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Mahon Lecture

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MAHON LECTURE

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Twenty-six years ago, I spoke at an annual meeting of the American Bar Association, responding to an invitation to publicly express my view that the threat to Article III courts was not the Congress but the courts themselves. This threat was not visible to me as an active practitioner in the federal courts, but its outline had come clear in those early years sitting on the federal district court. Over time my concern grew as I found fissures in my vision of an indestructible, monolithic structure resting on the solid stone of Article III, with judges drawn mainly from the trial bar, insulated from political pressures by life tenure, with a simple mission—as best they could to get it right. For me, this meant offering a process that respected the dignity of individuals and property, including corporations and associations—where government has no higher ground than the citizen whose liberty or property were at peril—not an illusive perfect justice, but a fair shake. The image was of a hearty breed operating within the stricture of Article III of the Constitution—which as I then tended to think of it, both fenced in and fenced out. Now, the latter is the self-evident principle that federal courts are courts of limited jurisdiction—that a case or controversy must walk through either the federal question or the diversity doors. The former, fencing in—the exclusivity of adjudicative function—I did not focus upon, a mistake I will return to.

I came to learn that much about this image was flawed. Judges were more tenditious and political than I thought—at least hoped—and we were far from the only federal institution in the business. The administrative state by the early 70s was already both large and growing. Indeed, there were large numbers of persons whose daily work looked very much like court work—albeit without title, or stature. They carried titles other than judge, such as hearing examiner. They were employed by the governmental agency whose disputes they were deciding, from Social Security to Atomic Energy, resolving disputes from the most simple of fact patterns to matters of great technical complexity. Yet they were dim on the screen of a Texas-based trial lawyer. The federal district judge had small staffs of one or two law clerks, a secretary, and a court reporter. The clerk's offices were also relatively small, seldom employing a lawyer. And magistrate judges, then commissioners, were yet to successfully lobby for a title change, as had hearing examiners who became administrative law "judges."[1]

1. *See* Victor W. Palmer & Edwin S. Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673, 675 n.12 (1984) ("In 1978, the APA was amended to substitute the title 'Administrative Law Judge' for the earlier designation 'Hearing Examiner.'").

CHANGING DOCKETS . . .

In the ensuing twenty-six years, the work of the United States District Court, the trial court, has changed. Indeed, trials are no longer its main work, a phenomenon that I have written and lectured about.[2] Over time the academy and bar opened their eyes to the elephant in the room—the decline of trials. Today we are raising the large questions we must ask and answer about the loss of trials. To its credit, the Litigation Section of the American Bar Association, in what has been described as its most important work, funded an important study, including a study by Marc Galanter followed by a conference with papers by leading scholars.[3] Many able scholars are doing important work here.[4] I will not travel that ground today.

Rather, within the time constraints of this lecture, I will attempt to sketch the changing role of Article III courts in a larger setting. My purpose is to broaden the discussion of causation: why the decline of trials? Plainly, declining trials, ADR, and arbitration are part of a larger picture. As we disentangle the intertwined reasons for the decline and its implications, we will find the fit of this change in the role of the federal trial courts among larger changes, long in process but not fully grasped.

In 1979 I expressed concern that Article III courts faced their greatest threat from bureaucratic impulses,[5] the hallmark of which was delegation of judicial tasks, and peopleless process—involving the people is messy and inefficient, so "do it on the papers." If anything, I was far too cautious. A few numbers are helpful here:

2. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So, Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002). The Ainsworth lecture in 1999 was followed by presentations to the members of the Association of Law Professors who teach federal courts, the American Law Institute Annual meeting, the Judicial Conferences of the Fifth and Second Circuits, and the annual meeting of the ABA in Atlanta, Georgia.

3. The study was presented for the ABA Section of Litigation Symposium on the Vanishing Trial, held in San Francisco, Dec. 12–14, 2003. The resulting papers were published in the Journal of Empirical Studies on behalf of Cornell Law School. Symposium, The Vanishing Trial, 1 J. EMPIRICAL LEGAL STUD. 459–984 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL STUD. 459 (2004), available at http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf. *See also* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. OF EMPIRICAL STUD. 689 (2004); Judith Resnik, *Migrating, Morphing,* and *Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. OF EMPIRICAL STUD. 783 (2004); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. OF EMPIRICAL STUD. 843 (2004); Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. OF EMPIRICAL STUD. 843 (2004).

