

## JUDICIAL GOVERNANCE OF THE LONG BLUR

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In a recent issue of *Futures*, I concluded an essay on the futures of the courts and law with an ancient Chinese poem which I first heard read by the Chief Justice of the Courts of Singapore, Yong Pung How. The poem said that one of the signs of a well-governed polity is that "the courts of justice are overgrown with grass" [1]. I have also been known to argue passionately that, while some polities are closer to being democratic than others, no current system is democratic; that true democracy lies in the future, most likely as enabled by some forms of electronic direct democracy [2].

At the same time, I have been working for many years with judges, judiciaries, lawyers, and law associations throughout the US and in other countries as well, and have become increasingly impressed with how future-oriented they are, compared with other political and economic actors in postmodern societies [3].

The purpose of this little essay is to explain a related phenomenon I (and many others) have long noted: that the relevance of elected legislatures is fading away while more and more governance is being taken over by judiciaries. This phenomenon is especially found in common law jurisdictions where judiciaries have considerably more policy-making discretion than they do in civil law systems. But I believe it is more or less true everywhere, and might become more and more the case worldwide over the following years.

I do not see the move from elected-representative to judicial governance as necessarily "good" or "bad." Most people who also comment on this phenomenon heartily condemn it. I do not. Neither do I praise it, as some others do. I certainly do not see judicial governance to be the "final solution" to the obsolescence, and indeed, the obstruction, of representative government. Judicial governance is probably a transitional step towards some other kinds of governance. What those future alternatives might be is not the burden of this essay. Rather, I here simply intend to offer my explanation for the transition I believe I see underway.

The explanation for the rapid rise of judicial governance lies, I believe, in the needs of what is often called "the New Economy."

In what follows, I will first outline some of the alleged characteristics of "The New Economy" (I prefer to call it, the "Long Blur"). Then I will suggest that increased judicial

governance is a reasonable and necessary response to them. The Long Blur needs a governance system that can speed along with it. Judiciaries can. Legislatures can not.

I will not discuss here the problematic character of the Long Blur itself. But I need to make it clear that I do not consider the New Economy to be sustainable--neither socially (it creates enormous wealth and opportunities for the few, but enormous poverty and misery for the many; it requires exhilarating risk-taking by the few while it forces everyone to live lives of intolerable uncertainty and despair) nor environmentally (it requires us to devour and trash Mother Earth with ever greater greed, speed and unconcern; it focuses us only on the immediate "now" and spits in the face of future generations).

But, suspend those concerns. Imagine with me that The Wall Street Journal, The Financial Times, Forbes, Fortune, Worth, Money, Fast Company, Upside, Business 2.0, The Industrial Standard, eCompany, Wired, the "Business" section of your daily paper and every popular magazine--and all the rest of those propagandistic rags--are accurately explaining the present and foretelling the future, and let's see what consequence that might be having for the present and futures of governance.

## I. THE "NEW ECONOMY" AS A "LONG BLUR".

For the last several years, particularly during the roaring stock market boom as the Dow Jones approached, then passed, then dipped below, then soared above the mythical 10,000 number, the popular, and especially business-oriented, press has been delirious in its joy and its undying optimism. Virtually every article paints a picture of a completely rosy future for anyone who is willing and able to play the new games of the New Economy. Even the occasional warning about the inevitabilities of business cycles is downplayed. While there may be some downs, the long-range trajectory is inevitably up.

### A. THE LONG BOOM.

We have finally found the secret for continued economic growth and prosperity in the New Economy. While elements of the bad old economy--unions, job security, government regulation, and local/national protectionism--still linger on, they are, fortunately, few in number and elderly. Time, we are constantly being assured, is on the side of the New.

The titles of four recent books foretell this bright future very clearly:

The Long Boom: Forging a better future for our families, communities, and business in the new global economy [4].

Prosperity: The coming 20-year boom and what it means to you [5].

Dow 36,000 [6].

Dow 100,000 [7].

It just doesn't get any better than this--though it will! We are in the early pastures of a paradise beyond any dreams of the past.

The New Economy is said to be transforming our relations to everything--to our family, friends, neighbors and customers; to the world around us; to the changed nature of change itself, and even to the meaning and experience of time.

#### B. THE TWENTY-FOUR HOUR ECONOMY.

Capitalism, like rust, never sleeps. If you snooze, you lose. A moment's reflection is an opportunity lost. The world is round, the economy is global, and if you are not out there buying and selling, someone will corner your share of the market.

