes rely on survivorship language even when the plaintiff’s claim arises out of a lapsed container contract. For example, in Milfort v. Comcast Cable Communications Management LLC, 309 F. Supp. 3d 1268, 1272-73 (S.D. Fla. 2018), the court
Despite this island of doctrinal calm, trouble lurks on the horizon. All of the decisions that have enforced survival provisions have involved wrongdoing that occurred shortly after the container contract ended. Townsend is pretty typical: Pinnacle fired Townsend just seven months after their formal employment contract expired.342 Arguably, Townsend should have expected that her arbitration commitment would have lasted that long. Nevertheless, now that survival provisions have become common, defendants will likely start trying to compel arbitration of claims that stem from conduct that takes place many years—perhaps even decades—after the conclusion of the container contract.

Allowing a single line of text in an adhesion contract to waive an individual’s right to access the courts forever would do violence to the tenet that arbitration is consensual. Indeed, the common law has long bent over backwards to deem seemingly-perpetual contracts to be terminable within a reasonable time.343 As the Mississippi Supreme Court explained in 1876, this approach helps square the language of the agreement with what the parties truly intended:

[C]ontracts . . . will not be enforced as imposing an eternal and never-ending burden. An agreement to furnish a support or service, or a particular commodity, at a specified price, or to do a certain thing without specification as to time, will be construed either as terminable at pleasure, or as implying that the thing to be done shall be performed within a reasonable time, and the obligation will cease within the same limitation. Any other theory than this would subject incautious persons—a class, it may be remarked, which includes the majority of mankind—into life-long servitudes . . . .

compelled arbitration of plaintiff’s allegations that the defendant illegally accessed his credit report when he signed up for cable service. The court held that it did not matter that the plaintiff had cancelled his account before he filed the lawsuit because “the Subscriber Agreement contains a survivability clause.” Id. However, the survival provision should have been irrelevant. Because the dispute involved “facts and occurrences that arose before expiration,” it arose under the container contract and should have been arbitrable even without a survivability clause. Litton Fin. Printing Div. v. N.L.R.B., 501 U.S. 190, 206 (1991); see also supra text accompanying notes 166–167.

342 Townsend, 457 F. App’x at 206.

343 See, e.g., Killearn Props., Inc. v. City of Tallahassee, 366 So. 2d 172, 182 (Fla. Dist. Ct. App. 1979) (holding that the contract “was for an indefinite period but not perpetual” and was “terminable within a reasonable time”); Rico Indus., Inc. v. TLC Grp., Inc., 6 N.E.3d 415, 420 (Ill. App. Ct. 2014) (“[P]erpetual contracts are contrary to public policy.”); Glacial Plains Coop. v. Chippewa Valley Ethanol Co., 912 N.W.2d 233, 237 (Minn. 2018) (“A contract of indefinite duration is terminable at will upon reasonable notice to the other party after a reasonable time has passed.”); MS Real Estate Holdings, LLC v. Donald P. Fox Family Tr., 864 N.W.2d 85, 92–93 (Wis. 2015) (“We are ‘reluctant to interpret a contract as providing for a perpetual contractual right unless the intention of the contracting parties to provide for the same is clearly stated.’” (quoting Capital Invs., Inc. v. Whitehall Packing Co., 280 N.W.2d 254 (Wis. 1979)));

344 Echols v. New Orleans, Jackson & Great N. R. R. Co., 52 Miss. 610, 614 (1876).
Although sophisticated parties in negotiated deals can override this presumption by using "clear and unequivocal terms," no authority suggests that fine print can generate this robust form of assent. And in any event, most arbitral survivorship provisions do not unambiguously purport to be perpetual. They state only that the obligation to arbitrate "survives" the container contract, not that it survives until the bitter end of the world. Thus, courts should conclude that forced arbitration clauses have an implicit shelf life.

2. Scope Challenges

As noted, in other disputes over infinite language, there is no doubt that the plaintiff entered into an operative agreement to arbitrate against all relevant parties, but it is unclear whether this agreement is broad enough to cover a specific claim. Counterintuitively, this Section argues that the primary check on corporate power in this sphere is the text of the FAA. Because infinite provisions often exceed the foundation laid by Congress, scope challenges are primarily governed by state law.