4. *See generally supra* note 3.

5. *See* Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1979).

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In 1975 there were 400 judges of the United States District Courts, growing in the next four years to 516.[6] By 2004, marking the roughly thirty plus years of my span on the federal bench, the number had grown to 679 judges.[7] During my first four years on the trial bench, 1975 to 1979, the average Article III trial judge completed 48 trials and terminated 385 cases.[8] By June 30, 2004, the average Article III trial judge terminated 467 cases and completed the trials of 19 cases.[9] Despite the dramatic drop in completed trials, the median time to trial in criminal cases went from 3.6 to 6.4 months, nearly doubling.[10] A similar increase of time to trial occurred on the civil side of the docket—from 16 months to 21.1 months.[11] Keep in mind that during this time the percent of criminal guilty pleas went from the high 80s to the high 90s, and very few cases were being tried on the civil side.[12]

During this same time the federal magistrate system was growing and the task of managing discovery was largely handed off to them. This was done to give the district judge more trial time. Despite this influx of magistrates, the percentage of civil cases over three years old grew to 12.6 percent in 2004, from 6.4 percent in 1975, again almost

6. Judicial Facts and Figures: Table 4.1 Civil & Criminal Cases Filed, Terminated, Pending, http://www.uscourts.gov/judicialfactsfigures/contents.html (last visited Mar. 1, 2006); 1979 Annual Report of the Director for the Twelve-Month Period Ending June 30, 1979, at 55 (explaining that the Omnibus Judgeship Act of 1978 was signed into law increasing the number of authorized judgeships in the district courts from 399 to 516) [hereinafter 1979 Annual Report].

7. Judicial Facts and Figures: Table 4.5 Total Weighted and Unweighted Filings Per Authorized Judgeship, *supra* note 6.

8. 1979 Annual Report, *supra* note 6, at 114 Table 59 (for number of completed trials divide the total number of trials completed in the United States District Courts by the number of authorized judgeships–400); Judicial Facts and Figures: Table 4.1 Total Civil and Criminal Cases Filed, Terminated, Pending, *supra* note 6 (for number of terminated cases over four year period average totals for 1975–1979 and divide the average number of terminated District Court civil and criminal cases by the number of authorized judgeships–400).

9. Judicial Facts and Figures: Table 4.1 Total Civil and Criminal Cases Filed, Terminated, Pending, *supra* note 6 (for number of cases terminated divide the total terminated District Court civil and criminal cases by the number of authorized judgeships–679); Judicial Facts and Figures: Table 4.3 Civil and Criminal Trials Completed, *supra* note 6 (for number of cases tried divide the grand total of civil and criminal trials completed by the number of authorized judgeships–679).

10. Judicial Facts and Figures: Table 4.7 Median Civil and Criminal Case Times, *supra* note 6.

11. *Id.*

12. *See* United States v. Booker, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part) (noting that guilty pleas resolve ninety-seven percent of federal prosecutions); U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 448 (1996) (noting that 48,196 out of 52,270—approximately ninety-two percent—of defendants convicted in federal cases were convicted pursuant to guilty pleas); Myrna S. Raeder, Andrew E. Taslitz, Paul C. Gianelli, *Convicting the Guilty, Acquitting the Innocent*, 20 CRIM. JUST. 14 (2006) (noting that negotiated pleas constitute 80–90 percent of all criminal case dispositions).