According to Harriet Presser, presently, two-fifths of all employed Americans work mostly during the evenings or nights, or rotating shifts, or on weekends. Less than 30% of employed U. S. citizens work a "standard work week" defined as 35-40 hours a week, Monday through Friday, on a fixed daytime schedule. The modal family is the two-earner couple. In these, typically one, and often both, work a "non-standard work week". There are important gender, ethnic and class differences and consequences, moreover, which these aggregate figures hide.

Presser says the leading causes for these new patterns of work are the change of the economy from manufacturing to service; changing demography (postponed marriages, aging of the population generally); and changing technologies and systems (The Internet, globalization, Federal Express). Presser cites extensive research showing the negative effects of the new patterns of work on individual health.

Her concluding paragraph:

"The movement toward a 24-hour economy is well underway, and will continue into the next [i.e., 21<sup>st</sup>] century. Although driven by factors external to individual families, it will affect the lives of family members in profound ways. The home-time structure of families is becoming temporally very complex. We need to change our conception of family life to include such complexities. This should help to improve social policies that seek to ease the economic and social tensions that often result from the dual demands of work and family, particularly among the working poor" [8].

#### C. THE FUTURE? IT'S ALL A BLUR.

Another prominent feature of the New Economy is the speed of change and novelty. Nothing lasts very long--not specific products or services, certainly not company loyalties, and not even brands (though brand names--being image empty of substance--are comparatively more enduring). [9]

The tremendous volatility and speed of the economic future is captured very dramatically in the title of a recent book: BLUR.

In *BLUR: The Speed Of Change In The Connected Economy*, Stan Davis and Christopher Meyer say that increasing speed of every aspect of business, increased electronic connectivity, and the fact that intangibles are now more important than tangibles equals BLUR, "the new world in which you will come to live and work" [10].

"And what will you see? A meltdown of all traditional boundaries. In the BLUR world, products and services are merging. Buyers sell and sellers buy. Neat value chains are messy economic webs. Homes are offices. No longer is there a clear line between structure and process, owning and using, knowing and learning, real and virtual. Less and less separates employee and employer. In the world of capital--itself as much a liability as an asset--value moves so fast you can't tell stock from flow. On every front, opposites are blurring" [11].

"In an increasing number of businesses, the real capital is intangible; it consists of such things as brand image, strong customer relationships, the talent on staff, the experiences built into business processes and systems.. ." "The implication is clear: In our future accumulation of surplus value and investments in production capacity, we have to get less physical. The tangible must give way to the intangible" [12].

More recently, Rick Levine, et al., make the point even more forcefully:

"Where business is headed there are no roadmaps yet, and few comforting parallels with the past. The landscape has little to do with mass production, mass merchandising, mass markets, mass media, or mass culture.

"Instead, the future business of businesses that have a future will be about subtle differences, not wholesale conformity; about diversity, not homogeneity; about breaking rules, not enforcing them; about pushing the envelop, not punching the clock; about invitation, not protection; about doing it first, not doing it 'right'; about making it better, not making it perfect; about telling the truth, not spinning bigger lies; about turning people on, not 'packaging' them; and perhaps above all, about building convivial communities and knowledge ecologies, not leveraging demographic sectors" [13].

#### D. E-COMMERCE.

If I were asked to say what was the one major thing I encountered in tremendous abundance during my environmental scanning in 1999 that was barely noticeable two years ago, I would say, "e-commerce." E-commerce was clearly an "emerging issue" in 1997. By 1999 it was a roaring feature of the present. More people bought their automobiles online than in auto lots. Amazon.com revolutionized virtual bookselling (just as Borders and Barnes & Noble had revolutionized physical bookstores only a few years earlier). Discussions of e-shopping and e-tailing dominated everywhere I scanned.

A leading tracker of e-commerce proclaimed:

"Consumers will spend \$4 billion on the Internet between Thanksgiving and New Year's Day. The 8.6 million households that shop online this holiday season will buy everything from books and CDs to researched big-purchase items like computers and furniture. Some will even buy their holiday meals through the Net" [14].

