



RESENHA

Capturing the complexity of constitutional erosion and resilience in Brazil¹

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1. Introduction

Brazil deserves far more international attention as a locus of both constitutional crisis and resilience. Professor Meyer's new book is a highly valuable contribution to the global literature, presenting a much-needed systematic country case-study of what he calls constitutional erosion in Brazil, but embedding it within a broad comparative enquiry that forges meaningful links between the Brazilian and international experiences, with references to Latin American states such as Argentina, Chile and Peru, South Asian states such as Thailand and Myanmar, and the USA, among others. His account challenges, and brings new dimensions to, the fundamental assumptions and central preoccupations in the literature, as well as providing a counter-narrative to any international misconceptions or misrepresentations of the contemporary crises facing Brazil's constitutional democracy; not least lazy representations of these challenges as simply executive-centred, with international media speaking of President Bolsonaro as "Trump of the Tropics".²

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² See e.g. Tom Phillips, 'Trump of the tropics: the 'dangerous' candidate leading Brazil's presidential race' *The Guardian* (19 April 2018); or a discussion of 'The Trump of the Tropics—Jair Bolsonaro' organised by Australian Broadcasting Corporation (ABC) Radio National (18 July 2021).

At 230 pages, *Constitutional erosion in Brazil* is a substantial, rewarding, compelling, and at times arresting account of the decades-long project to make not just democracy, but social democracy, a reality in Brazil. Meyer pursues a central argument that Brazil's contemporary challenges and crises are rooted in multiple state and non-state actors' resistance to the undeniably social-democratic character of the 1988 Constitution, that the Constitution remains a foundational text to be valued, and that it provides resources for enhancing resilience and possibly reversal of the current authoritarian trajectory. He not only provides a detailed account of the multiple and connected crises that have beset Brazil since 2014, but takes the long view, delving deeply into the nature of Brazil's democratic transition in the 1980s, and governance back to the imperial era of the nineteenth century, to place these crises in context, illuminate their origins, and explain the deep roots of resistance to a democratic model aimed at more fully addressing inequality.

The book is divided into nine chapters. A chapter-length introduction on defining constitutional erosion in the Brazilian context is followed by eight thematic chapters on: the role of the military and courts in Brazil's "transitional constitutionalism (chapter 1); the tensions between social-democratic constitutionalism, transformative constitutionalism and authoritarian and neo-liberal modes of governance (chapter 2); institutional features of the judiciary that explain its role as an actor in the processes of constitutional erosion and political crisis (chapter 3); the role of courts and judges in destabilising constitutionalism (chapter 4); the evolving role of military actors in governance before and after the democratic transition (chapter 5); the historical and contemporary roles and perceptions of military and judges as "moderating powers" in Brazil's constitutional order (chapter 6); the serious democratic challenges presented by digital technologies such as social media for elections and the epistemic environment essential to democratic functioning (chapter 7); and sources of resilience in the 1988 Constitution.

Meyer's account is, above all, one focused on capturing the sheer complexity of the challenges facing the consolidation of a stable social-democratic constitutional identity and constitutionalism in Brazil, encompassing a prismatic set of actors and processes including not only the roles and interactions of key institutions such as the federal executive, legislature, and courts, but also wider issues such as distinctive civil-military relations, the incompatibility of neoliberal policies with the social-democratic nature of the Constitution, and

the phenomenon of social media and “surveillance capitalism” disrupting and distorting political discourse.

In this review I focus on locating this work in the existing literature and discussing some principal themes in the book, aiming to strike a balance between the importance of understanding Brazilian democracy on its own terms as well as adding to Meyer’s comparative perspective and reflecting on the lessons, including positive lessons, that the world can learn from Brazil.

2. Locating this book in the international literature

Meyer’s book addresses a very significant gap in English-language scholarship. The global literature on democratic decay, as I call it, has long been dominated by a small number of country case-studies focused on the USA, Hungary and Poland, and, perhaps to a lesser extent, Brazil’s neighbour Venezuela (e.g. ARAT; PAMUK, 2019; BREWER-CARÍAS, 2010; PAP, 2017; SADURSKI, 2019; SUSTEIN, 2018). Other states such as Israel and, in recent years, India have also come become more prominent in the scholarship (e.g. KHAITAN, 2020; MATE, 2018). Yet, single country case-studies remain relatively rare: comparative constitutional law in particular features a strong tendency toward work that takes a broad comparative tack, especially in the construction of analytical frameworks (e.g. HUUQ; GINSBURG, 2019; SCHEPPELE 2018).