Section 2—the statute's centerpiece—contains an important limit:

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

As the italicized words reveal, the statute only governs agreements to arbitrate "controvers[ies] . . . arising out of [the container] contract." In turn, "to arise" has long been understood as "[t]o originate; to stem (from) . . . [or] [t]o result (from)." However, infinite arbitration clauses purport to cover

---


346 See supra text accompanying notes 186–187.

347 Cf. Ashbury Heights Capital, LLC v. FactSet Research Sys. Inc., No. 145806, 2016 WL 4368146, at *6 (Cal. Ct. App. Aug. 16, 2016) (holding that the defendant's argument that "the parties are perpetually bound to arbitrate any dispute" is "untenable and surely does not reflect the original intent of the parties").

348 See supra Section II.A.


350 Id.

351 Arise, BLACK'S LAW DICTIONARY (11th ed. 2019); see also Rouse v. Greyhound Rent-A-Car, Inc., 506 F.2d 410, 414 n.3 (5th Cir. 1975) ("The term 'arising out of' is ordinarily understood to mean originating from, incident to, or connected with the item in question."); Friedman, supra note 50, at 1037-39 (providing more detail about the distinction between “arising out of” and “relating to”).
allegations without regard to whether they flow from the container contract. Indeed, they attempt to suck into their maw all causes of action—no matter their source. Because § 2 requires that a claim “arise[s] out of” the container contract, it does not apply to the infinite portions of these clauses. I will refer to this as the “contractual nexus” theory.

Section 2’s requirement of a contractual nexus was a deliberate choice. The FAA was modeled on arbitration statutes that New York and New Jersey passed in the early 1920s. Section 2 of the FAA thus mirrored the corresponding provisions of these state laws with one striking exception. New York’s legislation validated agreements to arbitrate any cause of action “arising between the parties to the contract.” Conversely, policymakers in New Jersey established two rules: they made predispute arbitration clauses enforceable to cover lawsuits “arising out the contract,” but permitted parties to submit existing claims to arbitration for “the violation of any . . . obligation.” Thus, New York’s entire statute and New Jersey’s approach to post-dispute agreements allowed infinite clauses. Indeed, even if a complaint bore no relationship to the container contract, it nevertheless was a controversy “arising between the parties to the contract” and sought redress for “the violation of any . . . obligation.” However, Congress decided not to go down this route. Instead, it chose the narrowest of the three options by following New Jersey’s approach to predispute clauses and requiring that a claim “arise out of [the container] contract.”

The FAA’s drafting history also bolsters the contractual nexus theory. In January 1924, the Joint Committee of the Subcommittees on the Judiciary of the House and Senate debated a different version of § 2, which provided:

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

This version of the FAA would have governed arbitration agreements to arbitrate claims that arose not only from the container contract, but also from “any . . . transaction.” The word “transaction” is “broader than 'contact'”

356 Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 2 (1924) (emphasis added).
because it “is synonymous with ‘act,’ ‘action,’ ‘affair,’ ‘business,’ and the like.”357 As a result, a “[c]ontract is a transaction, but a transaction is not necessarily a contract.”358 Thus, if the January 1924 draft had passed, § 2 would have covered agreements to arbitrate claims that emerged from the sprawling universe of the parties’ relationship, rather than the narrower subject matter of the container contract.359 But Congress ultimately deleted the phrase “transaction involving commerce,” confining the FAA to agreements to arbitrate claims “arising . . . out of . . . a [container] contract.”360

There are two powerful counterarguments to the contractual nexus theory. First, there is tension between the theory and settled law. Although the Court has never grappled with the “arising out of” language in § 2, it has instructed lower courts to err on the side of sending disputes to the private forum.361 Thus, as noted, courts often hold that broad arbitration clauses cover lawsuits that merely “relate to,” rather than “aris[e] out of,” the container contract.362 “Relate to” encompasses slightly more territory than “aris[e] out of”: it means “to have bearing or concern; to pertain; refer; to bring into association with or connection with.”363 For example, violations of antitrust and workplace discrimination laws “relate to” but do not necessarily “aris[e] out of” the container contract. Each allegation hinges on conduct that is far removed from the agreement, such as a conspiracy to fix prices or a prejudiced employment decision. The fact that these claims are arbitrable although they only brush up against the terms of the deal seems to belie my thesis.