"A new study from the Gartner Group predicts that online sales in North America will exceed \$29.3 billion this year [2000]--a 75% increase over last year's sales of \$16.8 billion. Gartner estimates that e-tail sales will comprise 5-7% of total retail sales in North America by 2004, up from less than 1% in 1999. ... The biggest moneymaker will continue to be the computer/electronics industry segment, which is forecast to grow from \$7.5 billion in 1999 to \$59.7 billion in 2004. But the strongest growth will likely be in the home consumables and entertainment businesses. IDC recently predicted that U.S. sales of pharmaceutical, health and beauty products over the Internet will soar from less than \$250 million in 1999 to more than \$18 billion in 2004, while grocery sales will mushroom to \$8.8 billion in the same period" [15].

E-commerce is perfect for the Long Blur: ideally, one has no inventory and no personnel. All you need is a server in your mother's basement; fast and reliable connectivity; and a killer webpage which you update by the second to respond to whatever is happening NOW.

To be sure, much of the initial exuberance surrounding the thousand early "dotcoms" was tempered by a stock market "correction" in the first half of 2000 which wiped most of them out. Even Amazon.com seems on the verge of facing the realities of the Old Economy at this moment of writing. But the songbirds of the future continue to sing of the vitality of the Long Blur.

#### E. GLOBALIZATION.

Without a doubt, the characteristic of the New Economy that has been noted the longest, and most frequently, is that it is global--that local, and even national, economies are dead and gone.

One example among the very many:

"Technology is creating a global economy that is rapidly supplanting our old national economies. National governments cannot control this new economy, yet no one, least of all Americans, wants to create the forms of global governance that might be able to control it. As a result we are going to be living in a fundamentally unmanaged economic system." "National governments, which used to worry about managing and maintaining their economic systems, are slowly being pushed out of business" [16].

#### F. THE ECONOMY OF ICONS: IS THE "INFORMATION SOCIETY" OVER?

Several other recent sources have also focused on the imminent swift transformation of the most advanced societies from an information economy to a service economy and now to what Ernest Sternberg calls The icon economy [17], or what Rolf Jensen terms The dream society: How the coming shift from information to imagination will transform your business [18], and B. Joseph Pine II and James H. Gilmore label The experience economy: Work is theatre and every business a stage [19].

It is no longer product, or service, or information or even knowledge that counts. It is performance. It is pretense. It is pizzazz. It is shtick.

Or maybe worship?

## G. THE MARKET AS GOD.

After studying The Wall Street Journal and the business pages of weekly news magazines, the well-known theologian, Harvey Cox, concluded that a post-modern theology has emerged, complete with "myths of origin, legends of the fall, and doctrines of sin and redemption .. chronicles about the creation of wealth, the seductive temptations of statism, captivity to faceless economic cycles, and ultimately, salvation through the advent of free markets, with a small dose of ascetic belt-tightening along the way, especially for the East Asian economies." "The East Asian troubles, votaries argue, derive from their heretical deviation from free-market orthodoxy--they were practitioners of 'crony capitalism,' of 'ethnocapitalism,' or 'statist capitalism,' not of the one true faith."

"Soon I began to marvel at just how comprehensive the business theology is. There were even sacraments to convey salvic power to the lost, a calendar of entrepreneurial saints, and what theologians call an 'eschatology'--a teaching about the 'end of history.' At the apex of any theological system, of course, is its doctrine of God. In the new theology this celestial pinnacle is occupied by The Market, which I capitalize to signify both the mystery that enshrouds it and the reverence it inspires in business folk" [20].

## II. FROM PREMODERN, TO MODERN, TO JUDICIAL GOVERNANCE.

So what has all this to do with judicial governance?

For many hundred years, until the rise of the United States and other modern nations, "law" was not a set of generalized rules "made" by legislators. Rather, law was typically declared (or, it was pretended, "discovered") by judges on behalf of kings in common law communities on a case-by-case basis. Judges did of course seek to follow the decisions of other judges in similar cases, but, because of the rarity of adequate written records, and the considerable distance between courts in relation to existing transportation and communication systems, there was actually considerable variance between and within jurisdictions. Law was, in effect, highly localized and individualized. In England, it might have been the intention of the King's Law "to devour all other" laws, as Maitland said, but it was no easy task actually to accomplish at the time.

During the last few hundred years, however, "law" has been thought to be "made" by legislators acting as representatives of citizens, typically guided by principles contained in written constitutions. Law in modern societies was intended to apply to everyone in order to produce a stable, long-lasting set of rules by which the newly-emerging games of nation-building, industrialization, and capitalism could be played. The widespread use of the printing press, and of educational and other institutions based upon and furthering the

use of the written word for economic and governance purposes, further led to a system whereby judge-discovered oral law gave way to legislatively-made written law, with the primary role of the courts becoming to render judgements based upon reconciling specific human actions with generalized written rules, requirements, or prohibitions [21].