In particular, states such as Brazil and South Africa, whose democratic challenges are inextricably intertwined with deep and stark inequality as well as prevalent corruption, and which appear to feature forbiddingly complex patterns of interaction across historical, political, institutional and cultural axes, have been difficult to fit into the established frames of the literature, especially “paradigmatic” liberal accounts of the incremental dismantling of the liberal-democratic system by democratically elected governments in largely well-functioning democracies through the subversion and subordination of key institutions such as parliament, the courts, the public service and the independent media (e.g. Hungary, Poland).

Based on analysis of “non-paradigm” cases of democratic decay, I have argued that, despite its many insights, the literature’s focus on a small cohort of principal case-studies has produced a range of distortions and blind spots in the literature that impede or ability to see challenges clearly: an excessive focus

on executives; insufficient attention to other institutions such as courts and the military; an excessive focus on populism as a governing concept; and insufficient attention to the political history of the state, especially the experience and nature of past authoritarianism and the nature of the transition to a more democratic system; among others (DALY, 2021).

The lack of fuller accounts of the Brazilian experience has been odd, especially given its status as one of the world's largest democracies. For instance, an otherwise excellent collection, *Constitutional Democracy in Crisis?*, published in 2018, featured 15 country and 4 regional case-studies alongside thematic and theoretical chapters, but omitted Brazil bar limited analysis in the regional overview of Latin America (GRABER, LEVINSON; TUSHNET, 2018).³ That may be due to, again, the excessive focus on executives and the lack of attention to other processes and institutional actors: the collection was, after all, published before the rise of President Bolsonaro.

In a recent article, this reviewer attempted to provide an outsider's preliminary English-language account locating the Brazilian context within existing analytical frames, offering that it resonates with dimensions of comparative experiences of democratic decay but presents an example of "multi-directional" decay that has followed its own patterns including errant courts, abuse of the impeachment procedure, "constitutional dismemberment" through constitutional amendments enshrining austerity measures in contradiction to the social-democratic character of the constitutional text, the return of the military as a political force, and the rise of President Bolsonaro as an expressly authoritarian actor (DALY, 2020).

Meyer's book provides a much fuller "insider" account, rich in theoretical, conceptual and empirical insights, which rewards a close and full read. I have been fortunate to see parts of this book develop, including through a panel on "Courts Against or in Favour of Democratic Decay?" Professor Meyer organised for the annual conference of the International Society of Public Law (ICON-S) in Santiago, Chile in 2019, at which he presented a paper that forms the basis for chapter 6.⁴ It is important, too, to note that I have had the good fortune to receive in advance a forthcoming book, which, will serve as an excellent

³ The Latin American chapter is R Gargarella, 'Latin America: Constitutions in Trouble'.

⁴ Professor Meyer presented a paper co-authored with Mariana Rezende Oliveira, 'Moderating Power? Military and Judges in Brazilian Democratic Backsliding'.

companion piece: Professor Juliano Zaiden Benvindo's *The Rule of Law in Brazil*, the latest addition to the Hart Publishing series on the rule of law worldwide, whose central themes also include the separation of the rule of law from stark inequality throughout Brazil's history and the endurance of the authoritarian mindset, among others (BENVINDO, 2022).

3. The value of constitutional erosion as a conceptual framework

Meyer opts to use the concept of “constitutional erosion”, pairing it with the familiar concepts of constitutional crisis and constitutional identity, to capture the patterns of degradation of constitutional democracy in the Brazilian context. My initial reaction to this choice was one of caution, given my longstanding criticism of what I view as excessive conceptual proliferation in the field, with an array of novel concepts coined in the field of constitutional law alone since 2015 including “autocratic legalism”, “abusive constitutionalism” and “constitutional capture”, not to mention the array of additional (and often synonymous) concepts in other fields and disciplines such as “democratic deconsolidation” and “autocratization” (DALY, 2019).

