Arbitration, Consent and Contractual Theory: The Implications of EEOC v. Waffle House

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Arbitration, Consent and Contractual Theory: The Implications of
*EEOC v. Waffle House*

Jaime Dodge Byrnes & Elizabeth Pollman


Consent has long been the foundation of arbitration, giving the process legitimacy and informing decisions about its nature and structure. The Supreme Court has consistently required consent as a precondition for compelling arbitration. However, it remains unclear what actions constitute consent. In *First Options v. Kaplan*, the Supreme Court held that courts should apply state contract law to determine whether an arbitral clause exists, but “added an important qualification” that “[c]ourts should not assume that the parties have agreed to arbitrate unless there is clear and unmistakable evidence that they did so.”

In the wake of *First Options*, the courts of appeals have compelled arbitration by non-signatories, applying both state contract law and the pro-arbitration mandate of the Federal Arbitration Act (“FAA”). This trend of compelling arbitration by non-signatories is in tension with the traditional notion that arbitration should be based upon direct consent by the parties. The Supreme Court had historically refused to grant certiorari to resolve this conflict.

2. *Id.* at 944.
4. As will be discussed in Part II, *infra*, while a circuit split exists regarding particular contractual theories, every circuit has continued to compel some arbitration by non-signatories.
In its 2002 term, the Court accepted its first case, *EEOC v. Waffle House*, that directly addressed when a non-signatory may be required to arbitrate. The Court held that if a non-party has not consented to arbitration, it could not be compelled to arbitrate its claim. The holding reinforced *First Options* and clarified that its protections reach non-parties, which was consistent with the Court's tendency toward a strict construction of consent for determinations of arbitrability. Nonetheless, the Court's minimal attention to the issue in *Waffle House* may not have provided sufficient guidance to judges attempting to reconcile the federal pro-arbitration policy, the application of contractual theory, and the consent requirement. As a result, lower courts could conceivably continue to compel arbitration by relying on state contract law even in the absence of real consent, thereby contravening the most fundamental principle of arbitration.

Part I of this Note describes the facts, procedural history and holding of *Waffle House*. Part II then explores the current non-signatory jurisprudence through an examination of the five state law bases for compelling arbitration by a non-signatory. Part III assesses the relative merits of opposing arguments about whether *Waffle House* has or has not precluded these theories for requiring non-signatories to arbitrate. Part IV concludes that the court has limited, but not completely precluded, the expansion of binding arbitration to non-signatories.

I.

A. Facts and Procedural History

In August 1994, Eric Baker signed an employment application containing a mandatory arbitration agreement at a Waffle House restaurant in South Carolina. After Baker suffered a seizure at work approximately two weeks after starting employment, Waffle House fired him with a notice stating, "[w]e decided that for [Baker's] benefit and safety and Waffle House it would be best he not work any more." Baker did not initiate arbitration but instead filed a charge

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8. *Id.*
of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that his termination violated the Americans with Disabilities Act of 1990 ("ADA").

After an investigation and an unsuccessful conciliation effort, the EEOC filed an enforcement action pursuant to the ADA and the Civil Rights Act of 1991 against Waffle House in the Federal District Court of South Carolina. The EEOC alleged that Waffle House had engaged in an unlawful employment practice in violation of the ADA by terminating Baker because of his disability. The agency requested permanent injunctive relief and victim-specific relief, including compensation, reinstatement, and punitive damages. In response, Waffle House petitioned to compel arbitration under the FAA and to stay the litigation or, alternatively, to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The district court found that the arbitration clause was not binding because Baker had signed the employment agreement at a location different from where he worked and therefore denied the motions.

On appeal, the Fourth Circuit held that Baker's arbitration agreement with Waffle House did not preclude the EEOC from seeking injunctive relief, but did preclude the EEOC from pursuing victim-specific relief on Baker's behalf. Although the court recognized the EEOC was not a party to the agreement and that Title VII provides it independent statutory authority, it nevertheless determined that permitting the EEOC to prosecute the claim on Baker's behalf would undermine the "competing federal policy favoring the enforcement of arbitration agreements." To protect the FAA's goals, the

9. See id.
10. The EEOC's action was pursuant to section 107(a) of the ADA, 42 U.S.C. § 12117(a) (2003), and section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (2003). Baker was not a named party to the suit. Id.
11. See Waffle House, 193 F.3d at 807.
12. See id. at 807-08.
13. See id. at 808.
14. See id. The district court held that the arbitration agreement Baker had signed was not binding because Baker had submitted the application to a different Waffle House facility than the one that employed him. The court found that the Waffle House facility Baker went to work for had not hired him pursuant to the prior application. See EEOC v. Waffle House, Inc., No. CIV.A.3:96-2739-0, 1998 U.S. Dist. LEXIS 23245, at *6 (D. S.C. Mar. 20, 1998).
15. See Waffle House, 193 F.3d at 808-09. The Court of Appeals found the arbitration agreement binding; that Baker had not signed the employment application at the facility where he ultimately worked was "immaterial." Id. at 808. Baker had signed a "generic, corporation-wide employment application [that] followed Baker to whichever facility of Waffle House hired him." Id.
16. Id. at 812.
Fourth Circuit distinguished the interests represented when the EEOC seeks victim-specific relief, where the "EEOC's public interest is minimal," from when the agency seeks broad injunctive relief in the public interest.\textsuperscript{17}

B. Majority Opinion

The United States Supreme Court reversed by a 6-3 vote, rejecting the Fourth Circuit's decision to give effect to the FAA by compromising Title VII's authorization of the EEOC to seek victim-specific relief.\textsuperscript{18} Writing for the majority, Justice Stevens emphasized that the EEOC, as a non-party to the arbitration agreement, could not be compelled to arbitrate under the FAA absent consent.\textsuperscript{19}