Under this modern system, judges neither made nor discovered law. Their role was simply to interpret and announce the meaning of (and perhaps to clear up any ambiguity in) the written laws and constitutions so that everyone would be playing the modern game according to the same set of rules.

#### A. JUDICIAL RESTRAINT VS. JUDICIAL ACTIVISM?

The myth that judges do not, and should not, "make law" but "merely interpret and apply" it is surely the most enduring in American legal history and popular culture.

For example, as I was writing this paper, a controversy was going on in Hawaii about a decision of a Federal District Judge, David Ezra, in a case concerning longline fishing. The judge's decision produced considerable public outrage. A group of lawyers wrote a letter to the editor expressing their support for Judge Ezra, saying the uproar was unwarranted:

"Judges are required to enforce the law, and they take an oath to do so. Judges...cannot disregard all or part of the law in the name of 'fiscal responsibility,' convenience or popular opinion.

"Similarly, the notion that Judge Ezra should have asked himself whether his decision was 'the best possible solution to the dispute' ignores the fact that judges cannot second-guess the wisdom of federal laws. Those political judgments are made in Congress and in the White House, not the courthouse.

Judges cannot 'make' law." [22].

And yet, the learned lawyers to the contrary notwithstanding, and certainly without concerning ourselves with what Judge Ezra ruled in this instance, judges do "make law" or at least set policy, every day.

Arguments about the existence or propriety of "judicial activism" and "judge-made law" fill many library shelves.

Typical is the following testimony (subsequently published) submitted by Lino A. Graglia, a University of Texas School of Law Professor, to the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, US House of Representatives, May 15, 1997:

"The most serious defect in the American system of government as it currently operates is the policymaking role assigned to itself by the Supreme Court. The Court has in recent decades evolved into the most important institution of America government in terms of domestic social policy. It has made itself the final arbiter on issues literally of life and death.. ." "In sum, the issues that determine the nature of a civilization or culture and the quality of life as a society are no longer determined on a local basis by elected

representatives, but for the nation as whole by a majority vote of a committee of nine lawyers unelected to office, unremovable by election, and holding office essentially for life.

"Policy making by the Court is obviously inconsistent with the basic constitutional principles of separation of powers, representative self-government and federalism that are the only real protection against governmental tyranny. Judicial policymaking usurps the legislative power that the Constitution assigns exclusively to Congress in part and otherwise reserves to the states; it replaces representative self-government with government by electorally unaccountable officials, and it decides for the nation as a whole policy issues that the Constitution leaves for the most part for decision on the state or local level, by officials closest and most responsive to the people the policy affect. It amounts, in short, to a near-total subversion of the system of government created by the Constitution" [23].

On the other hand, there have been many attempts from many different perspectives to justify "judicial activism." One very familiar argument is that the U. S. Constitution is "a living document" which must be viewed as more than the original words on parchment, as formally amended.

More recently, a provocative and widely discussed explanation for judicial policy-making has been offered:

"The pragmatic reason courts tend to ignore federalism and the separation of powers, therefore, is that the principles no longer describe the governmental system in which they exist, or the model of government action that modern government embodies." "As our state has become increasingly administrative and managerial, judicial policy making has become both more necessary for judges to produce effects and more legitimate as a general model of governmental action." "We no longer see discrete, independently operating entities, like 'the executive,' 'the legislative,' or 'the judiciary.' Rather we see complex organizations that interact with each other through a wide range of individual behaviors." "Regulation is an intimate, albeit not affectionate, process of negotiation, threat, bargaining, compromise, and confrontation that cannot be subjected to fixed, preestablished rules without becoming either excessively lax or excessively harsh. It is dynamic, rather than mechanistic.. ." "A modern version of the rule of law, therefore, incorporates the concept of constraint, but jettisons the idea that the constraint must necessarily consist of fixed, preestablished rules." "Reliance on attitudes, culture, and complex supervisory mechanisms rather than on the grand structure of government may appear to be an insubstantial or unreliable way to protect freedom, but there is really nothing else" [24].