However, Meyer is not alone in opting to craft a conceptual framework tailored to the country context. For instance, in the Polish context, Professor Wojciech Sadurski in his 2019 book, *Poland's Constitutional Breakdown* coined his own compound concept, “anti-constitutional populist backsliding”, to capture what he viewed as the dominant characteristics of the phenomenon in Poland (SADURSKI, 2019, p. 1-34). Even more apposite is Manoj Mate's use of the term “constitutional erosion” in his 2018 analysis of democratic regression in India in arguing that, while the country enjoys vibrant electoral politics, the deployment of religiosity by both the ruling Bharatiya Janata Party (BJP) and the opposition Congress Party presents a serious threat to secularism as a governing principle of the Indian Constitution, and by extension, “a fundamental threat to the integrity of India's constitutional order.” (MATE, 2018, p. 380).

Meyer's use and development of constitutional erosion as his governing concept follows a similar logic to Mate's but is broader in its scope. He defines his concept as “a prolonged situation in time where different challenges to the constitutional structure of a country repeatedly take place, without, by themselves, disrupting the whole constitutional system”, in contrast to the “single rupture”

of a *coup d'état* (MEYER, 2021, p. 8). Continual defiance of the constitutional system, regarding both the text and spirit of the Constitution as establishing a social democracy, by a variety of actors, undermines the capacity to maintain a stable sense of constitutional identity. Offering that his concept complements existing concepts such as “democratic erosion”, “democratic decay” and “authoritarian backsliding”, he emphasises that his concept of constitutional erosion takes place on the plane of “constitutional norms, institutions, rights and identity,” with particularly detailed attention to the erosion of Brazil’s constitutional identity since 2014 (MEYER, 2021, p. 9). In that sense, he underscores that his central focus is on the constitutional dimensions of constitutional democracy, not democracy *per se*, although he recognises the interdependence of constitutionalism and democratic institutions. By the end of the introduction, Meyer had convinced me that his conceptual framework adds valuable dimensions to our understanding of how democracy comes undone.

Of course, existing frameworks tend to make a clear distinction between democratic erosion and breakdown. Larry Diamond, for instance, suggests that the global “democratic recession” encompasses four broad categories, with a central distinction between the breakdown of democratic regimes, as opposed to a decline in the quality of democracy in both younger democracies and long-established democracies (DIAMOND, 2015, p. 144). Other scholars draw this distinction quite differently. For example, Huq and Ginsburg employ “democratic breakdown” as an overarching framework comprising two sub-concepts lying at opposite ends of a spectrum – “authoritarian collapse” and “democratic erosion” – while emphasizing that, in a given country context, a process of democratic regression may feature elements of each (HUQ; GINSBURG, 2019, p. 39).

In their view, the types of institutional and legal manoeuvres employed to degrade democratic rule appear to differ between rapid and more gradual breakdown of democracy: where rapid breakdown often features abuse of emergency powers and military coups, a more diverse and diffuse suite of measures tends to be employed in slower processes. In addition, faster and slower processes tend toward different destination points. The former tend to produce a “clearly authoritarian form of government”, e.g. Brazil after the 1964 military coup d’état, where democratic trappings were merely superficial, especially between 1969 and 1974. By contrast, slow erosion tends to produce a form of “competitive authoritarian structure with more than merely skin-deep accoutrements of democracy”, e.g. Hungary under the Fidesz Party government after 2010 (HUQ; GINSBURG, 2019, p. 39). Hungary (and, in the Latin American context, Venezuela between

2000 and 2013) present the now-paradigmatic example of the slower form, where a sophisticated “masterplan” has been rolled out to subordinate all democratic organs to the executive. This has not involved any overt suspension of rights or frontal assault on institutions. Rather, the liberal-democratic system has been subverted through the mutually reinforcing effects of court packing and changes to the Constitutional Court’s jurisdiction (disguised as reform), measures restricting the opposition, laws restricting NGO funding, and media buyouts of independent media by cronies of the government (PECH; SCHEPPELE, 2017).