1. Title VII Analysis

The Court examined the EEOC's authority as codified in Title VII and found that nothing in the statute suggests that a private arbitration agreement "materially changes the EEOC's statutory function or the remedies that are otherwise available."\textsuperscript{20} The Title VII amendments specify only the judicial districts in which Title VII actions may be brought without any reference to arbitration proceedings,\textsuperscript{21} and nothing in the 1991 amendments to Title VII, which expanded the relief under the Act to include compensatory and punitive damages for both private plaintiffs and the EEOC, suggests that a private arbitration agreement would change the EEOC's statutory function or the remedies available.\textsuperscript{22} "[T]hese statutes unambiguously authorize" the EEOC to seek victim-specific relief on Baker's behalf, as such relief was provided for in the amendments and there was no mention of arbitration as a limiting factor.\textsuperscript{23}

\textsuperscript{17} Waffle House, 193 F.3d at 812. The court agreed with "the balance struck" by the Second Circuit, citing EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 302-03 (2d Cir. 1998) (holding that an arbitration agreement between employee and employer precluded the EEOC from seeking monetary relief, but not injunctive relief, in federal court on behalf of the employee). See id. Circuits were split on this issue. See, e.g., EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) (holding that a private arbitration agreement does not preclude the EEOC from seeking monetary relief in federal court on behalf of an individual).


\textsuperscript{19} Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Id. at 281.

\textsuperscript{20} Id. at 288.

\textsuperscript{21} See id. at 286.


\textsuperscript{23} See id. at 287. The Court also noted two relevant cases decided prior to the 1991 amendments in which the Court recognized the difference between the EEOC's
2. FAA Analysis

Analyzing the history, purpose, and scope of the FAA, the Court concluded that the statute did not empower a court to compel arbitration of any issues or parties not covered by agreement.\(^\text{24}\) Citing the FAA purpose to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts,"\(^\text{25}\) including employment contracts,\(^\text{26}\) the Court noted that it has interpreted the FAA provisions as "manifest[ing] a 'liberal federal policy favoring arbitration agreements.'"\(^\text{27}\)

Nonetheless, the Court specified that when an agreement is unambiguous, the contractual language, not the policy goals of the FAA, defines the scope of disputes subject to arbitration.\(^\text{28}\) Though the FAA explicitly protects the enforceability of private arbitration agreements, it does not restrict a non-party's choice of a judicial forum nor does it address the enforceability of arbitration agreements on public agencies.\(^\text{29}\)

3. Rejection of Fourth Circuit's Decision

The Court held that although the Fourth Circuit correctly indicated the EEOC's non-party status and independent statutory authority, it erred both in distinguishing between remedies furthering public and private interests and in giving effect to the FAA rather

\(^{24}\) Id. First, in Occidental Life Insurance Co. of California v. EEOC, 432 U.S. 355 (1977), the Court held that state statutes of limitations did not bar the EEOC from seeking relief on behalf of an individual. Second, in General Telephone Co. of Northwest v. EEOC, the Court stated that "the EEOC is not merely a proxy for the victims of discrimination," 446 U.S. 318, 326 (1980), holding that Rule 23 of the Federal Rules of Civil Procedure did not bind the EEOC as it would bind a private Title VII class action litigant.

\(^{25}\) Id. (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

\(^{26}\) See Waffle House, 534 U.S. at 289 (quoting Mastrobuono, 514 U.S. at 57).

\(^{27}\) Id. (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The FAA provisions interpreted by the Court include the Act's mandate to federal courts to construe arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2 (2003). Additionally, the FAA authorizes courts to stay proceedings when an issue arises that is referable to arbitration and to order parties to comply with their contracted arbitration agreements. See 9 U.S.C. §§ 3-4 (2003). The Court also cited its recent decision in Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), holding that employment contracts, except for transportation workers, are covered by the FAA. See Waffle House, 534 U.S. at 289.

\(^{28}\) Id. (quoting Mastrobuono, 514 U.S. at 57).

\(^{29}\) See Waffle House, 534 U.S. at 289.
than analyzing the text of the statutes or arbitration agreement. The Court noted that because the EEOC only pursues a small number of claims from a field of thousands of potential suits, the impact of permitting the EEOC access to victim-specific relief would be minimal. In pursuing victim-specific relief, the agency may be seeking to serve a public interest. Furthermore, Congress authorized the EEOC to be "master of its own case" and nothing in the text of Title VII prevented the EEOC from determining the sort of relief it chose to pursue.

Moreover, the Court characterized the Fourth Circuit's policy-balancing approach as "inconsistent" with recent arbitration cases that required courts to determine the scope of the agreement by first addressing whether the parties agreed to arbitrate rather than by considering policy goals favoring arbitration. The Court emphasized that while it endorses interpreting ambiguities in favor of arbitration, the plain text of an unambiguous agreement must be enforced to give effect to the clear intent of the parties. The EEOC was undisputedly a non-party to the agreement between Baker and Waffle House, and "[i]t goes without saying that a contract cannot bind a non-party." The Court concluded that "[t]he proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."

30. See id. at 290 n.7. The Court pointed to statistics on the EEOC's website that the agency filed less than two percent of all anti-discrimination claims in federal court in 2000. See Waffle House, 534 U.S. at 290 n.7 (citing Equal Employment Opportunity Commission, Enforcement Statistics and Litigation, available at http://www.eeoc.gov/stats/enforcement.html (last visited Mar. 18, 2003)). The Court reasoned that the small number of suits filed by the EEOC in federal court indicates that the federal policy favoring arbitration will not be undermined by the EEOC's authority to seek victim-specific relief. See id.

