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Of Time and Tide

Thomas J. Stipanowich

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*by: Thomas J. Stipanowich**

"The moon waxes only to wane, and water surges only to overflow."
–Chinese Idiom[1]

I. Introduction

I am profoundly grateful to be among Texas A&M University's Hagler Fellows representing the field of law and legal scholarship and very appreciative of the *Texas A&M Law Review*'s effort to honor each of us in this 10th Anniversary Issue. I owe a special debt to Professor Jackie Nolan-Haley of Fordham Law School for her thoughtful (and generous) retrospective of my work, *Reflection, Deliberation, and Dialogue: Stipanowich's Contribution to Dispute Resolution*,[2] which prompted me to offer the following postscript.

The touchstone of this brief Essay is the Chinese idiom above. It exemplifies the eternal cyclicality of many aspects of the human experience, in which birth and growth are followed inescapably by maturity and decline—after which the whole cycle begins again. When the sun reaches its zenith, it begins to set; and when the moon is full, it begins to wane, like the tides on the beaches not far from where I live and work. The cycles of life, of coming and going, of decline and rebirth, are increasingly on my mind as apt metaphors for our lives and labor. I like to think that we are constantly experiencing concurrent cycles of change, so that while one aspect of our reality is on the wane, another may be ascendant, bringing with it new challenges and new opportunities.

II. Riding the Wave of the Quiet Revolution

By a stroke of good fortune, I began my career in law and dispute resolution at the threshold of a wave of change in our system of justice and ways of resolving public and private conflict—what Professor Nolan-Haley has tagged the Modern Progressive Era.[3] Afforded a front-row seat, first as a lawyer handling disputes and later as a law profes-

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* William H. Webster Chair in Dispute Resolution & Professor of Law, Pepperdine/Caruso School of Law. I wish to thank my friends and colleagues at Pepperdine University and its Straus Institute for Dispute Resolution; the International Institute for Conflict Prevention and Resolution; and Texas A&M School of Law. I am also appreciative of the efforts of the student editors who did so much to improve this article.

1. Binyong Yin, 100 Pearls of Chinese Wisdom 189 (1999).

2. Jacqueline Nolan-Haley, *Reflection, Deliberation, and Dialogue: Stipanowich's Contribution to Dispute Resolution*, 10 Tex. A&M L. Rev. 673 (2023), https://doi.org/10.37419/LR.V10.I4.7.

3. *Id.* at 673–74.

sor, mediator, and arbitrator, I became aware that big changes were afoot and that other practitioners and scholars shared my realization and enthusiasm.[4] In the first decade or two of this "Quiet Revolution," many of us had the exhilarating experience of taking part in a kind of renaissance or reformation—a time to reevaluate and rethink the nature and direction of our approaches to conflict. My immersion in practice confronted me with the inefficiency, waste, costs, and risks of lawsuits, leading to the conclusion that although litigation was sometimes necessary, even unavoidable, it had severe limitations and drawbacks as a general method for problem-solving and dispute resolution.[5] Like many others, I began to consider a possible re-visioning of our approach to conflict along the lines of the following:

THE WAY IT IS	THE WAY IT COULD BE . . .
One-size-fits-all	*Tailored to circumstances*
Lawyer-controlled	*Client-controlled*
Temple of justice	*Community-centered*
Adversarial	*Collaborative*
Formalized	*Relational, informal*
Rights-based	*Interest-based*
Long and costly	*Flexible, early, expeditious, efficient*

My sense of the possible was animated by personal experiences dealing with complex construction and engineering disputes. As a graduate architect who hoped to channel creativity into a career in law, my choice of practice specialty was serendipitous since I found myself in a virtual laboratory for developing and applying cutting-edge techniques for out-of-court dispute resolution, including arbitration, mediation, and mini-trial.[6] Among other things, our practical experimentation placed greater emphasis on arbitration as an alternative to court trial and revealed the potential value of mediated negotiation as a method for achieving quicker and more satisfactory solutions to problems emerging on a construction project.[7]

4. *See* Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 514–20 (2017) [hereinafter Stipanowich, *Living the Dream*].

