CLOSING REMARKS: 2024 BJELL SYMPOSIUM, "THE CURRENT STATE AND FUTURE OF FORCED ARBITRATION"

Barry Winograd†

UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
BERKELEY, CALIFORNIA
MARCH 21, 2024

Thank you, David, for the introduction. Thank you, too, for inviting me to offer closing remarks, and for your effort, and that of others at BJELL for organizing today's outstanding program on arbitration. My thanks, as well, to the participants who shared their deep knowledge and insights. We have learned a great deal today.

At the outset, let me be clear. I think arbitration, when voluntary and properly structured, is a wonderful way to resolve workplace disputes. Even when not voluntary and properly structured, I have worked with others and especially with the National Academy of Arbitrators to improve it. I say this based on personal experience. I have been an arbitrator for 35 years, mostly but not exclusively as an arbitrator of disputes arising under collective bargaining agreements. I also have written about arbitration. And I have taught about it at Berkeley and other law schools.

On a personal note, I thank David Feller, a legend at this law school, who taught many of us in the field and who definitely knew a thing or two about arbitration. David also helped BJELL get off the ground at its origins, in 1976 I believe, as the Industrial Relations Law Journal. While I treasure arbitration, I also believe that its usefulness as a means of securing workplace

† Barry Winograd has been an arbitrator and mediator of workplace and other civil disputes since 1988, serving on dispute resolution panels for neutral provider organizations, labor-management collective bargaining agreements, and federal and state courts. For over 35 years, Winograd has been a lecturer at UC Berkeley Law teaching labor law, arbitration, and mediation courses. He also has taught on the adjunct law school faculty at the University of Michigan and at the University of Pennsylvania. In addition, Winograd is a past president of the National Academy of Arbitrators, was a senior editor of a treatise on employment law and dispute resolution, has written articles for professional journals in the field, and has contributed to amicus filings on arbitration cases in the Supreme Court. Previously, he was an administrative law judge for the California Public Employment Relations Board and an attorney for the United Farm Workers Union.

justice has been severely compromised and that political and legal reforms are urgently needed.

A few of us present today are old enough to remember the earliest days– of Perry and Gilmer, and other cases. This has been a decades-long struggle to resist a transformation of the Federal Arbitration Act. What was once a law designed to permit the specific performance of executory agreements to arbitrate commercial and business disputes has become something else. Quite literally, the FAA has been turned into an 800-pound gorilla sweeping all manner of disputes in its path.

How did this happen? Congress did not awaken one day and change the statute. To the contrary. It was the Supreme Court, beginning in the 1980s, that arrived at a new interpretation of the law. Many are surprised to learn that liberals joined conservatives in many of the early cases. As a result of these rulings, the FAA, a procedural statute, has been deemed the supreme law of the land, preempting traditional substantive areas of state and local regulation and becoming the foundation for a parallel system of civil adjudication. The FAA has been relied upon to expand facets of contract law, as with the doctrines of separability and delegation. Indeed, we have been told that there are intrinsic features of arbitration that are implied in the FAA, although the law says nothing of the kind. The FAA has been wielded as a tool to roll back collective strength, whether that be with unions or class actions. And the FAA has been relied upon to privatize the enforcement of statutory civil rights absent a congressional mandate otherwise and with an exculpatory impact. Again, procedure negating substance.

As today's presentations demonstrate, some of us are still around. However, the great news is that other generations have followed, continuing work begun so many years ago. These efforts span a variety of actions across the public domain; in fresh research, in new litigation strategies, and in government reforms.

Today's participants shine a light on what the future promises. In the academic world, Professors David Horton and Tamar Meshel have probed the intricacies of arbitration agreements and motions to compel arbitration. On the litigation front, Michael Rubin, a champion for decades, continues his efforts, while Jennifer Bennett and Hannah Kieschnick have become leaders with new approaches and expertise. For innovations at the state and local levels, Cliff Palefsky, a pioneer in the field, explores new ideas for legislative reform, administrative regulation, and direct action on behalf of employees, along with Miles Locker and Mariko Yoshihara.

Last, but certainly not least, let me thank Justice Goodwin Liu in conversation with Professor Catherine Albiston. Justice Liu's ability to grapple with FAA precedent and its relationship to California law has been exemplary, not because advocates prevail on every argument, and they do not, but because few jurists have brought such a wide lens and keen

intelligence to the problems presented, particularly his view of "playing in the joints" between federal and state law within what he described as the "amoeba" of the expansive FAA.

We owe them all our thanks for their past and continuing contributions, and for being with us today.