358 Id.
359 Eagled-eyed readers may note that the FAA validates agreements in “any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.” 9 U.S.C. § 2 (2018). Based on the italicized text, one might argue that the statute does, in fact, apply to arbitration clauses in “transaction[s]”—not just “contract[s].” However, the word “transaction” refers back to the earlier mention of “maritime transaction[s].” See Friedman, supra note 50, at 1041-44. Thus, § 2 ultimately insists that a claim “aris[e] out of” the container contract.
360 9 U.S.C. § 2. Congress likely removed the phrase “transaction involving commerce” because the January 1924 draft attempted to regulate “contracts that did not “involve [interstate] commerce,” which would have exceeded its authority under the Commerce Clause. See Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854, 856 (4th Cir. 1944) (“[I]t was realized that Congress had no power to legislate with respect to the validity of contracts generally but only as to the validity of those which related to matters subject to its control,” namely those contracts that “cover only maritime transactions and transactions involving interstate and foreign commerce.”).
361 See supra text accompanying notes 120–123.
362 See supra text accompanying notes 150–154.
363 Relate, BLACK’S LAW DICTIONARY (6th ed. 1990); see also Friedman, supra note 50, at 1037–40 (observing that the FAA uses the phrase “relating to” elsewhere “to essentially mean ‘having something to do with’”).
Second, one might justify glossing over the FAA’s text on the grounds that it prevents claim-splitting. Courts have long interpreted arbitration clauses expansively to minimize the burden on the parties. Where two claims share a common factual nucleus, rigidly following Congress’s blueprint could slice cases in half.\footnote{Miletic v. Holm & Wonsild, 294 F. Supp. 772, 776 (S.D.N.Y. 1968) (“Unless the claims are resolved by one tribunal, the parties will be put to the expense and duplication occasioned by arbitration of one claim before one tribunal and trial of the other in this Court.”). Similarly, even before the FAA, courts cited pragmatic concerns to construe submissions to arbitration broadly. See supra text accompanying notes 92–95.} Indeed, allegations that “arise out of” the container contract would be arbitrated, while those that merely “relate to” the agreement would proceed in the judicial system. Sending the entire dispute to arbitration avoids this inefficient result.

Nevertheless, it is one thing to blur the definition of words in a statute and another thing to ignore them entirely. There is a thin line between “aris[e] out of” and “relate to,” but there is a chasm between “aris[e] out of” and “unrelated to.” Accordingly, broad arbitration clauses have a plausible textual hook in § 2, whereas infinite provisions do not.\footnote{Admittedly, there is another way in which the contractual nexus theory does not map on neatly to settled law. Parties sometimes sign multiple contracts at the same time, only one of which contains an arbitration clause. Yet courts generally hold that the arbitration provision governs disputes related not just to the container contract, but to one of the non-container contracts. See, e.g., Woodville Enter., LLC v. Kokosing Materials, Inc., 94 N.E.3d 1053, 1057-58 (Ohio Ct. App. 2017) (finding that arbitration clause in one agreement also applied to other contracts involved in the dispute). However, this is not fatal to the contractual nexus theory. For one, under the common law, “[d]ocuments ‘pertaining to the same transaction may be read together,’ even if they are executed at different times and do not reference each other, and ‘courts may construe all the documents as if they were part of a single, unified instrument.’” In re Laibe Corp., 307 S.W.3d 314, 317 (Tex. 2010) (quoting Fort Worth Indep. Sch. Dist. v. City of Fort Worth, 22 S.W.3d 831, 840 (Tex. 2000)). Thus, there is no bright-line distinction between multiple related contracts. In addition, cases that apply the arbitration provision in one agreement to a claim related to a related agreement can be understood as a soft-focused view of the “contract” that a dispute must “aris[e] out of” under § 2. Just as courts have construed “aris[e] out of” to include “created to,” they have stretched “contract” to include several agreements that are intertwined in “one overall transaction.” Nestle Waters N. Am., Inc. v. Bollman, 305 F.3d 498, 503 (6th Cir. 2007).}

In addition, courts implicitly acknowledge that § 2’s authority diminishes as the gap between the lawsuit and the container contract widens. As noted, when judges apply the “touch matters” or “significant relationship” tests, they liberally invoke doctrines such as unconscionability, reasonable expectations, and contra proferentem.\footnote{See supra text accompanying notes 124–128.} The fact that state law plays an outsized role in this sphere suggests that the FAA’s power fades when a claim only “relates to” the agreement.