Meyer shows in chapter 8 that it is largely only under President Bolsonaro’s administration since January 2019 that anything similar to this “masterplan” has taken place in Brazil, including attacks on the National Congress and the Federal Supreme Court, the politicisation and, in some cases, subordination or diminution of other independent accountability agencies, and attempts to undermine critical independent media, such as reducing their funding – accompanied by persistent virulently anti-democratic rhetoric. Here, Meyer mirrors Sadurski’s view that “erosion” is an inapt term for what is better understood as active destruction of constitutional democracy (MEYER, 2021, p. 213; SADURSKI, 2019, p. 10). However, central to his account is the argument that this ongoing crisis is merely the culmination of diverse patterns of behaviour that have challenged and undermined the 1988 Constitution and any broader adherence to legality and the rule of law in the over thirty years since the Constitution was promulgated, which includes everything from adjudication, to political behaviour, to constitutional amendments incompatible with the design of the Constitution, to tolerance of securitisation and militarisation of the public sphere. In this way, his framework diverges significantly from the focus on a somewhat decontextualised and limited “democratic minimum core” or “liberal constitutional democracy” in much of the literature (e.g. SCHEPPELE, 2018). As Meyer, explicitly states in the book, there are serious “problems generated by a reading of constitutionalism that excludes concerns on inequality.” (MEYER, 2021, p. 228)

Meyer’s concept of constitutional erosion appears to have a complex and close relationship with more full-blown democratic erosion or decay: it is antecedent to it, it creates the facilitating conditions for it, but it also transcends it and runs parallel to it in many ways, as well as raising the risk of full breakdown through a coup. Far from the “authoritarian playbook” discussed in the literature, he illuminates processes that are far deeper, pervasive and corruptive in that they are both brazen and blend into the background. As such, it has powerful explanatory value not only for Brazil but for a range of countries

worldwide. It sets Meyer's account apart from some country case-studies that tend to portray a largely positive (if imperfect) *status quo ante* before the arrival of an anti-democratic leader or government, which portray actions such as “constitutional hardball” and norm-breaking as aberrant rather than hard-wired into the system, and which can fail to place contemporary challenges in an adequately developed historical context of the culmination and convergence of multiple negative trends.

Meyer places the past three decades in broader context, offering that it is an attachment to “praetorianism” rather than any specific measure (e.g. use of emergency powers) that has been, and continues to be, the defining challenge for the realisation of genuine popular empowerment and, more specifically, social democracy since 1988. In this respect, although authoritarian resistance to the nature of the contemporary Brazilian state seems less sharply articulated, the Brazilian experience might be likened to the Polish context, where authoritarian actors push a narrative that the liberal-democratic state constructed after 1989 is illegitimate, and that what the governing parties fought for in the Solidarity transition movement was a nationalist Catholic state, which is now being constructed through statute and state transformation without any change to the face of the 1997 Constitution (BERNATT; ZIÓŁKOWSKI, 2019; KORYCKI, 2017). This, then, is not just persistent political conflict: we could perhaps characterise recent developments in Brazil as efforts toward the construction of a material “alt-Constitution” or “counter-Constitution” whose operation does not necessarily depend on the promulgation of a new constitutional text.

4. Moderating powers, legalism and extra-legality

One of the central original contributions of the book is its detailed and insightful exploration of the development, internal logic, and dynamics of the concept of a “moderating power” in the Brazilian constitutional tradition. Tracing this concept back to the imperial Constitution of 1824, and the Emperor's role as a *pouvoir neutre* (neutral power) capable of disciplining the branches of government or ensuring their functioning, Meyer shows how a constitutional idea fashioned by Benjamin Constant in post-revolutionary France has had remarkable staying power in Brazilian constitutional thought for two centuries, especially in conservative circles. As the state has passed through successive constitutions, Meyer shows how the idea of a moderating power has transferred from the Emperor to the military, to the courts after 1988, and arguably back

to the military since 2014 – or, as he observes, is the subject of a tussle between the military and the judiciary.

Reading the chapter on the courts and military as moderating powers one is struck by the resonances with aspects of the Turkish experience. Although the comparison should not be pushed too far – Turkey’s democratic development differs in many respects – it is worthwhile to note commonalities in the way the judiciary and the military have previously operated to discipline popular sovereignty and individual rights protection in order to safeguard certain values, such as secularism, as foundational values of the state that have been central pillars of each successive constitution.