5. Thomas J. Stipanowich, *Synchronicity, Paradox, and Personal Evolution*, *in* EVOLUTION OF A FIELD: PERSONAL HISTORIES IN CONFLICT RESOLUTION 231, 236–37 (Howard Gadlin & Nancy A. Welsh eds., 2020) [hereinafter Stipanowich, *Synchronicity*].

6. *Id.* at 237–38.

7. *Id.* at 238.

Like many others, I learned that playing the role of creative problem-solver helping to resolve disputes suited me much better than that of lawyer–advocate. Upon becoming a professor of law, I embraced occasional service as an arbitrator and mediator as part of a conscious cycle of engagement, scholarly reflection, and teaching. This allowed me to garner, process, and share lessons from a broad spectrum of experience. For example, appointed as a "standing mediator" for a construction of a public housing project, I remained on-call to facilitate the resolution of issues as they arose on the jobsite, allowing the project to finish on time and without resort to further legal action.[8] In other situations, I served as a facilitator of "project partnering," bringing to bear the skills of a mediator at the *beginning* of construction projects to help construction managers, design engineers, owner representatives, and other team members share their priorities, goals, and concerns and promote a framework for early resolution of conflict.[9]

My experiences inspired parallel scholarship on key legal, practical, and ethical issues in dispute resolution. I was also motivated to collaborate on the design and administration of wide-ranging concurrent surveys of attorneys, construction personnel, and design professionals regarding practices and perspectives of conflict management and resolution.[10] The studies produced some of the first empirical data points on the character and impact of mediated negotiation.[11] They also offered some support for the belief that mediation and project partnering might become increasingly popular as vehicles for dispute prevention and resolution.[12]

Could the use of mediation be a means of opening up the justice system and transforming our concepts of community justice? Some of us investigated the workings of community centers in which lawyers joined other community volunteers to mediate negotiations for a wide array of civil cases.[13] This led to the creation of our own community mediation center—one of hundreds of local or regional programs, court-connected and private, around the country.[14] Our center was a

8. *See* Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 368–69 (1998).

9. *See id.* at 379–81.

10. *See, e.g.*, Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 68 (1996) [hereinafter Stipanowich, *Beyond Arbitration*] (discussing and analyzing the results of the first American Bar Association-sponsored survey on dispute resolution in the construction industry); *see also* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988) (discussing and analyzing the results of an ABA-sponsored survey on the American Arbitration Association rules).

11. *See* Stipanowich, *Beyond Arbitration*, *supra* note 10.

12. *See id.* at 140–42, 144–45.

13. Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 KY. L.J. 855, 878–80 (1992–93) [hereinafter Stipanowich, *Case Study*].

14. *Id.* at 880.

non-profit institution supported by our state administrative office of the courts and played an important role in the mentoring of mediators (including lawyers, law students, and non-lawyers) and the acceptance of mediation as a vehicle for informal resolution of legal disputes.[15]

The impact of the Quiet Revolution was felt on every level—transactional, local, regional, national, and international. The New York-based non-profit CPR, founded as the Center for Public Resources in 1979, emerged as one of the leading national and international proponents of transformative change in the handling of legal disputes.[16] The organizational focus on promoting alternatives to the high costs and risks of litigation resonated with my own experience and philosophy, and CPR's prestigious leadership and members included counsel for many of the world's major corporations and law firms, as well as prominent public servants, scholars, and thought leaders.[17] In recognition of my scholarship,[18] CPR invited me to become part of its international network for effective dispute resolution—participating in its conferences and helping develop new products and guidance for the resolution of business disputes. A Hewlett Foundation-funded effort to promote best practices in commercial arbitration processes afforded me an opportunity to facilitate the efforts of a commission composed of several dozen experts.[19]

As with all waves of change, the Quiet Revolution affected people in very different ways, often because of power differentials and societal stratification. After years of concentrating on the dynamics of business-to-business (B2B) disputes and opportunities for their creative resolution, I was exposed to the very different realities of disputes between companies and individuals as a public interest representative in

15. *Id.* at 857.