31. See id. at 290 n.7.

32. See id. at 291. The Court pointed to the EEOC's enforcement scheme created by Congress under Title VII in support of its determination that the EEOC is in command of the prosecution process rather than an individual employee. See Waffle House, 534 U.S. at 290. Once an employee files a claim with the EEOC, the agency has exclusive jurisdiction over the claim for 180 days. See 42 U.S.C. § 2000e-5(f)(1) (1994). During this period, the EEOC investigates the claim and determines whether there is "reasonable cause" to believe the alleged discrimination occurred. See 42 U.S.C. § 2000e-5(b) (1994). If the EEOC finds "reasonable cause," it then attempts to conciliate with the employer before bringing an action against the employer in court. See id. If the EEOC files suit, the employee may intervene, 42 U.S.C. § 2000e-5(f)(1) (1994), but has no independent cause of action. See Waffle House, 534 U.S. at 291.


34. Waffle House, 534 U.S. at 294.

35. Id.
The Court then added that even if the policy goals of the FAA supported limiting the EEOC's statutory authority, the Fourth Circuit's distinction between injunctive and victim-specific relief nevertheless created "an uncomfortable fit with its avowed purpose of preserving the EEOC's public function while favoring arbitration."36 The Court characterized the Fourth Circuit's victim-specific distinction as "both over-inclusive and under-inclusive,"37 explaining that injunctive relief may address the employee's injury more than any public interest, and conversely that the EEOC may seek to vindicate a public interest when pursuing victim-specific relief.38

4. EEOC's Claim Is Not Derivative

Finally, the majority addressed Waffle House's argument that employee action might limit the relief the EEOC could obtain in court. Because Baker had not arbitrated his claim or entered into settlement negotiations, the court noted that whether a settlement or arbitration judgment would affect the EEOC's claims or available remedies was not presented by this case and remains "an open question."39 Though an employee's conduct may affect the EEOC's recovery, this does not make the EEOC's claim "merely derivative."40 Pointing to prior decisions, the Court concluded that while "ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims," the agency is not thereby rendered "a proxy for the employee."41

C. Dissent

Writing for the dissent, Justice Thomas argued that the Court should have reconciled the EEOC's statutory authority to enforce the ADA with the policy goals of the FAA.42 He criticized the Court's decision to allow the EEOC to do "on behalf of an employee that which an employee has agreed not to do for himself."43

36. Id.
37. Waffle House, 534 U.S. at 294.
38. See id. at 294-95.
39. Id. at 297.
40. Waffle House, 534 U.S. at 297.
41. Id. at 298.
42. See id. at 312-13 (Thomas, J., dissenting). Justice Thomas was joined by Chief Justice Rehnquist and Justice Scalia. Id. at 298.
43. Waffle House, 534 U.S. at 298 (Thomas, J., dissenting).
In contrast to the majority's conclusion that Title VII grants the EEOC the right to determine the remedies it pursues, he interpreted that statute to confer on courts, rather than the EEOC, the role of deciding what is an "appropriate" remedy in a particular case. Here, victim-specific relief was not "appropriate" because Baker's conduct had limited the EEOC's ability to obtain relief on his behalf and because the FAA compels a court to give effect to arbitration agreements. Justice Thomas stated that the majority had incorrectly framed the issue by focusing on the EEOC's authority rather than on giving effect to the FAA, thereby "allow[ing] the EEOC to reduce that arbitration agreement to all but a nullity." He further contended that the Court's decision will discourage employers from using arbitration agreements because employers may face the prospect of defending claims in both judicial and arbitral forums.

As a final point, Justice Thomas raised potential problems for the Court in deciding future cases consistently with this opinion. If in a subsequent case the Court were to decide that an employee's unfavorable arbitral judgment affects the remedies available to the EEOC in court, it would face the "impossible task" of reconciling the FAA with the result or "mak[ing] a mockery of the Court's holding here: that the EEOC is 'the master of its own case.'"

II.

Although the Court in Waffle House reached an appropriate conclusion in light of existing arbitration law, the Court did not enunciate its ruling with sufficient clarity to resolve whether state

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44. See id. at 301-02 (Thomas, J., dissenting).
45. Id. at 301-02 (Thomas, J., dissenting). Justice Thomas cited language in 42 § 2000e-5(g)(1) to support this assertion. See Waffle House, 534 U.S. at 301. The majority refuted this reading by clarifying that the term "appropriate" refers only to a subcategory of equitable relief claims rather than damages. See id. at 292-93. The Court stated that the terms the dissent pulled out of the statute were "not the natural reading of the text" which "obviously refer[s] to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case." Id.
46. Id. at 304-05 (Thomas, J., dissenting). Justice Thomas listed the following situations to illustrate this point: when an employee waives or settles his claim, fails to mitigate his damages, or fails on the merits of his private suit. See Waffle House, 534 U.S. at 304-05.
47. See id. at 308-09 (Thomas, J., dissenting).
48. Id. at 309 (Thomas, J., dissenting).
49. See Waffle House, 534 U.S. at 309 (Thomas, J., dissenting).
50. Id. at 310 (Thomas, J., dissenting).
contractual theories could require a non-signatory to arbitrate without its consent. Not only does the Court not decisively decide the issue, but the brevity of the Court's analysis and reasoning perpetuates the existing ambiguity. The Court claimed that "no one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims," thereby implicitly suggesting that Waffle House failed to mention any theories that could bind the non-signatory EEOC. In fact, the parties' briefs did specifically raise two contractual theories, agency and estoppel, in order to argue that the EEOC was a party to the contract despite being a non-signatory. The Court's statement seems to indicate that the agency and estoppel theories, even if proven, would not be a valid basis for finding consent to bind a non-party to arbitrate. On the one hand, it seems incongruous that the Court would strike down the use of contractual theories to compel non-signatories to arbitrate in such an indirect way and with such inconsequential language. On the other hand, if the Court was willing to accept the use of agency, estoppel, or other contractual theories to bind a non-signatory, it is unclear why the Court would state that no such arguments were made despite their explicit advancement in the briefs.