But it is now being increasingly argued that more and more important policy decisions are being made by judges, and less and less are being made by legislatures:

"Over the last few years, the legal system has begun to overtake the legislative process as the vehicle to resolve contentious debates, particularly over unpopular products, when Congress is unwilling to act" [25].

"Americans lean heavily on the law. More than any society on earth, the U. S. relies on its civil justice system to define relations between man and man, man and woman, man and corporation. Americans depend on the civil law to shape and bind society: to defend individual rights, tame the excesses of capitalism, and compensate them for the modern and ancient adversities of living. Litigiousness is not just a perverse American character flaw: it is something closer to a core American value. But now, as big government wanes, America seems to be entering an era of more and bigger lawsuits. For more than a decade, mass litigation has become increasingly common in areas of personal injury, product liability, and workplace discrimination." "Courts are increasingly called upon to assume an oversized role, making public policy in areas vacated by politicians. The glacial pace of legal change has suddenly accelerated as the third branch of government assumes responsibilities from the other two, regulating and taxing whole segments of U. S. industry" [26].

## B. WHY JUDICIAL GOVERNANCE?

Summarizing the above arguments, and adding a few of my own not previously mentioned by anyone as far as I know, I believe the reasons for the rise of judicial governance in the United States are the following;

--Elected officials throughout the U. S. try not to make decisions about controversial or unpopular matters for fear of losing elections, leaving the issue to be decided by appointed judges.

--Extensive tax cuts and "downsizing" of governments at all levels, most especially at the U. S. federal level, has rendered most nonmilitary and non-paramilitary governmental agencies increasingly understaffed and underfunded, and thus unable to function as intended. While this primarily impacts the administrative branch, the effect is to force more and more decisions into the hands of judges.

--Alexis de Tocqueville commented on the American tendency to solve disputes by turning to the courts more than a hundred years ago. With enrollments in law schools (and the number of law schools--and now of online law schools) in the U. S. continuing to grow more rapidly than the overall rate of population growth, an ever-increasing proportion of American citizens are lawyers, trained primarily to solve their disputes by going to court.

--Because of the rapid rate of technological and hence social change, corporations as well as ordinary individuals often find themselves facing problems (or opportunities) which require a quick and authoritative decision, but about which no legislative body has set (or, as likely, even considered) public policy. Hence, cutting-edge, future-oriented cases and controversies come before judiciaries for policy decisions before the public, or its elected representatives, is even aware of them.

There seems little doubt that, as the pace of technologically-induced social change increases, as time and space coalesce into a single instantaneous and global market which

never sleeps and seldom rests while governments become weaker and weaker, that courts everywhere--and not just in the U. S.--will resume more and more policy-making roles.

In her Financial Times article, Patti Waldmeir quoted primarily from people--many of them American judges, lawyers or legal scholars--who were opposed to increasing judicial activism. She summarizes and concludes her article:

"Used as a regulatory system, civil litigation is unpredictable and costly; as a system of social insurance it is random and expensive. All involved in the debate should remember that the role of the courts is to deliver justice--not to compensate for small government with even bigger litigation" [27].

I believe that this rather typical explanation is missing the most important point about the increase of judicial activism.

Modern governments everywhere appear to be losing their legitimacy. In the U. S. this seems especially advanced. Fewer and fewer Americans vote or are otherwise politically active. Fewer and fewer even bother to pay attention to politics. While young people have always been less active and less attentive to the formal political process in the U. S. than are adults (tending to become more involved as they themselves reach middle age), apathy towards formal politics and political issues seems increasingly widespread among American youth [28].

While the symbols of American government--the Constitution and the Flag--retain their almost holy status, politicians and actual processes of politics are either held in contempt, or totally ignored by more and more people [29].

At the same time, "gridlock" (the inability of legislative and executive branches to agree quickly--sometimes, at all--on policy matters) has come increasingly to characterize American politics. Gridlock is nothing new. Neither is it a temporary mistake. Gridlock is a fundamental design feature of the U.S. Federal Constitution, more or less widely copied by all U. S. state constitutions and most municipal charters. The U. S. Constitution intentionally makes it almost impossible to govern without agreement between the executive and the legislature, and yet the Constitution also enshrines a system of governance, best called "presidentialist", which makes such agreement almost impossible [30].