16. *See generallly* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 9–10 (2014) (discussing CPR's founding and dispute resolution methods); Stipanowich, *Case Study*, *supra* note 13, at 862 n.35 (summarizing CPR's founding).

17. *See* Stipanowich & Lamare, *supra* note 16, at 10 n.58 (describing the CPR Commitment or "Pledge").

18. I received CPR's outstanding article award for Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473 (1987). During the writing of this Essay, I received word from CPR that the arbitration book I co-authored with Professor Amy Schmitz, THOMAS J. STIPANOWICH & AMY J. SCHMITZ, ARBITRATION: PRACTICE, POLICY, AND LAW (2022), was named CPR's Outstanding Book Award winner for 2022. *2022 Award Winners*, CPR (Mar. 2, 2022), https://www.cpradr.org/news/2022-award-winners [https://perma.cc/4F56-MPF5].

19. The final report of the CPR Commission was a set of guidelines in book form. *See generally* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS: A REPORT OF THE CPR COMMISSION ON THE FUTURE OF ARBITRATION (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) (discussing how individuals can best utilize commercial arbitration).

the Securities Industry Conference on Arbitration (SICA).[20] SICA was set up as a forum for discussion and debate over policies and procedures governing Securities and Exchange Commission-regulated arbitration between securities investors and brokerage firms.[21] My tenure on SICA helped me appreciate that arbitration rules that were advantageous to business parties might work to the disadvantage of consumers and that private justice raised special challenges and concerns for individuals who were subject to its jurisdiction only because of boilerplate language in standardized agreements.[22] Such concerns motivated me to accept appointment as academic reporter for the creation of a "Consumer Due Process Protocol" under the auspices of the American Arbitration Association.[23] Consumer advocates, corporate counsel, and attorneys general developed the Protocol together, envisioning it as a set of "community standards" establishing a floor of expectations for procedural fairness in the arbitration of consumer disputes.[24] Although participants brought markedly different perspectives to the table during the drafting of the Protocol, there was consensus on the need for fairness standards to govern private arbitration conducted under a contractual mandate in a world where the latter might be based on nothing more than the terms of a brochure in a product box (a "shrinkwrap" contract).[25] Among other things, the Protocol underlined the critical importance of consumer arbitration administration by an independent and impartial organization as a bulwark of protection for the public.[26]

In 2001, I left my chaired professorship to become the second president of CPR, succeeding founder James Henry. By this time, the early headiness, excitement, and sense of possibilities that characterized the early years of the Quiet Revolution had given way to a more mature

20. *See generally* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 900 n.403 [hereinafter Stipanowich, *Conflict Management*]; Thomas J. Stipanowich, PEPP. CARUSO SCH. L., https://law.pepperdine.edu/faculty-research/thomas-stipanowich/ [https://perma.cc/8ZWP-KMB9] (explaining Stipanowich's contribution to the CPR Institute's "book of guidelines" and the time he served as President and CEO of the Institute).

21. *See generally* Stipanowich, *Conflict Management*, *supra* note 20, at 900.

22. *See generally* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 3 (1997).

23. *See generally* NAT'L CONSUMER DISPS. ADVISORY COMM., AM. ARB. ASS'N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES (1998), https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf [https://perma.cc/E88Q-CNA2] [hereinafter PROTOCOL STATEMENT].

24. *See generally id.*

25. *See id.* at 26–27; Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, DISP. RESOL. J., Aug. 1998, at 8, 10 [hereinafter Stipanowich, *Resolving Consumer Disputes*].