Finally, policy considerations cut both ways. Recognizing that infinite clauses exceed the scope of § 2 would not mean that they are unenforceable. Instead, it would empower state law to control the issue. Most jurisdictions have
copied New York’s trailblazing arbitration legislation and have passed statutes that validate predispute agreements to arbitrate “any controversy . . . between the parties.” Thus, even if § 2 of the FAA does not apply, state arbitration legislation can provide the infrastructure to enforce infinite language. Whether state courts and policymakers decide to honor infinite provisions or strike them down, the contractual nexus theory would allow them to speak in a field where their voices are often silenced.

To summarize, scope challenges fall into one of three tiers. First, some claims flow from the formation, interpretation, or performance of the container contract. These allegations trigger § 2 and are subject to the full force of the FAA. Second, other causes of action are indirectly connected to the parties’ agreement. Although Congress did not intend the FAA to govern these complaints, the Court’s muscular interpretation of the statute has extended it into this sphere. However, because the FAA applies only in diluted form when causes of action relate indirectly to the parties’ contract, it leaves room for courts to invoke contrary principles from state contract law.

See, e.g., 710 I.L.L. COMP. STAT. 5/1 (2020) (excluding certain health care disputes); KY. REV. STAT. ANN. § 417.050 (West 2019) (excluding employment agreements and certain insurance agreements). For the argument that Congress should amend the FAA to conform to these state laws, see Stephen J. Ware, Interstate Arbitration: Chapter 1 of the Federal Arbitration Act, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88, 104-105 (2006).
Third, still other lawsuits have no relationship with the parties’ contract. These are the disputes that infinite clauses purport to govern. But because these provisions exceed the metes and bounds of § 2, judges can ignore the constraints of federal law and freely deem them to be unconscionable, construe them against the drafter, or find that they exceed the boundaries of a consumer’s or employee’s reasonable expectations.

B. Delegation

The previous Sections also have important implications for delegation clauses. As noted, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the Court abolished the “wholly groundless” rule, reasoning that “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”

This sweeping statement appears to give drafters *carte blanche* to use infinite arbitration clauses and delegation provisions to funnel all questions of scope arbitrability to arbitrators. But this Section contends that *Henry Schein* is not as groundbreaking as it seems, because some arbitrability issues are inherently nondelegable.

The distinction between “agreement” and “scope” challenges is the key to understanding why *Henry Schein* only goes so far. *Henry Schein* involved a textbook scope challenge: Archer and White contended that an arbitration clause that exempted claims for injunctive relief did not govern an antitrust claim that sought an injunction. To see why Archer and White needed to arbitrate this question, recall that *Rent-A-Center* held that delegation clauses are arbitration clauses within arbitration clauses: contracts to arbitrate whether the parties agreed to arbitrate the merits of a complaint. Under this rubric, a plaintiff in a scope challenge (1) denies that she agreed to arbitrate a substantive claim, but (2) concedes that she agreed to arbitrate whether she agreed to arbitrate this claim. For example, even though Archer and White objected that it did not agree to arbitrate a lawsuit that sought injunctive relief, it did not try to persuade the Court that (1) it never manifested assent to the delegation clause, (2) *Henry Schein* lacked standing to enforce the delegation clause, or (3) the delegation clause had lapsed. Thus, because Archer and White did not attack the