Because of the two-party system--itself an inevitable and totally predictable consequence of specific political design features of the U. S. and all state constitutions [31]--formal discussion of the many varied opinions and preferences different citizens might actually hold on policy issues is structurally impossible in the U. S., and only a narrow range of basically similar proposals, representative of few if any actual citizens, ever get discussed in legislatures. To make matters worse, decisions there are reached by a simple majority vote which virtually guarantees that in every matter of controversy, almost everyone is substantially dissatisfied with the outcome [32].

In contrast to this, judge-made law is both faster (though often still not fast enough) and personalized--tailored to the specific case and controversy, and generalized to other cases and controversies only with great difficulty.

This certainly does result in a situation where there are scores, if not hundreds, of different decisions being rendered on barely distinguishable cases every year--if not in fact every day--in the U. S. Many of these cases make it to the U. S. Supreme Court where they often are affirmed or overturned without a hearing, with only a tiny number of them being heard and decided, often by a narrowly split vote of the nine Justices, and sometimes with several different written concurring or dissenting opinions.

Surely this lack of uniformity must be lamentable, as the Financial Times article said. Surely capitalism requires stable, predictable, long-lived rules.

Modern capitalism perhaps did, but the postmodern "New Economy" of the "Long Blur" does not, if I read its proponents correctly. The kind of judge-made, personalized, and highly transitory rule-making is precisely what the Long Blur seems to require.

And the Long Blur neither needs nor wants rules about anything which are made by highly unrepresentative and remote "representatives"--rules which then must be administered and adjudicated slowly over many years. To the contrary, by the time such rules are finally and authoritatively affirmed (or denied!) by the U. S. Supreme Court, the technology, the economy, and the society will have long since moved on to other cases and controversies about which the legislature is ignorant and silent, though nonetheless still trying to place the dead hand of past regulations on the throttle of dynamic change.

In my view, then, judges are not "usurping" the proper role of legislators. Rather, they are merely responding as responsibly as they can to the increasingly common and real need of global economic actors to have quick decisions rendered on matters of great immediate, but probably quite transitory, urgency.

It is important to understand that to some extent, this is not simply an American, or even a common law, phenomenon. In a recent flurry of books and articles, Alec Stone Sweet and others have recently shown that legislatures in Europe also have lost much governance to constitutional tribunals. Stone Sweet opens his book titled *Governing with judges*:

"Parliamentary supremacy, understood by most students of European politics to be the constitutive principle of European politics, has lost its vitality. After a polite, nostalgic nod across the Channel to Westminster, we can declare it dead. In contrast to central tenets of the British parliamentary model (and of traditional Continental state theory), the 'new constitutionalism' has it that legislation must conform to the dictates of the constitution--as interpreted by constitutional courts--or be invalid. The work of governments and parliaments is today structured by an ever-expanding web of constitutional constraints. In a word, European policy-making has been judicialized. Constitutional judges routinely intervene in legislative processes, establishing limits on law-making behavior, reconfiguring policy-making environments, even drafting the

precise terms of legislation. The development of European constitutionalism has also infected the European Union. The European Court of Justice, the constitutional court of the Union, has fashioned a kind of supernational constitution, and this law binds governments and the parliaments they control [33].

But more than even this, constitutional review has also influenced the work of the judiciary as well, Stone Sweet notes:

"Ordinary judges today regularly use the techniques of constitutional law adjudication to manage the problems that confront them in their workplace. Judges may even be using such techniques to enhance their own policy-making authority, vis-à-vis legislatures and constitutional courts. The brute empirical reality is that parliaments have lost their implied monopoly on law-making, constitutional courts today share their authority to interpret the constitution, and ordinary judges--certainly not slaves to the codes--participate in constitutional politics. Stated differently, it has become increasingly obvious that traditional separation of powers doctrines, however deeply embedded in consciousness we might suppose them to be, are increasingly less relevant to the realities of European governance." [34].

Finally, Stone Sweet offers these comments about the future of judicial governance in Europe:

"The techniques of constitutional adjudication will then tend to diffuse. Sites of public governance are gradually saturated with models of action (rules, discursive tools, modes of reasoning) prescribing how officials ought to do their jobs. Officials will make use of these models to insulate their activities from future constitutional censure. They will also acquire the capacity to participate in the construction of the constitution, thereby conditioning how constitutional courts do their jobs.

"In the end, governing with judges also means governing like judges" [35].