26. *See generally* Stipanowich, *Resolving Consumer Disputes*, *supra* note 25, at 11–13 (explaining and summarizing the purpose and principles outlined in PROTOCOL STATEMENT, *supra* note 23).

outlook seasoned by experience. After many years during which programs for "ADR" (alternative dispute resolution) proliferated with the support of state and federal courts, agencies, communities, bar associations, and professional associations, there came a period of readjustment and recalibration. While some initiatives faded away, others moved forward, determined to continue the work of the Quiet Revolution in a sustainable fashion. In addition to reinvigorating its support among companies and law firms and securing new sources of revenue, my own tenure at the head of CPR was devoted to promoting greater awareness and use of mediation in Europe and in Asia—regions where the "new day" of mediation was still relatively nascent.[27] We also collaborated on empirical research on public and private dispute resolution[28] and explored new opportunities to minimize or avoid legal disputes. These "second generation" efforts were reflected in a new name for the organization: The International Institute for Conflict Prevention & Resolution.[29]

As an educator who had long aspired to head a respected academic dispute resolution center, I welcomed the opportunity to join the leadership team of the Straus Institute for Dispute Resolution at Pepperdine University School of Law in 2006, once again succeeding the institutional founder. The Institute's academic curriculum of more than 40 courses, supporting multiple graduate programs, was unmatched in depth and breadth.[30] Based in Los Angeles, the Institute was a wellspring and incubator for the Quiet Revolution; it helped make L.A. and Southern California a major epicenter of mediation and grew to meet a mounting demand as lawyers and others sought professional credentials as mediators. The Institute achieved national and international visibility through its seminal professional skills training program, "Mediating the Litigated Case."[31]

By the time I joined the Pepperdine faculty and became Academic Director of the Straus Institute, its graduate programs were attracting not only mid-career U.S. professionals seeking a change of vocation, but also young lawyers, recent law graduates, and law students entering a world in which alternatives to litigation were becoming critical elements of the lawyer's toolbox. As the Institute's primary resident scholar, my efforts involved implementing and analyzing surveys of

27. *See generally* NANCY NELSON WITH THOMAS J. STIPANOWICH & CPR EUR. COMM., COMMERCIAL MEDIATION IN EUROPE: BETTER SOLUTIONS FOR BUSINESS (2004).

28. *See, e.g.*, Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843 (2004). *See generally* Stipanowich, *Conflict Management*, *supra* note 20 (discussing how the Quiet Revolution affected private actions).

29. *See* Stipanowich & Lamare, *supra* note 16, at 9–10.

30. *See generally* Stipanowich, *Synchronicity*, *supra* note 5, at 249.

31. *See generally Meditating the Litigated Case*, PEPP. CARUSO SCH. L., https://law.pepperdine.edu/straus/training-and-conferences/mediating-litigated-case/malibu.htm [https://perma.cc/N9MW-QJV5].

experienced lawyers and dispute resolution professionals, including a 2011 follow-up to a 1997 canvas of counsel for companies in the Fortune 1,000.[32] The most striking insight from the corporate studies was that the use of mediation was becoming more widespread and was employed in the resolution of virtually the entire range of business disputes.[33] By 2011, the vast majority of corporate legal departments had experience with mediation for all kinds of disputes and anticipated its use in the future.[34] The corporate study provided a more mixed picture of binding arbitration and its present and future use.[35] Some corporate lawyers complained that arbitration lacked some of the procedural safeguards of court litigation; some focused on perceived disadvantages that it shared with litigation, including excessive costs and delay.[36]

III. Five Decades On: A Current Assessment

Today, close to five decades after the heralding of a new era in dispute resolution, some posit that the Quiet Revolution has passed its high-water mark and is on the ebb.[37] They point to reduced support for some academic dispute resolution programs as well as lower attendance at meetings of some of the leading organizations in the field.[38] One recently retired teacher/scholar, an important voice in the field, shared with me concern that another dispute resolution expert would probably not fill the vacated position.