---

368 139 S. Ct. 524, 528 (2019).
369 *Id.*
370 See supra text accompanying notes 263–273.
371 The fact that *Henry Schein* was not a signatory to the container contract had dropped out of the case before it reached the Court. *See supra* note 294. In addition, because the agreement only incorporated the AAA Rules and did not feature an explicit delegation clause, the Court “express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator.” *Henry Schein*, 139 S. Ct. at 531; see also *supra* note 293. On remand, the Fifth Circuit held that the parties did not “evinced [a] ‘clear and unmistakable’ intent to delegate arbitrability.” *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 282 (5th Cir. 2019). The court reasoned that the
delegation clause, Justice Kavanaugh enforced it, instructing lower courts to allow arbitrators to decide even frivolous scope challenges.372 Critically, however, Henry Schein does not address agreement challenges. Cases involving a challenge to the agreement to arbitrate are profoundly different than scope challenges. Recall that because arbitration arises from the parties’ consent, arbitrators cannot decide whether the parties agreed to arbitrate:

If an arbitrator must determine whether a valid arbitration agreement exists as to the parties before it, a conundrum arises: “[A]n arbitrator would be put in the position of deciding whether he was authorized to decide the parties’ dispute, concluding either that he was not authorized, a logical circularity, or that he was, and raising himself by his own bootstraps.”373

For this reason, the FAA “preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question.”374 And that is precisely what an agreement challenge to a delegation provision does.

Consider nonsignatory plaintiffs. Suppose an individual files a wrongful death action and the defendant responds by invoking a delegation clause in its contract with the decedent. Even after Henry Schein, a judge in a state that treats wrongful death claims as “independent” must disregard the delegation provision and decide for itself whether the plaintiff is bound under third party beneficiary principles. Unlike a scope challenge, where the plaintiff merely argues “I did not agree to arbitrate the merits of that claim,” a nonsignatory plaintiff contends “I did not agree to arbitrate anything (including whether I agreed to arbitrate the merits of a claim).” Thus, the court must retain jurisdiction to “assure itself that the non-signatory has agreed to arbitrate at all.”375

AAA Rules did not come into play because Archer and White requested an injunction, and arbitration agreement exempted “actions seeking injunctive relief.” Id. at 277; see also id. at 281 (“The plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes except those under the carve-out.”).

372 Henry Schein, 139 S. Ct. at 529-31.

373 Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 632 n.21 (Tex. 2018) (quoting In re Morgan Stanley & Co., Inc., 293 S.W.3d 182, 193 (Tex. 2009) (Hecht, J., dissenting)); cf. VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P., 717 F.3d 322, 326 n.2 (2d Cir. 2013) (opining that “whether the parties agreed to arbitrate in the first place is [a question] only a court can answer, since in the absence of any arbitration agreement at all, ‘questions of arbitrability’ could hardly have been clearly and unmistakably given over to an arbitrator”).

374 Rau, supra note 101, at 17 (emphasis omitted in part); see also supra text accompanying notes 101–102.

375 WTA Tour, Inc. v. Super Slam Ltd., 339 F. Supp. 3d 390, 399 n.7 (S.D.N.Y. 2018); see also Riley v. BMO Harris Bank, N.A., 61 F. Supp. 3d 92, 98 n.2 (D.D.C. 2014) (“[T]he court must still determine whether [p]laintiff is estopped from avoiding arbitration, even if the question of arbitrability must be submitted to the arbitrator per the language of the loan agreements.”). In fact, even courts in jurisdictions that refused to adopt the “wholly groundless” exception for matters of “pure scope” before Henry Schein nevertheless recognized that “delegation provision[s] can apply only to those parties who
Likewise, although the law is a tangled mess, the same principle should extend to nonsignatory defendants. Initially, the First and Second Circuits held that nonparties could enforce a delegation clause in another firm’s contract and ask the arbitrator to determine whether the nonparty was entitled to compel arbitration. But those cases featured nonsignatories who truly stood in the shoes of the original contracting party: a bankruptcy assignee and a clear-cut successor-in-interest. Outside of those unique circumstances, a delegation provision should not permit an arbitrator to decide whether plaintiffs must arbitrate against nonsignatories. For one, a plaintiff in such a case denies that she agreed to arbitrate any issue with the nonsignatory, including the threshold matter of whether she agreed to arbitrate her substantive claims. As a judge in the Southern District of New York recently put it:

To use the delegation clause to demand that arbitrators settle the question of who are the parties to the agreement puts the proverbial cart—the question of whether the arbitration agreement is valid—before the horse—whether a non-signatory has anything to do with a contract it did not clearly sign.