A. Summary of Background Law

Like one-party and two-party methods of dispute resolution, arbitration pre-dates the formation of government-based adjudication. After centuries of subordination to adjudication, arbitration reemerged in the late seventeenth century. The legitimacy of arbitration in its reconstituted form was derived from the adjudicatory authority of the state, whose power was derived, in turn, from a social compact. Arbitration has returned to its origins as a process that derives its authority directly from the consent of the parties such that

51. Id. at 294.
52. One-party dispute resolution mechanisms are unilateral solutions based on the superior power of one party that has the power to force the other side to accept its resolution.
53. Negotiation is the most common two-party mechanism, so named for the requirement that both sides work together to find an agreeable solution. Some two-party, third-party hybrids, like mediation, have also regained popularity in recent years.
any arbitration that occurs outside without such consent is illegitimate and invalid.\textsuperscript{55} Consent has thereby reemerged as the foundational notion upon which the entire arbitration regime is built: "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."\textsuperscript{56}

In deciding whether a party has submitted a particular dispute to arbitration, state contract law applies.\textsuperscript{57} The question is therefore what actions are sufficient indicia of consent, since the federal policy in favor of arbitration does not apply until the jurisdiction of the tribunal has been established.\textsuperscript{58} Although agreements to arbitrate "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract,"\textsuperscript{59} many lower courts have concluded that "[i]t does not follow . . . that under the Federal Arbitration Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision."\textsuperscript{60} Courts have converged on five contractual theories that may be applied to require arbitration by non-signatories or, conversely, to allow non-signatories to intervene in or compel arbitration: incorporation by

\textsuperscript{55} While arbitration still relies upon the state for post-award enforcement, as well as assistance where required in tribunal formation and discovery, arbitration is generally conceived of as an extra-judicial process aligned with no state. This conception, in turn, reinforces the minimal role of the courts in arbitrated disputes. See, e.g., In re Application of Technostroyexport, 853 F.Supp. 695 (S.D.N.Y. 1994) (allowing discovery only when requested by the tribunal itself, not the parties). This creates a positive feedback loop in which arbitration becomes an even more clearly extra-judicial process.

\textsuperscript{56} United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); see also Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (finding that the FAA "does not require parties to arbitrate when they have not agreed to do so."). However, courts will read an ambiguous choice-of-law provision to favor arbitration. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).


\textsuperscript{58} See id. at 944-45.

\textsuperscript{59} Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995).

\textsuperscript{60} Id. Virtually every circuit has recognized this principle, to some extent. See Hilti, Inc. v. Oldach, 392 F.2d 368, 369 n.2 (1st Cir. 1968); Interocer Shipping Co. v. Nat'l Shipping & Training Corp., 523 F.2d 527, 539 (2d Cir. 1975); Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 938 (3d Cir. 1985); Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 978 (4th Cir. 1985); Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1074 (5th Cir. 2002) (applying Texas state law); Javitch v. First Union Sec., Inc., 315 F.3d. 619, 629 (6th Cir. 2003); In re Oil Spill by Amoco Cadiz, 659 F.2d 789, 795-96 (7th Cir. 1981); Letizia v. Prudential Bache Sec., Inc., 802 F.2d 1185, 1187-88 (9th Cir. 1986); Gibson v. Wal-Mart Stores Inc., 181 F.3d 1163, 1170 n.3 (10th Cir. 1999); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 786-57 (11th Cir. 1993).
reference, assumption, agency, veil-piercing, and estoppel. Predictably, courts facing motions to compel divide not only over arbitral law, but also over differences in and implications of state contract law.

B. Incorporation by Reference

Incorporation by reference allows parties to incorporate the terms of an earlier agreement, which may or may not be between the same parties, without a redundant recitation of the terms, for example, where subcontractors are being bound to the contract between the owner and contractor, or where parties are renewing an earlier contract. While this is an accepted practice in contract law, some parties have challenged incorporation of an embedded arbitration clause.

The First, Second, Fourth, and Sixth Circuits have held that an arbitration clause may be incorporated by reference, even where the incorporated contract merely adopted the arbitration clause.

61. See Thompson-CSF, 63 F.3d at 776 (summarizing its acceptance of “five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.”); see also Randy J. Sutton, Annotation, Enforcement of Arbitration Agreement Contained in Construction Contract By or Against Nonsignatory, 100 A.L.R. 5th 481 (2002) (discussing third-party beneficiary, agency and employment, equitable estoppel, statutory construction, and procedural reasons for compelling arbitration by nonsignatories).

62. See Commercial Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386, 388-89 (1st Cir. 1993) (holding that a chain may be established whereby each contract adopts by incorporation an arbitration clause expressly stated or incorporated into the incorporated contract’s terms); J & S Const. Co. v. Travelers Indem. Co., 520 F.2d 809, 810 (1st Cir. 1975) (allowing third-party surety to compel arbitration where the arbitration clause of a construction contract was incorporated by reference in its contract with the general contractor).

63. See Thyssen, Inc. v. Calypso Shipping Co., 310 F.3d 102, 107-08 (2d Cir. 2002) (holding that parties are bound to arbitrate where a bill of lading incorporates an arbitration clause of another contract by reference).

64. See Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd., New York Branch, 210 F.3d 262, 266-67 (4th Cir. 2000) (holding that terms of arbitration clause were incorporated by reference in a subsequent contract with the third party, thereby binding all parties to arbitrate disputes arising out of and related to construction agreement); Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 978-79 (4th Cir. 1985) (holding an arbitration provision was incorporated by reference into a subcontract), appeal after remand 817 F.2d 1086, 1087-88 (4th Cir. 1987) (noting a circuit split as to whether federal courts may order consolidation of arbitration proceedings without consent by the parties, but holding that the terms of the contracts evinced an intent to consolidate and therefore ordering a consolidation of the arbitration proceedings).

clause by reference to an even earlier contract. In addition, international arbitral tribunals have readily recognized the validity of incorporation by reference,\(^6\) since it meets the strict written requirement of the New York Convention.\(^7\)

In contrast, the Eighth Circuit has adopted an opposite approach, rejecting incorporation by reference, in whole or in part, as a basis for compelling arbitration against non-signatories.\(^8\) This outcome is consistent with the view that incorporation by reference may not serve the cautionary function of formality,\(^9\) given that the parties may be unaware of the embedded arbitration clause, and may intend to refer merely to the substantive obligations of the earlier contract.\(^10\) This concern is especially pertinent given that the separability doctrine recognizes the initial contract and the later contract as two separate contracts.\(^11\) Separability suggests that courts should not impose on the parties any obligations they did not clearly intend to assume, in light of the requirement that the existence of arbitration clauses be strictly construed.