In my own view, the knell has yet to sound. Thousands of seasoned professionals now intervene in disputes as mediators, arbitrators, expert evaluators, or facilitators; and many lives and relationships are transformed or made better by third-party intervention. Mediation is an established feature of court and administrative procedures and the cornerstone of private dispute resolution. Although the uptake of mediation has varied considerably in countries outside the world of common law, the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation") has been signed by more than 50 countries and has now been adopted by a small but growing number.[39]

32. *See generally* Stipanowich & Lamare, *supra* note 16 (discussing and analyzing the 2011 survey).

33. *See id.* at 44–51 (comparing data showing the expanding use of mediation and contracting use of arbitration).

34. *See id.*

35. *See id.* at 44–53 (analyzing data comparing mediation and binding arbitration, and specifically explaining why arbitration is contracting).

36. *See id.* at 51–53.

37. *Cf.* Stipanowich, *Living the Dream*, *supra* note 4, at 513–14.

38. *See id.*

39. *See Status: United Nations Convention on International Settlement Agreements Resulting from Mediation*, United Nations Comm'n on Int'l Trade L., https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status [https://perma.cc/NW7P-226P].

There is, however, reason for concern about the direction of things. In the United States, there are signs that the strong lawyer-centric litigation culture has reasserted itself in different ways.[40] The gradual professionalization of arbitration and mediation practice has been dominated by litigators and judges pursuing second careers as neutrals, a trend facilitated by the fact that lawyers continue to control the resolution of legal disputes and tend to pick other lawyers or retired judges to mediate and arbitrate.[41] As practiced, arbitration often closely replicates litigation; cases are more likely to settle prior to hearings on the merits, but today's extended pre-hearing procedures often include very costly and time-consuming motion practice and discovery.[42] In my recent experience, statute and contract drafters often provide for the application of civil procedural rules in arbitration; in other cases, civil rules are cited in support of discovery motions and other motions.[43]

Mediation often helps bring about settlement, but mediation tends to occur late in the pre-hearing process, a fact that limits its potential for cost- and time-saving. Empirical studies of the practices and perspectives of mediators indicate that in California and some other places, lawyer-driven mediation tends to de-emphasize the use of joint sessions and rely heavily or exclusively on caucuses, and interest-based facilitation is eschewed in favor of directive opinion-giving by mediators.[44]

None of the foregoing developments are inherently inappropriate and are often well suited to the circumstances in which parties find themselves. I would argue, however, that many opportunities for quicker, more efficient, and more satisfactory resolution of disputes have been squandered due to a litigation mentality on the part of counsel and, in some cases, the mutually reinforcing economic interests of arbitrators, mediators, and lawyers. Despite widespread indications that B2B arbitrations often fail to meet parties' expectations regarding cost-effectiveness and expedition and widely supported efforts to promote those goals by the U.S. College of Commercial Arbitrators and other organizations,[45] these realities persist. Clients must

40. *See, e.g.*, Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 366–68 (2014) [hereinafter Stipanowich, *Reflections*] (discussing the dominance of lawyer-arbitrators and the lack of non-lawyers on commercial arbitrator panels).

41. *See id.* at 366, 374.

42. *See id.* at 341–42, 349.

43. Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 12 & n.62 [hereinafter Stipanowich, *"New Litigation"*].

44. *See generally* Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISP. RESOL. MAG., Winter 2016, at 6–8 (discussing and analyzing results from a 2014 survey of members of the International Academy of Mediators).

45. *See generally* THE COLL. OF COM. ARBS., PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS AND ARBITRATION PROVIDER INSTITUTIONS

rely on lawyers' expertise throughout arbitration and are usually not in a position to question their advice and counsel.

In the world of legal education, meanwhile, dispute resolution courses have attained a foothold as electives but are rarely integrated into the core curriculum in a meaningful way.[46] Even at Pepperdine, with its vast spectrum of dispute resolution electives, a law student may graduate with little if any exposure to negotiation, mediation, or dispute resolution options. Most first-year texts continue to place heavy emphasis on appellate court opinions as a way of teaching students substantive law, and students may be left with the impression that trial and appeal are the primary vehicles for dispute resolution, which is anything but true.[47] My own first-year contracts course regularly confronts students with the expense, delay, waste, and human costs of extended litigation and invites them to explore their obligations as contract drafters, counselors, negotiators, mediators, and arbitrators.