doubling with this measure of the aging of the cases.[13] This leads to the rough statement that "they aren't trying them and they are still pending." The number of pending cases grew from an average per judge of 355 civil and criminal cases in 1975 to 518 in 2004.[14] Weighted filings per judge moved from 400 in 1975 to 529 in 2004.[15] That is, weighted filings increased by over 100 and the number of pending cases increased by even more. This would make sense except the Federal Magistrates Act was signed on October 17, 1968, and was broadened substantially in 1976—to allow magistrates to conduct evidentiary hearings in civil and criminal cases, as well as prisoner cases.[16] According to the report of the Administrative Office, during the 12-month period ending June 30, 1979, "magistrates in 74 districts filed written reports . . . for disposition of 12,062 prisoner petitions . . . conducted 24,231 civil pretrial conferences for the judges in 77 district courts. In 77 districts they reviewed 34,311 motions in civil cases . . . [and] filed reports . . . on 4,074 social security appeals in 68 districts."[17] The report goes on to justify the magistrate system in a persuasive display of numbers. Yet we are left with the indisputable fact that the courtrooms are dark and the cost of prosecuting a case has become too much for most litigants. With their blizzard of paper, federal trial courts have become increasingly remote from citizens. Predictably, with increases in staff, decline in trials, and delegation of discovery problems to magistrate judges, federal trial judges will be perceived by many as blessing the work of others, not unlike their role in private arbitration where a district court must distance itself from the merits of a dispute.

Beyond enforcing the arbitration clause, the role of the federal trial judge is to bless the award at the end, lending the prestige and power of execution of a federal judgment to decisions that it did not make. At the least, with arbitration there is the coloration of consent and a principled rationale—that these are processes bargained for and the court is only enforcing a private agreement. But even this lending of legitimacy comes at a cost. By accepting the selection of a private forum for resolving a dispute as a legitimate subject of bargaining, courts have said a great deal about their own future.[18]

13. Judicial Facts and Figures: Table 2.4 Civil Cases Pending by Length of Time Pending, *supra* note 6; 1979 Annual Report, *supra* note 6, at 83 Table 39.

14. Judicial Facts and Figures: Table 4.1 Total Civil and Criminal Cases Filed, Terminated, Pending, *supra* note 6 (for average number of pending cases divide pending District Court Caseload by number of authorized judgeships).

15. Judicial Facts and Figures: Table 4.5 Total Weighted and Unweighted Filings Per Authorized Judgeship, *supra* note 6.

16. *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) and Pub. L. No. 94-520, 90 Stat. 2458 (1978) (codified as amended at 28 U.S.C. §§ 631–39 and 18 U.S.C. §§ 3401, 3402, 3060 (2000)).

17. 1979 Annual Report, *supra* note 6, at 11.

18. This subject is thoughtfully explored by Professor Judith Resnik in: Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

The law of federal courts is now a free-standing subject in every law school curriculum, taught in law schools as federal jurisdiction and in distinct courses as federal practice and civil procedure. So much of this is recent. After all, the Federal Rules of Civil Procedure which fueled a sea of change in American litigation are only 65 years old.[19] Its youth in the law is easily demonstrated. For example, the doctrine of standing did not appear in anything like its present form until after World War II, responding as it did to the growth of public law and the expanded use of private litigation to enforce federal norms.[20] We saw the traditional bi-polar suit by a plaintiff against a defendant complaining of breaches of duty by private persons, joined by suits by private persons complaining of state and federal government failures to comply with the law. These newly emerging public lawsuits typically sought orders from federal courts directing state and federal officials to obey federal law and remedies for the injuries suffered by those violations. I point to these as examples of the "law" of federal courts with which we have busied ourselves, along with a myriad of other "reforms" and concerns, such as costs of civil litigation and the role of judge and jury in district courts. In this important work with the trees, we risk missing the forest, whistling past macro changes in the role of federal district courts and courts of appeal in turn. When we widen our lenses, we find disturbing trends, such as the decline of trials with federal trial courts looking like European courts. We also find a suspiciously parallel flow of dispute resolution to the administrative agencies.

Administrative Resolution . . .

Students of federal practice look to the federal courthouse as the primary site for resolving disputes that have the requisite federal components of federal law or diversity of citizenship of the parties. We have nurtured this illusion. As Professor Richard Pierce, Jr., of George Washington University explains:

> [A]dministrative law is a vast field that applies to hundreds of federal agencies. Federal agencies adjudicate far more disputes involving individual rights than do the federal courts. They create more binding rules of conduct than Congress. . . . They investigate, enforce, cajole, politicize, spend, hire, fire, contract, collect information, and disseminate information.[21]

19. Act of June 19, 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064; Order of Dec. 20, 1937, 302 U.S. 783 (1937). *See also* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989).

20. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 226–29 (1988) (discussing in part the doctrine of standing's evolution due to the increase in private litigation over public laws).

21. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 2 (Aspen Law & Business, 4th ed. 2002).

The administrative state employs a cadre of administrative law judges. For example, the Department of Health and Human Services, an executive agency, by the year 2001 employed more than 800 Administrative Law Judges, the approximate number of federal district judges, and adjudicated more than 320,000 cases each year, more civil cases than all federal districts combined.[22] The Social Security Administration decides over 280,000 cases annually.[23] That is, just two agencies decide over 600,000 cases annually. Many agency actions flow into the federal courts; indeed, federal courts decide more than 10,000 administrative law cases each year.[24] Yet with the substantial deference due these decisions under *Chevron*[25] and the reality that this number is a small percentage of administrative decisions, it is apparent that Article III has conferred no monopoly on the resolution of a very large range of disputes turning on federal law. To the contrary, Article III courts have the smaller market share. Much of that market share has been taken from courts, state and federal. As Professor Pierce has reminded us:

> Virtually all powers to resolve disputes now exercised by administrative agencies have independent common law antecedents previously enforced by courts. The most frequently cited illustration is the near universal replacement in the workplace of judicially enforced tort law with agency-administered workers' compensation schemes.[26]

He concluded: "Each of these preexisting judicially administered private rights was replaced by an agency-administered regulatory system because the prior system of common law rights simply did not work satisfactorily."[27]

In 1979 when I expressed concerns over the bureaucratic tendencies of federal courts, I described the inherent tendency of any institution created to resolve disputes as an alternative to judicial resolution, to emulate and morph to the courts that Congress attempted to distance them from.[28] I observed that this phenomenon is explainable in part by the reality that lawyers would find comfort with what they know—courts.[29] I predicted that administrative agencies would continue on that path, that hearing examiners would press to change their title to

22. *Id.* at 39–40.

23. *Id.* at 116.

24. *Id.* at 32.

25. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1983) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

26. PIERCE, *supra* note 21, at 119.

27. *Id.* at 119.

28. Higginbotham, *supra* note 5.

29. *Id.*

judge, and that less formal inquiry into adjudicative facts would become more formal.[30]

The seeds of expansion lay in the distinction drawn by the Supreme Court between judicial and political process, a duality that allowed administrative agencies to implement policy in their quasi-legislative and executive roles, as well as in individual adjudications. The administrative agency could deploy process requisite for policy decisions, "effecting more than a few people on grounds unrelated to an individual decision," or, process requisite to government decisions that affect an "individual upon individual grounds."[31]

I was right in the sense that administrative dispute resolution and judicial dispute resolution have become increasingly indistinct. But I now see that I missed one large point. While it proved to be true that the administrative law system increasingly failed to offer the complete and distinct alternative as it emulated judicial process, the judiciary was also emulating the administrative model in its method; the joining up also came from the judicial side as it moved toward the administrative side. There was more blending than absorption. It signifies that the disconnect between pre-trial and trial has been the main path of this movement by the judiciary toward the administrative model.

Federal courts have always offered a unique service, a trial—bench or jury. Over the past thirty years, federal courts have, however, increasingly disconnected trial from pre-trial. As discovery has become the end game, it has been delegated to non-Article III magistrates where it has flourished. When we look at the true model of dispute resolution in federal district courts today alongside the administrative model, the blending I am describing becomes clear. It is fair to say that Article III, together with the Sixth and Seventh Amendments, clouds the limits of congressional power to locate decision-making in administrative agencies rather than Article III courts. The Bankruptcy Code,[32] *Northern Pipeline Co. v. Marathon Pipe Line Co.*,[33] and its progeny are fresh in our memory. The reality is that a significant amount of the business of federal district courts could be moved

30. *Id.* at 264.