\(^{66}\) See, e.g., United Nations Comm’n on Int’l Trade, Model Law on Int’l Commercial Arbitration of 1985, Art. 7(2), available at http://www.uncitral.org/english/texts/arbitration/ml-arb/htm (last visited Mar. 5, 2003) (“The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”).


\(^{69}\) For a discussion of the roles of formality, see Arthur T. von Mehren, Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis, 72 HARv. L. Rev. 1009, 1015-17 (1959).

\(^{70}\) See, e.g., AgGrow Oils, 242 F.3d at 781 (explaining that “an incorporation clause is effective only when the provision to which reference is made has a reasonably clear and ascertainable meaning.”) (internal citations omitted) (quoting JS&H Constr. Co. v. Richmond County Hosp. Auth., 473 F.2d 212, 215 (5th Cir. 1973)).

C. Veil Piercing

Veil piercing\(^{72}\) is distinguishable from other methods of compelling arbitration in that it focuses not on a non-signatory's actions, but instead on the nature of the relationship between the non-signatory and a party. It is the only theory that binds a non-signatory to arbitrate despite the possibility that the non-signatory is unaware of the agreement and did not participate in its formation. There is some disparity between circuits in the application of veil piercing to arbitration agreements. However, these differences often reflect distinctive features of the underlying state contract law, rather than a true disagreement between the circuits.\(^{73}\) Indeed, the courts of appeals that have addressed the issue uniformly accept the general principle that a court may pierce the corporate veil for liability purposes when the two entities are significantly intertwined because one may presume that the parent entity had the power to influence the arbitration clause.\(^{74}\)

D. Agency

Circuits are widely divided on the proper application of agency theory\(^{75}\) to arbitration clauses.\(^{76}\) The Third Circuit has concluded that agents of a signatory may be bound, along with its employees

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72. Veil piercing is a term drawn from corporate law, describing where a corporation and another entity, whether a living person or corporation, can be held liable as one transactional unit. The elements of veil piercing are typically characterized by a lack of separateness or commingling and unfair or inequitable conduct.


74. See Beiser v. Weyler, 284 F.3d 665 (5th Cir. 2002); E.I. DuPont de Nemours and Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d. 187 (3d Cir. 2001); Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration Int'l, 198 F.3d 88 (2d Cir. 1999); Freeman v. Complex Computing Co., 119 F.3d 1044 (2d Cir. 1999); Nordell Intern. Res. Ltd. v. Triton Oil, 97 F.3d 1460 (9th Cir. 1996); United Intern. Holdings, Inc. v. Wharf (Holdings) Ltd., 76 F.3d 393 (10th Cir. 1996); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995); ARW Exploration Corp. v. Aguirre, 45 F.3d 1455 (10th Cir. 1995); Fisser v. Int'l Bank, 282 F.2d 231 (2d Cir. 1960).

75. An agency relationship is a "fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1958). Liability to a third party may accrue to the principal where the agent had real or apparent authority, or "the agent had a power arising from the agency relation and not dependent upon authority or apparent authority."
and representatives. In contrast, the First, Fifth, and Ninth Circuits have held that an agent or employee of a party is not privileged to enforce an arbitration clause, unless the parties specifically intended for the clause to reach to these non-signatories.

Courts have often looked to whether the principal is disclosed or undisclosed, generally finding that where the principal is disclosed, signing the arbitration agreement is insufficient to bind the agent. Where the principle is undisclosed, courts may follow the lead of international arbitration and bind the agent to the clause. However, the Fourth Circuit has suggested that where a party signs an arbitration agreement with an agent, either the agent or the principal may compel arbitration, even where the existence of a principal is not disclosed.

Id. at § 140. However, even where a principal is not subject to liability under principles of agency, there may be a basis in estoppel, restitution or negotiability for finding liability. See id. at § 141.

Where an agency relationship is disclosed or partially disclosed, the principal is deemed to be the party if his name appears as such within the contract, and there is no indication within the contract to the contrary. See id. at § 155. However, where the principal is undisclosed, agency law does not provide a decisive rule: “An undisclosed principal may be liable upon a simple contract in writing, although it purports to be the contract of the agent.” Restatement (Second) of Agency § 190 (1958).


77. See Pritzker, 7 F.3d 1110.

78. See McCarthy, 22 F.3d at 356.

79. See Westmoreland, 299 F.3d at 465.

80. See Britton, 4 F.3d at 749.


82. See Habitat Architectural Group, P.A. v. Capitol Lodging Corp., 28 Fed. Appx. 242, 245-46 (4th Cir. 2002) (holding signatory plaintiff is compelled to arbitrate claims against the undisclosed principal because ambiguity is construed against the drafter, the state has a strong public policy in favor of arbitration, and state contract law finds that either the principal or agent may sue where an undisclosed agency relationship exists).
E. Assumption

Assumption is a corollary to a party's submission to a court's jurisdiction in adjudication. A party may be bound by its indication of a willingness to participate in arbitration such that it is precluded from subsequently challenging the jurisdiction of the arbitrators. For example, the Second Circuit has ordered parties to arbitrate where they send a representative to participate in the arbitration. However, there is a risk that parties are not aware of which step in the arbitral process signifies consent.