Moreover, allowing nonsignatory defendants to capitalize on delegation clauses would open the door to a surreal hall of mirrors. No matter how attenuated the connection between two entities, any party—from American Airlines to Zenith Electronics—could enforce a delegation clause in a different

---

378 See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 888 F. Supp. 2d 104, 106 (C.D. Cal. 2012) (refusing to allow the arbitrator to decide an equitable estoppel issue); Qpro Inc. v. RTD Quality Servs. USA, Inc., 761 F. Supp. 2d 492, 497 (S.D. Tex. 2011) (reasoning that “whether a nonsignatory to an arbitration clause may enforce it against a signatory . . . [i]s a matter for the court to decide”); First Am. Bulk Carrier Corp. v. Van Ommeren Shipping (USA) LLC, 540 F. Supp. 2d 483, 485 (S.D.N.Y. 2008) (holding that the arbitrator could not decide whether the nonsignatory defendant was a successor-in-interest to the signatory because “there is much to be said for determining who are the parties to the arbitration before the arbitrators hear the merits”); In re Paragon Offshore PLC, 588 B.R. 735, 733 (Bankr. D. Del. 2018) (“[E]ven where express contractual language exists to show an intent to arbitrate questions of arbitrability, the [c]ourt must consider whether the ‘parties’ at issue fall within the scope of the delegation language.”); Elgohary v. Herrera, 405 S.W.3d 785, 793 (Tex. Ct. App. 2013) (“[E]vidence of a successor, assigns, or affiliates clause in the contract between the signatories is not evidence that the non-signatory intended that an arbitrator decide whether the non-signatory was bound under the contract’s provisions about successors.”). But see Rainbow Cinemas, LLC v. Consol. Constr. Co. of Ala., 239 So. 3d 569, 577 (Ala. 2017) (allowing nonsignatories to enforce delegation clause); cf. Britannia-U Nigeria, Ltd. v. Chevron USA, Inc., 866 F.3d 709, 715 (5th Cir. 2017) (same).
party’s contract and have the arbitrator decide who belongs in the private forum. Thus, cases with nonsignatory defendants raise “question[s] of ‘relational sufficiency’” that are “for the [c]ourt, not the arbitrator, to resolve.

Finally, survival issues are also nondelegable. When a plaintiff argues that the container contract has expired, she calls into question whether her assent to arbitrate any matter whatsoever—both the merits and arbitrability—has likewise expired. Even when the underlying agreement includes both a survivorship provision and a delegation clause, an arbitrator cannot make this call. Indeed, survivorship is the kissing cousin of the nonarbitrable issue of whether a plaintiff manifested assent to the container contract. Just as only a judge can decide whether consent emerged from the ether, only a judge can decide whether it evaporated.

---

380 Cf. Dental Implants & Biomaterials S.L. v. Keystone Dental, Inc., No. 12-1158, 2012 WL 12896195, at *3 (D. Minn. July 3, 2012) (“A defendant could not, for example, institute arbitration against a company with whom it never had a contract at all and then insist that only an arbitrator could decide that there was no contract between the two parties.”).


382 See N.Y. Dialysis Servs., Inc. v. N.Y. State Nurses Ass’n, 262 F. Supp. 3d 96, 102 (S.D.N.Y. 2017) (“Whether the agreement to arbitrate has likewise expired is a pure question of the continued operation vel non of the contract itself (as opposed to the scope of the arbitration clause) and hence a question . . . left to the courts.”). A federal judge in Minnesota has correctly held that infinite language does not change this calculus because it cannot manufacture agreement where it otherwise does not exist. See Dental Implants & Biomaterials S.L., 2012 WL 12896195, at *3 n.3 (“The fact that the arbitration provision ‘survive[s] any termination or expiration’ of the agreement . . . does not mean that any dispute between the parties must for-evermore be arbitrated.” (citation omitted)).