31. *See* Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practicioner*, 30 IDAHO L. REV. 273, 284–86 (1994) (discussing the distinction made by the United States Supreme Court in Londoner v. Denver, 210 U.S. 373 (1908) and Bi-metallic Invest. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) that "contested case procedures are constitutionally required only where a 'small number of persons . . . are exceptionally affected . . . upon individual grounds'; [while] rulemaking procedures, on the other hand, may be employed 'where a rule of conduct applies to more than a few people'").

32. 11 U.S.C. §§ 101–1330 (2000).

33. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (affirming judgment that § 1471's broad grant of jurisdiction to bankruptcy judges violates Article III of the Constitution).

to administrative structures, bypassing the federal district courts to enter at the courts of appeals.[34]

Over time the judiciary and the Congress have become comfortable with the administrative model for dispute resolution. The story of the sentencing guidelines is illustrative. While this is a subject to itself, I want now only to point to the significant reduction of the role of the trial judge and the jury in criminal cases that came with the large administrative machinery of federal sentencing under the guidelines.[35] Specifically, the acceptance of the view that there was nothing foul in asking a jury if an accused possessed an illegal drug, insisting that the government make that proof beyond a reasonable doubt to a jury—the right of an accused—and then if "convicted," let the judge determine if the sentence was five years or life by a hearing without a jury, with relaxed rules of evidence and by a preponderance of the evidence standard. The good news is that in *Apprendi*[36] the Supreme Court finally stanched this bleeding. Whatever the ultimate outcome of the pending challenges to the guidelines, about which I express no opinion, it is our tolerance of this drift for so long that is disturbing. It bears emphasis that here I am pointing to the loss of trial rights to administrative processing. If the federal district courts are not going to try cases but are to become full-time facilitators of settlement and if the trend toward zero trials continues, then the distinctions between the Article III judge and the Administrative Law Judge will be increasingly blurred. That should be of concern.

The Increasing Demand for Resolution of Transnational Disputes

The largest challenge to our traditional dispute resolution process is "globalization," a word now much in use, in spite perhaps, because of its inherent protean character. The word, as I use it, has an engine. It is the computer. Internet and global news services, made possible by the nigh instantaneous transmission of data worldwide, have unleashed forces that defy political boundaries, even distance. This shrinking of the world will demand the bridging of domestic legal orders.

A citizen of the United States and a citizen of France with a dispute under traditional principles of International Law address each other

34. *See generally* Pierce, *supra* note 21.

35. For a review of this topic, see generally Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 Val. U. L. Rev. 693 (2005); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stan. L. Rev. 155 (2005); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 Emory L.J. 753, 798 (2002).

36. Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that any fact, other than fact of prior conviction, that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond a reasonable doubt).

through their respective sovereigns. This principle lies at the core of the traditional Nation-State. Yet, the very concept of sovereignty is being redefined from one of Nation-State to Market-State.[37] I will return to this large shift later, including some thoughts drawn from *The Shield of Achilles*,[38] the recent and extraordinary book by Philip Bobbitt, as described by the *Financial Times*:

> This chaotic situation has led political thinkers on both sides of the Atlantic – Phillip Bobbitt in America, Robert Cooper over here to demand a total paradigm shift in our approach to international order. Globalisation, they argue, has meant the end of the territorial national state and the advent of "market states" or "post-modern states" whose power transcends territorial boundaries. With that power goes or should go – responsibility for the maintenance of order among impotent and backward "pre-modern" states; not only moral but prudential responsibility for rescuing their populations from starvation, enforcing human rights, and ensuring that they do not spawn bellicose dictators or provide safe harbour for terrorists and pirates.[39]

It is a mistake to think only of market exchanges in visualizing these increasingly anemic political boundaries. The cause of personal liberty and human rights go hand in hand with a Nation-State's need for access to world markets. Participation in world markets that ignore political boundaries inevitably redefines the relationship of state and citizen. We have seen the United Kingdom adopt the Human Rights Protocol into its organic law, introducing a form of judicial review wholly antithetical to its historic parliamentary form of government.[40] The British Judiciary must now decide if certain acts of parliament violate the human rights secured by the new law. This alone required a substantial program of CLE for bench and bar. We see Japan opening law schools in a large effort to produce more lawyers.[41] And the price of a ticket to these markets may include subscription to norms protective of individual liberty. It is instructive that as Hong Kong came under China's rule, the British Judiciary was left in place. The reputation of its judicial system for integrity and predictable results

37. *See* Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 642–43 (2005).