The decision to recognize assumption turns on the court's conception of the purposes of contract. On the one hand, allowing assumption may permit a party to slip unknowingly and unintentionally into a purported agreement to arbitrate despite the absence of a meeting of the minds. On the other hand, refusing to recognize assumption makes parties susceptible to relying on an opposing party's bad faith indication of willingness to participate in arbitration. While most courts have interpreted the pro-arbitration policy of the FAA as indicating that courts should attempt to construe arbitration agreements liberally to bring the maximum number of parties into arbitration, this policy does not hold drafters accountable for meeting a sufficient level of diligence in drafting arbitration clauses.

F. Estoppel

Estoppel claims in contract differ in a nuanced way from estoppel in the context of compelling arbitration. Some courts have not distinguished between estoppel and assumption, preferring to subsume

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83. See Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1105 (2d Cir. 1991) (providing a clear example of the assumption principle).
84. See id.
85. For example, there is a question of whether merely interviewing arbitrators is sufficient, or whether one must select an arbitrator and arrive for at least the first day of testimony.
86. Clearly the easiest route for practitioners ex ante is to memorialize the intent to arbitrate at the time it is manifested by both parties, rather than attempting to prove intent ex post. Nevertheless, these claims remain common in the courts, perhaps because of a concern by practitioners that raising the issue of creating a written arbitration agreement will chill willingness to explore arbitration or be interpreted as mistrust by the opposing counsel. Ironically, it is those cases in which one party would not have been willing to become contractually obligated to arbitrate that are the most problematic for the requirement of consent.
87. See Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524, 531 (5th Cir. 2000) (Dennis, J., dissenting). In disagreeing with the use of estoppel in establishing an arbitration agreement, Judge Dennis stated:

'Nearly anything can be called estoppel. When a lawyer or a judge does not know what other name to give for his decision to decide a case in a certain
both within a broader definition of estoppel. Those courts that distinguish between these two bases for compelling non-signatory arbitration have used estoppel for situations in which a party to a lawsuit must rely on the existence of a contract in order to prove its claim. The litigants are thereby precluded from alleging that they are not parties to the contract and its arbitration clause. The estoppel argument is most often raised where the non-signatory plaintiff relies on the existence of a contract that contains an arbitration clause in order to prove its claim against a signatory. However, this has also been applied in the less common situation of a signatory relying on a contract containing an arbitration clause to assert claims against a non-signatory.88

The Eleventh Circuit has held that a non-signatory can compel arbitration where the signatory's claims rely on the existence of the contract containing the arbitration clause. It has also held that where a signatory is raising claims against both a fellow signatory and a non-party, the non-signatory may compel arbitration where the claims are "substantially interdependent."89 The Fourth Circuit has applied a similar test holding that "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."90

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88. See, e.g., Hughes Masonry Co., Inc. v. Greater Clark County, 659 F.2d 836 (7th Cir. 1981) (holding that a signatory was obligated to arbitrate where its claimed breach of contract by a party it alleged was a non-signatory, as these two positions were found to be logically inconsistent by the court).

89. MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999). This test has also been adopted by the Fifth Circuit. See Grigson, 210 F.3d at 527.

90. J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1993). J.J. Ryan is further indicative of the indistinguishable line in some circuits between veil piercing and the more general category of equitable estoppel, discussed supra in Part II.C. See id.
III.

Even after the Supreme Court’s decision in *Waffle House*, the state of the law regarding compelling non-signatories to arbitrate remains ambiguous because of the continued presence of persuasive arguments on both sides of the issue.

A. The Case for Binding Non-Signatories

There are two primary reasons why lower federal courts still might continue compelling arbitration based on non-signatory theories after *Waffle House*. First, the Supreme Court did not directly overrule this pervasive practice.91 While the Court explicitly stated that “[i]t goes without saying that a contract cannot bind a non-party,”92 the Court says nothing more on the matter. It seems unlikely that the Court would overrule such an established precedent with only a few sentences that do not specifically reference any of the extensive non-signatory case law. Moreover, though the Court need not expressly state its intention to overrule this case law, it would probably not do so without referring to the practice or without even mentioning the term “non-signatory.”

A second argument that non-signatories may still be bound to arbitrate is that the Court may have intended for *Waffle House* to have a narrow holding, applicable only to cases involving a relationship between a federal agency and arbitration. For instance, after characterizing the effects of settlement on a similar claim as “an open question,” the Court reiterated: “The only issue before this Court is whether the fact that Baker has signed a mandatory arbitration agreement limits the remedies available to the EEOC.”93 It is significant that the Court framed the issue as whether a specific agency,

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91. In light of the Supreme Court’s failure in the Waffle House opinion to explicitly overrule the practice of compelling non-signatories to arbitrate claims, courts have distinguished the holding and continued to consider non-signatory theories. For example, in a recent First Circuit case, *Medical Air Tech. Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 (2002) the court cited *Waffle House* for the general rule that “a contract cannot bind a non-party” but stated there are exceptions to the rule, such as the estoppel theory. In another case, *Gambardella v. Pentec, Inc.*, 218 F. Supp. 2d 237, 242 (D. Conn. 2002), the court distinguished *Waffle House* as addressing only situations in which non-signatories are compelled to arbitrate and not cases where the non-signatory is compelling a party to arbitrate. The *Gambardella* court cited *Choctaw Generation Ltd. P’ship v. American Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001) as noting the distinction between these situations and concluded that Waffle House “does not alter this analysis.” *Gambardella*, 218 F. Supp. 2d at 242.
93. *Id.* at 297.
the EEOC, was limited in possible remedies and not whether the class of non-parties more generally could be compelled to arbitrate.

A structural analysis of the Waffle House opinion also supports the hypothesis. The Court divided its opinion into five sections, none of which explicitly focus on the non-signatory issue and most of which are devoted to describing the operation of the EEOC and its statutory authority. Notably, the Court did not begin with an analysis of whether the EEOC could be compelled to arbitrate, but rather examined Title VII as the source of the EEOC’s enforcement authority. Even when the Court considered whether the EEOC’s claim was derivative, the analysis was grounded in the EEOC’s unique status given its statutorily proscribed function and available remedies. By describing the EEOC’s role as a non-party “in command of the process” and as “the master of its own case,” but failing to address the non-signatory issue directly, the Court distinguished the EEOC from private litigants. Under this narrow interpretation, arguing that the Waffle House holding precludes courts from applying contractual theories to all non-signatories would require a tenuously broad reading.