383 Occasionally, a case features both a matter of “pure scope” and an “agreement challenge.” For example, in Tillman v. Hertz Corp., No. 16-4242, 2016 WL 5934094, at *1 (N.D. Ill. Oct. 11, 2016), Rico Tillman’s mother rented a car from Hertz on January 6, 2016 and listed Tillman’s phone number as her emergency contact. Tillman then rented vehicles from Hertz on January 18 and January 25, 2016. Id. Hertz’s customer agreement mandated arbitration for “any aspect of the relationship or communications between us” and also included a delegation provision. See Memorandum in Support of Defendant the Hertz Corporation’s Motion to Compel Arbitration and to Dismiss, or, in the Alternative, to Stay Pending Arbitration at 3, Tillman, 2016 WL 5934094 (No. 16-4242). Tillman’s mom failed to return her car on time, and Hertz made several automated phone calls to Tillman in February. Tillman, 2016 WL 5934094, at *1. When Tillman sued under the TCPA, Hertz sought to invoke the contracts he had signed in mid-January, which Hertz claimed contained an arbitration clause and delegation provision to which Tillman had agreed. A federal court in Illinois rejected this request:

The instant dispute arises not from the contractual relationship between plaintiff and defendant, but rather from the contract between plaintiff’s mother and defendant—a contract to which plaintiff was not a party. Therefore, even if plaintiff did enter into valid arbitration agreements when he rented cars from defendant, those arbitration agreements would not apply to a dispute regarding plaintiff’s mother’s rental car.

Id. at *2. Nestled within this reasoning are two separate conclusions: that (1) Tillman was not a party to the contract his mother had signed (an “agreement challenge”) and (2) that assuming Tillman had agreed to the arbitration clauses in the mid-January rental contracts, those arbitration agreements would not apply to a dispute regarding plaintiff’s mother’s rental car (a matter of “pure scope”). Under my thesis, the court would decide the first issue, leaving the second for the arbitrator.
Table 1: Delegation of Challenges to Arbitration

<table>
<thead>
<tr>
<th>Challenge</th>
<th>Nature of Assertion</th>
<th>Delegable?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scope</td>
<td>Plaintiff agreed to arbitrate arbitrability, but denies that she agreed to arbitrate a specific claim.</td>
<td>Yes</td>
</tr>
<tr>
<td>Nonsignatory Plaintiff</td>
<td>Plaintiff denies that she agreed to arbitrate <em>anything</em> (including arbitrability).</td>
<td>No</td>
</tr>
<tr>
<td>Nonsignatory Defendant</td>
<td>Plaintiff denies that she agreed to arbitrate <em>anything</em> (including arbitrability) <em>with this defendant</em>.</td>
<td>No</td>
</tr>
<tr>
<td>Survival</td>
<td>Plaintiff agreed to arbitrate arbitrability with this defendant, but argues that this agreement <em>expired</em>.</td>
<td>No</td>
</tr>
</tbody>
</table>

Therefore, despite *Henry Schein*’s categorical statements, courts retain jurisdiction over a wide variety of disputes over scope arbitrability. Even the one-two punch of the broadest possible delegation and arbitration provisions cannot pass the baton to the arbitrator to decide whether a plaintiff agreed to arbitrate a matter. Ultimately, contracts cannot validate themselves.

**CONCLUSION**

Until recently, an agreement to arbitrate “any claim or controversy arising out of or relating to” the container contract was “the very paradigm of a broad arbitration clause.” But now, through infinite provisions, consumers, employees, medical patients, and their relatives are supposedly assenting “to arbitrate all claims that could ever arise” against a defendant and its allies. Moreover, companies are trying to use infinite language in tandem with delegation clauses to almost completely opt out of the court system—a trend that will only accelerate after *Henry Schein*.

---

This Article has explained why many of these efforts should fail. First, infinite language is not enforceable when it tries to fabricate contractual consent. Second, § 2 of the FAA does not provide safe harbor for arbitration provisions that govern lawsuits that are disconnected from the parties' agreement. Third, delegation clauses cannot cover questions about whether arbitration clauses apply to nonsignatories or last forever. Recognizing these parameters will prevent private dispute resolution from becoming a black hole that swallows an ever-expanding swath of the civil justice system.