38. PHILIP BOBBITT, THE SHIELD OF ACHILLES (2002).

39. Sir Howard Michael, *Smoke on the Horizon*, FINANCIAL TIMES (London), Sep. 7, 2002, at 1.

40. Human Rights Act 1998, c. 42, § 3, (U.K.) (adopting articles 2–12 and 14 of the Convention, 1–3 of the First Protocol, and 1 and 2 of the Sixth Protocol of the European Convention on Human Rights) (requiring any court or tribunal determining a question which has arisen in connection with a Convention right to take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights).

41. Kathryn Tolbert, *In Japan, They Actually Need More Lawyers*, WASHINGTON POST, Sept. 25, 2000, at A11.

was critical to the powerful market of Hong Kong.[42] What is significant here is that it was acknowledged by China. The larger point is that protection of liberty interests may follow protection of property rights, or so it seems. This interactive effect is complex with many variables. Yet, given that the right to own property is a cornerstone of Western-based freedoms, it is fair to say that protection of private property at the least moves toward a regime of greater individual liberty.

That globalization is roiling fundamental relationships among nation states and working changes in their legal orders is not today's story. Rather, it is that our legal system is not immune from these transnational forces. That much is plain. The reality is that the federal district court today, with its managed discovery process and structured mediation and settlement programs, looks increasingly less like the common law courts of England and more like the civil law model of litigation, conducted less by private counsel and more by civil servants. Globalization has also fueled arbitration. Beyond question, the success of arbitration in the absence of other machinery for resolving transnational commercial disputes encouraged its growth as an alternative to well-established domestic systems available to citizens but passed over for a myriad of reasons. As with the new market states, where commerce looks horizontally to the other market participants and accepts a dispute system negotiated for private use, domestic commerce is doing the same. Now, this is no domestic hijacking of the American court system. Arbitration exists only because the courts have accepted that a justice system is subject to private bargaining. Indeed, the Supreme Court has warmly embraced arbitration, invoking the old justification of crowded dockets.[43]

Other Changes in Attitude . . .

One senses significant changes in attitudes toward the role of the state in dispute resolution—that the growth of resolution outside of state-controlled processes is being fed by growing cynicism about state-offered resolutions and "law" itself. This questioning view finds little trade-off in opting for private resolution. It accepts a parity of public and private fairness, a realist view of the sameness of both the crudity of indeterminate standards and sameness in predictability and integrity. Finding parity leaves the choice between systems to private convenience for which contracted for systems hold an inherent advantage. This is the spawning ground for private ordering. It has quickly found effect in the thinning of political boundaries for transnational

42. *See, e.g.*, China & Honk Kong in Legal Transition (Joseph W. Dellapenna & Patrick M. Norton eds., 2000); Yash Ghai, *Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights*, 60 Mod. L. Rev. 459 (1997).

43. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 131–32 (2001).

commerce where distrust of systems is often shared by both sides of transactions who find that agreement upon enforcement processes is the skeleton for defining their respective rights and obligations in the transaction.

With disputes between American citizens, contracting out of the system still entails a drawn upon government-created normative standard, if no more than as a framework for defining a dispute. In sum, this draw reflects a judgment that law in the hands of courts, while dispensed with traditions of explanation, rationality, and solemnity, is nonetheless at the bottom and seen as at least as arbitrary as that of private resolutions, showing a distrust of law itself and reflecting strong libertarian impulses. It appears as a twin to the growing individualization of transnational relationships—the horizontal citizen-to-citizen over state-to-state vision.

All that can be said with confidence is that the ground is moving under our feet and has been for decades. My modest reminder is that we must understand the directions we are going if we are to play a studied role in our destination. Again, this is not an inside game for lawyers and judges. It is a matter of governance and preserving freedoms in a changing and dangerous world.