B. Arguing Against Binding Non-Parties

In the wake of Waffle House, counsel and courts alike have a strong basis for arguing that a non-party cannot be compelled to

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94. The first section is devoted to the facts and procedural history, the second analyzes Title VII and the function of the EEOC, the third focuses on the FAA and subsequent court interpretations thereof, the fourth reviews the Fourth Circuit’s decision, and the fifth addresses the “open question” of whether settlement or other action by the employee would affect the outcome. See Waffle House, 534 U.S. at 279.

95. See id. at 288. In its examination of cases prior to the 1991 amendments to Title VII, the Court pointed to its recognition in these cases of the difference between the EEOC’s role as an enforcement agency and the individual employee’s cause of action. See id. While this suggests the Court recognized the EEOC’s claim was non-derivative, the Court finished this line of analysis with a conclusion harkening back to its focus on remedies: “There is no language in the statute or in either of these cases suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC’s statutory function or the remedies that are otherwise available.” Id.

96. Waffle House, 534 U.S. at 291.

97. For example, the Court states “If it were true that the EEOC could prosecute its claim only with Baker’s consent, or if its prayer for relief could be dictated by Baker, the court’s analysis might be persuasive. But once a charge is filed, the exact opposite is true under the statute—the EEOC is in command of the process.” Waffle House, 534 U.S. at 291.

98. The term non-signatory as used in this discussion is exclusive of parties merely standing in place of the signatory, through a derivative claim, since it is well-established that a party may not pass to another a claim stronger than that which he
arbitrate in the absence of consent. The Court expressly declared that “[a]rbitration under the [FAA] is a matter of consent, not coercion . . . . It goes without saying that a contract cannot bind a non-party.”99 Even though it is unusual that the Court did not include further discussion or analysis, the statement is clear on its face. This recognition is further buttressed by an understanding of the context in which the Court made the statement as it demonstrates a concerted intention to reign in the lower courts’ willingness to compel non-signatory arbitration.

First, the Supreme Court was not making a radical departure from its past opinions. Instead, it was merely re-affirming consent as a long-standing tenet of arbitration, upon which the entire arbitral framework depends on for legitimacy, and thus may not have found a lengthy analysis to be necessary.100 While First Options mandates that courts apply state law contract principles to determine whether parties agreed to arbitrate, this is limited by the requirement that there must be “clear and unmistakable evidence” that the parties agreed to arbitrate.101 Since this was framed as a “qualification” to the application of state law, it sets a minimum threshold rather than

100. See, e.g., Volt Info. Sciences, Inc. v. Bd. of Trs., 489 U.S. 468, 469 (1989) (holding that “Arbitration under the Act in a matter of consent, not coercion”); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (holding that a party cannot be compelled to arbitrate where it has not consented to do so, even though related claims against another party were subject to an arbitration agreement and would thus create two competing forums).
101. When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.

This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear[r] and unmistakable[e]’ evidence that they did so. In this manner the law treats silence or ambiguity about the question ‘who’ (primarily) should decide arbitrability’ differently from the way it treats silence or ambiguity about the question ‘whether’ a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement’ for in respect to this latter question the law reverses the presumption.

allowing any contract theory to apply. Such an interpretation is in harmony with the theory that consent is the basis for compelling arbitration.

In contrast, modern theories binding non-signatories do not evince such close connections to consent. For example, in veil piercing, a party is bound by the consent of another. While a party may have a close enough relationship with another to be liable for its actions, courts rarely find two parties sufficiently related that one may waive another's due process rights—yet an analogous event occurs here through the forum selection clause. Similarly, under an agency theory, parties can conceivably be obligated to arbitrate with an unknown party, with whom they could not possibly have manifested consent to arbitrate. Thus, while courts should look to state law in determining the existence of an arbitration contract, where its formation is not based on a clear and unmistakable intent to consent to arbitrate this dispute with these parties, then the contract does not evince the consent required to form an arbitration contract. Indeed, many of the courts that have found these contractual theories suitable proxies for consent have also relied on Mitsubishi's general policy favoring arbitration, even though First Options explicitly states that such a presumption applies only to the scope of an agreement, not its existence.

Second, there is evidence that the Court was aware of the expansion by lower courts of the reach of arbitration agreements to non-parties. Indeed, it had repeatedly denied certiorari in similar cases. Moreover, in their submissions to the Court, both parties explicitly raised the issue of whether a non-party may be bound by an arbitration clause.

103. See, e.g., Arnold v. Arnold Corp, 920 F.2d 1269 (6th Cir. 1990).
104. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1297 (3d Cir. 1996) (held that a non-signatory parent corporation cannot "by reason of their corporate relationship" enforce an arbitration clause, signed by a wholly-owned subsidiary, absent an express agreement to that effect), cert. denied, 519 U.S. 1028 (1996); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993) (compelling arbitration where signatory was acquired by a corporation which assumed all the signatory's obligations, under a theory of equitable estoppel), cert. denied, 513 U.S. 869 (1994); Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1105 (2d Cir. 1991) (assumption by conduct sufficient), cert. denied, 502 U.S. 910 (1991); Interoccean Shipping Co. v. Nat'l Shipping & Trading Corp., 523 F.2d 527, 539 (2d Cir. 1975) (holding that an alter ego of the signatory may be obligated to arbitrate, but that this obligation is highly limited), cert. denied, 423 U.S. 1054 (1976).
agreement.\textsuperscript{105} In its brief, Waffle House made an estoppel argument, although it did not label it as such: “The federal courts consistently refuse to allow circumvention of arbitration agreements through litigation that, while nominally brought by a third party, is in reality for the benefit of the party who has agreed to arbitrate.”\textsuperscript{106} The EEOC responded by framing the question as one of consent, relying on the Court’s jurisprudence that a party could not be compelled to arbitrate when it has not agreed to do so.\textsuperscript{107} In an impressive move, the EEOC argued the binding of non-parties issue in terms not of estoppel, but of agency. The EEOC then argued that it was not an agent of the signatory employee.\textsuperscript{108} Since earlier petitions for certiorari and both parties’ briefs had brought this issue to the Court’s attention, the Court must have understood the effects that proclaiming a non-party could not be bound by a contract would have on forcing non-signatories to arbitrate.