U.S.-style litigation practices have also influenced the conduct of procedures in international arbitration.[48] Although mine may be an extreme view, I have long harbored concerns regarding the popular Vis International Arbitration Moots,[49] in which hundreds of teams from law schools around the globe compete in timed positional debates in which success is based on harvesting and presenting the most effective substantive and procedural arguments from a fancifully complex scenario. While there is no doubt that the Vis competitions have dramatically enhanced the profile of arbitration and provide a captivating way of training tomorrow's advocates, I worry that the unspoken message to would-be arbitration "samurai" is that there are always going to be ways to challenge and undermine the other party's position and little room for finding common ground.

Perhaps, after all, it is inevitable that as mediation has achieved a primary place in the informal, negotiated resolution of disputes, people feel less urgency about arbitration serving as a distinct form of adjudication that is less formal, less costly, more efficient, and perhaps less adversarial than litigation. There are, after all, other priorities, such as refining arbitration procedures to accommodate multi-party practice, emergency motions, mixing settlement-oriented and adjudi-

(Thomas J. Stipanowich et al. eds., 2010) (discussing the shortcomings of arbitration and providing protocols for improvement).

46. *See generally* Stipanowich, *Reflections*, *supra* note 40, at 379–80.

47. *See generally* Lela P. Love & Thomas J. Stipanowich, *Dear 1L: Five Guideposts for Your Future Professional Practice*, 22 CARDOZO J. CONFLICT RESOL. 529, 533–34 (2021).

48. *See* Stipanowich, *"New Litigation," supra* note 43, at 23.

49. *See generaly* WILLEM C. VIS INT'L COM. ARB. MOOT, https://www.vismoot.org/ [https://perma.cc/7XZW-AT4D].

cative modes of dispute resolution,[50] and digitalization. Indeed, for those still looking for new vistas in the Quiet Revolution, online dispute resolution (ODR) remains a potentially beneficial avenue for those seeking to prioritize economy and efficiency.[51] As usual, however, the sword has a double edge: The presence of metadata, for example, has inevitably complicated discovery and ballooned attendant costs.[52] I leave these issues and other procedural intricacies to others. For me, commercial arbitration seems a lot less interesting than it was 30 years ago.

Meanwhile, U.S. consumer and employment arbitration have never ceased to be political footballs. Although the development of due process protocols and the intervention of state and federal courts and agencies have made many of these standardized arrangements more hospitable for consumers and employees, the future is uncertain.[53] The U.S. Supreme Court has manipulated arbitration doctrine to drastically limit the supervisory role of courts in enforcing arbitration agreements and to provide an end run around class actions rather than tackling the latter directly.[54]

IV. Present Challenges, New Opportunities

When it comes to dispiriting developments, of course, none is more concerning than the current state of our nation and our world. While the Quiet Revolution was about the value of listening; rational, principled discourse; nuanced appreciation; and mutual understanding, our society is about none of these things. We are fragmented by distrust, dislike, fear, and demonization of those we see as different from ourselves due to social and economic stratification or reasons of race, ethnicity, nationality, politics, or religion. Our separateness is reinforced by retreat into homogenous bubbles and echo chambers and cynical manipulation by politicians, the media, and other opinion lead-

50. *See generally*, Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med, and Settlement-Oriented Activities by Arbitrators*, 26 Harv. Negot. L. Rev. 265 (2021); Thomas J. Stipanowich, *Multi-Tier Commercial Dispute Resolution Processes in the United States*, *in* Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study 271 (Anselmo Reyes & Weixia Gu eds., 2022).

51. *See generally* Stipanowich, *Living the Dream*, *supra* note 3, at 543–46 (discussing the effect of technology on ADR).