To be clear, I must point out that Stone Sweet, et al, are describing developments in Europe that are moving away from the traditional political philosophy which considered legislatures to be the sole interpreters of the constitution because they embody Rousseau's "general will", to a political philosophy that is more like traditional American-style "judicial review" which privileges "the Constitution", as interpreted by the courts, over anything a legislature or executive might do.

However, what I am discussing in this essay is the next step that Europe has not taken, but that many American judges have: beyond slavish concern with what any old document says to doing whatever is determined to be just for the moment and responsive to the future.

In the paragraphs below, Peter Spiller is writing of British and New Zealand judges, but much the same can and should be said of American judges as well:

"It is true that judges in England and New Zealand are bound to apply the unambiguous wording of valid Acts of Parliament, and that they do not have the right nor the opportunity to introduce systematic and wide-ranging reforms of the legal system. The reality is that the great majority of judges spend most of their time 'sifting through a

mass of conflicting factual material' and applying settled law to disputed facts, rather than formulating new principles of law. Nevertheless, it is evident that judges play a creative role in the legal system. They do this by virtue of 'the manner in which they perceive and interpret "facts" in cases before them.' Furthermore, particularly at the higher levels of the court system, they play a key role in legal development by extending the law to cover new or 'grey' areas and in exercising discretions allowed by statute. Modern judges tend to acknowledge their law-making power openly.. .."

"The current President of the Court of Appeal, Sir Robin Cooke, claimed (in 1990) that 'the great majority of New Zealand judges, perhaps all, now openly recognize, albeit, no doubt, in varying degrees, that the inevitable duty of the courts is to make law and that this is what all of us do every day.'"

"Thomas J has recently called for a distinct break with the traditional notion 'that past cases should be followed for the sake of precedent,' with the effect that 'the past.. . has predicted the future.' He believes that it should be recognised that 'the common law today remains what it has always been, the law as forged and reforged and made and remade by the judges.' He argues that 'past cases should be accepted as authorities and followed in a later case when, and only when, the judge consciously and sensibly determines that they accord with sound principle, will contribute to the achievement of justice in the individual case, and are responsive to the current norms and needs of their community.' He says that 'ultimately judges are not bureaucrats applying preordained rules, nor are they fundamentalists applying a rigid gospel unable to question the wisdom, validity, and relevance of the law which they are called upon to administer,' but are social artisans dealing with the affairs of people" [36].

Some one will certainly object that U. S. judges do not have this kind of freedom; that they are bound by the U. S. Constitution, their state constitutions, and by previous judicial decisions.

They are so bound only because of their mutual willingness to pretend they are. And if they are, then this might be yet another reason why the U. S. Constitution--a magnificent political design for America 200+ years ago, in the very earliest days of industrialization--deserves a serious reconsideration. The dead hand of Constitutional Fundamentalism (which characterizes the perspective of several U. S. Supreme Court Justices and a portion of the legal community) is strangling the life out of the body politic [37].

In the meantime, all American judges--whether conservative or liberal; literalists or pragmatists; activists or originalists--from time to time find themselves obliged by the dynamics of postmodern society, technology and economics to be fluid, flexible, and fair.

It goes without saying that judges are very poorly prepared, by prior academic training, to be the futurists and philosophers they are increasingly required to be. So the continuing legal education of the bar and bench is even more essential.

And it certainly goes without saying that this rising judicial governance is a fundamentally "undemocratic" process. But there is little truly democratic about any

modern government now, in spite of all the glowing rhetoric in our textbooks and from our politicians.

So it also goes without saying that, until a personalized, swift, highly flexible, authoritative (but not authoritarian), and future-oriented system of governance is finally invented to replace our obsolete republican form, judges will be required more and more to make, unmake, and remake highly private "public" policy decision which current conditions demand and future conditions will make even more imperative--as long as the Long Blur prevails.

### C. GRASS OR COWARDS?

I started this essay by reminding readers of the poem that looked forward to the time when the courts of justice were overgrown with grass. Yet, everything I have written in the rest of the essay suggests that all the grass on the planet is about to be overrun with judges and lawyers. All the world's a courthouse and all the men and women merely litigants.

That may be a necessary interim condition.

But while I was in New Zealand in February 2000, discussing judicial futures there, a judge, whose name I regret I do not recall, gave me this poem which he had written out in his own hand, saying it was by Robert Burns. Perhaps it can rekindle and sustain our hope for futures without courts:

A fig for those by laws protected.  
Liberty's a glorious feast.  
Courts for cowards were erected.  
Churches built to please the priests!

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