Third, the Court did not casually make the statement that non-parties may not be bound by the arbitration agreement, but applied the principle specifically to the fact situation of \textit{Waffle House}. In its analysis, the Court determined that one could only be bound to arbitrate if it is a party to the contract or if it agreed to arbitrate. In so


The operative provision of the FAA simply provides that agreements to arbitrate ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ 9 U.S.C. 2. The FAA, ‘as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements.’ Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). Accordingly, ‘just as [a party] has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.’ John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964). \textit{See also} AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) (‘party cannot be required to submit to arbitration any dispute which he has not agreed so to submit’) (citation omitted). The EEOC has never entered into a private contractual arrangement with respondent. The FAA’s ‘pro-arbitration policy’ (Resp. Br. 18), therefore, does not impose any limitation on an EEOC public enforcement action.

\textit{Id.}

\textsuperscript{108} See \textit{id.}
doing, the court specifically stated that “no one” has alleged that either of these criteria has been met and it therefore “goes without saying” that the agency was not compelled to arbitrate.\footnote{Waffle House, 534 U.S. at 294.} Yet, because Waffle House raised an estoppel argument in its brief, this sentence implies that estoppel cannot be used as a theory to bind non-signatories. Furthermore, such a finding comports with the fundamental principle that, without agreeing to the original clause or exhibiting subsequent intention to be bound, a non-signatory such as the EEOC could not have provided consent to arbitration. Indeed, the EEOC’s only connection to the arbitration clause was its reliance on the container employment contract in establishing its claim.

An attempt to read the \textit{Waffle House} discussion of non-parties and consent as not precluding certain state theories for finding a contract leaves an unanswered question: If the Court did not intend to invalidate non-signatory theories, why did it not explicitly analyze whether any of the theories applied to the EEOC before dismissing the motion to compel arbitration? Where such theories are valid, the court would have to assess whether the party is a signatory, and if not, whether there is an alternative basis for binding the party under state contract law.

IV.

The issue presented by \textit{Waffle House} was, at its core, whether non-signatories like the EEOC can be compelled to arbitrate and, if so, under what conditions. The Court answered, albeit briefly, that a court should undertake a multi-step analysis: first, determine whether the entity resisting arbitration is a party; then, if the entity is a non-party, determine whether there has been a manifestation of consent. If a non-signatory theory is to have any power post-\textit{Waffle House}, it must therefore establish either that the subject is a party or that it has consented to arbitrate. Such a reading would comport with the plain language and analytical method of the Court. Furthermore, because this interpretation does not completely preclude binding non-signatories, but merely reinforces the existing requirements of the FAA and the underlying principles of arbitration, it makes the Court’s light treatment of the issue appear consistent with the significance of the holding.

All five contractual non-signatory theories—agency, veil piercing, estoppel, assumption and incorporation by reference—are impacted differently by a strict return to the party-status or consent
regime asserted by Waffle House. Agency is likely to continue to play a dominant role in establishing party status, as it will inform the determination of the obligations which accrue when an independent agent represents a disclosed or undisclosed principle. Veil piercing may be limited after Waffle House, however. It is problematic to argue that veil piercing establishes party status because veil piercing is not a contractual theory, but rather it allows one to pierce the corporate veil for the purpose of liability. That being the case, it would also be difficult to use veil piercing to argue that the controlling entity actually consented to arbitration. Nevertheless, estoppel may have been weakened the most dramatically, as reliance on the existence of a contract alone is not a sufficient basis to argue that an entity is a party to a contract. Indeed, in Waffle House, the EEOC's claim rested on the existence of the employment contract, yet that did not make it a party to the litigation, nor was it evidence of implied consent to arbitrate. In contrast, assumption implicates the consent requirement, since the actions of an individual are purported to evince a willingness to submit to arbitration even if the party later decides not to arbitrate. In essence, this is the same question asked in any consent inquiry: Were the actions of the parties sufficient to constitute consent to arbitration despite the lack of a contractual agreement? As such, assumption theories will probably continue to apply post-Waffle House, although their value may be limited. Finally, unlike the other non-signatory theories, incorporation by reference deals with the substance of the contract, rather than whether an entity is a party or has otherwise consented to arbitrate. There is no evidence to suggest that Waffle House has limited this theory, since it turns on whether a state should recognize a particular type of contract.

In conclusion, the conflict between the meaning of the language of Waffle House when read in isolation and its meaning when read in context renders the holding unclear. For this reason, courts are likely to continue their practices of applying contract law theories to bind non-signatories to arbitration. While consent has long served as the fundamental, irreducible quality of party-initiated arbitration, the variations in interpreting party-status based on state law theories undermine the legitimacy of arbitration. Historically courts were required to find consent that met the threshold requirements of the FAA, however, the current line of jurisprudence has increasingly allowed contractual theories to overshadow consent. Circuits are now reaching so far as to imply consent based on the existence of a contract, even though the contractual theory itself may not require
actual consent to, or even knowledge of, the arbitration agreement. Rather than permitting the evisceration of consent, courts should again look for a real, rather than implied, consent to arbitration, as required by the core principles underlying arbitration, the FAA, and the long-standing jurisprudence of the Supreme Court.