52. *See, e.g.*, Robert W. Dilbert et al., *Metadata Issues in Discovery*, Frost Brown Todd Att'ys (Sept. 2, 2022), https://frostbrowntodd.com/metadata-issues-in-discovery/ [https://perma.cc/47TB-7RQY].

53. *See* Stipanowich, *Living the Dream*, *supra* note 4, at 547–49 (reflecting on the future of ADR).

54. *See generally* Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Concepcion *and the Future of American Arbitration*, 22 Am. Rev. Int'l Arb. 323 (2011) (discussing and analyzing three recent U.S. Supreme Court arbitration opinions).

ers. In part as a personal response to these realities, I chose to redirect my energy and scholarly effort into an exploration of the life and career of an exemplary lawyer/leader, Abraham Lincoln.

Abraham Lincoln is perhaps the most familiar figure in U.S. history, and the most written-about. Often ranked as America's greatest President, he presided over the Union throughout the crucible of conflict that was our Civil War and played the pivotal role in ending the enslavement of more than four million African Americans. More than a century and a half after his death, we are still harvesting new insights and learning new lessons from the life and career of Abraham Lincoln. The purpose of my own work is to break new ground by using lessons from different episodes in Lincoln's life as a way of improving our own skills as communicators, negotiators, problem-solvers, leaders, and decision-makers.[55]

Some years ago, I was astonished to learn that Abraham Lincoln was encouraging other lawyers to use appropriate dispute resolution in 1850, roughly *thirteen decades* before the beginnings of the Quiet Revolution.[56] In his notes for a lecture to fellow attorneys, Lincoln stated:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.[57]

My subsequent study of Lincoln's 25 years in law practice, aided immensely by the Lincoln Legal Papers, convinced me that Lincoln did not just talk the talk but walked the walk.[58] As in other parts of Lincoln's life, his approaches to handling issues and disputes tended to be thoughtful, deliberate, and driven by pragmatism and reason. What's more, Lincoln learned from experience; he was capable of evolving.

During his 56 years, Lincoln was called upon to deal with practically the entire spectrum of human conflict, first as an aspiring young man, then as a lawyer, a suitor, a local and national politician, and, eventually, as commander-in-chief of our country during its time of greatest challenge. Along the way, he learned relevant lessons about self-control in managing relationships, communicating messages, and motivating individuals and groups of people. Thanks to modern studies in dispute resolution and behavioral science, we now possess the tools

55. *See* THOMAS J. STIPANOWICH, THE LINCOLN WAY: ABRAHAM LINCOLN AS NEGOTIATOR, PROBLEM-SOLVER AND MANAGER OF CONFLICT (forthcoming).

56. *See* 1 ABRAHAM LINCOLN, *Notes for a Law Lecture*, *in* THE PAPERS OF ABRAHAM LINCOLN: LEGAL DOCUMENTS AND CASES 12, 12 (Daniel W. Stowell et al. eds., 2008) (emphasis omitted).

57. *Id.* at 81.

58. *See generally* Thomas J. Stipanowich, *Lincoln's Lessons for Lawyers*, DISP. RESOL. MAG., Winter 2010, at 18 (detailing five lessons that lawyers can take from Lincoln's writings).

and insights to have new and better ways of understanding how Abraham Lincoln met daunting challenges in his personal and public life while making the most of opportunities presented.[59]

At a time when unprecedented attention is given to the causes of conflict and the means for its avoidance and active management, consideration of the character, virtues, and evolution of the most chronicled and scrutinized citizen in American history provides a uniquely valuable focus of study. His life and career, culminating at the heart of America's fulcrum of conflict, is an appropriate curtain-raiser for a *new* avenue of investigation that views historical leaders through the lens of our recent exploration and growing understanding of the dynamics of problem-solving, negotiation, and conflict resolution.

59. *See generally* Thomas J. Stipanowich, "WORTHY OF THEIR ESTEEM": ABRAHAM LINCOLN'S AFFAIRS OF HONOR (forthcoming).