This has been reflected in understandings of the power framework of the Turkish State. Superimposed on the classic tripartite division of government power among the executive, legislative and judicial branches, the military has played an overarching “nation-building” tutelary role, accompanied by the civilian State bureaucracy as representatives of an elite wedded to the foundational values of the Republic. A common conceptual division of the state has distinguished the “permanent” civilian and military state (*devlet*) from the “changeable” elected organs of government (*hikimel*) (BÂLI, 2012, p. 263), with the military intervening at crucial junctures through *coups d’état* in 1960-61, 1971 and 1980-83, twice adopting a new constitution in 1961 and 1982, as well as intervening in subtler ways including the “postmodern coup” of 1997 by which the military ended the government of Prime Minister Necmettin Erbakan due to generals’ concerns surrounding what they viewed as its “Islamist” policies, with the *coup de grâce* delivered by the Constitutional Court banning Erbakan’s Welfare Party – at the time, the largest political party in the parliament. Yegen describes the post-1982 court as “a politicized Constitutional Court that acts as a mechanism of tutelage” (YEGEN, 2018, p. 284). The fact that the current authoritarian turn under President Erdoğan has neutered these moderating powers tends to support Meyer’s view that authoritarianism is a substitute for such powers. Further comparison of these systems could yield further insights, including the differences in coordination and conflict between the military and the courts in each state.

Meyer’s discussion of the courts as a moderating power is couched in a broader assessment of their performance before and after the democratic transition in the 1980s. From chapter 2 to the very last page of the epilogue, he paints a portrait of a judiciary that has had, at best, mixed success in defending the social democratic project enshrined in the 1988 Constitution. We see a submissive

judiciary under the military dictatorship focusing on defending its institutional form and privileges in the Constituent Assembly of 1987-88 (thereby stymying institutional reforms essential to a fuller implementation of the new constitutional project), taking a deferential posture toward the political branches in the early post-transition years, but after the 2000s taking an increasingly muscular role in its jurisprudence, producing a curial hypertrophy quite unlike the “standard” concerns about “legislative and executive hypertrophies” (MEYER, 2021, p. 121).

While the accretion of substantial status and governance authority has allowed the judiciary to constrain some of the worst excesses of the Bolsonaro administration, Meyer is highly critical of, in his view, a failure to vindicate the transformational promises of the 1988 Constitution, to place adequate constitutional controls on authoritarian elements and governance post-transition, to discipline highly dubious impeachment processes, alongside a tendency to expand the judiciary’s economic privileges and to wade unhelpfully into mega-politics. Importantly, he provides a fuller account of how the Court has so often unmoored itself from the constraints of the constitutional text in its jurisprudence, and the relationship of this laxity to views of its role as a moderating power. His account is bolstered by other Brazilian scholars such as Eneida Desiree Salgado, Emerson Gabardo and Juliano Zaiden Benvindo, who identify courts’ populist language and claims to represent the will of the people as a form of “rule of law erosion” (SALGADO; GABARDO, 2021). It also adds further nuance to the existing literature on the role of courts in post-authoritarian democracies, as well as the recent landmark work of Rosalind Dixon and David Landau on the phenomenon of courts undermining constitutional democracy through what they call “abusive judicial review” (DIXON; LANDAU, 2021, p. 81-115).

Insofar as it addresses issues such as the separation of powers and the electoral system, Meyer’s account also resonates in many ways with my own “outsider” perception of the Federal Supreme Court’s mixed track record as an engine of democratisation (DALY, 2017), although Meyer takes a broader view than my framework’s focus on shaping a democratic public sphere (e.g. by adjudicating on free speech and electoral issues), mediating the shift from an undemocratic to democratic order (e.g. by addressing authoritarian-era laws and articulating the relationship between the old and new constitutional order), and carving out a role for the court in the new democratic order (e.g. by delineating its jurisdiction and powers). Meyer’s approach also presents a powerful retort to my eschewal of a focus on social and economic rights protection in framing “democratisation jurisprudence”, and while I find his views on the Court’s failures in this field

convincing as a dimension of constitutional erosion, I remain unconvinced that any court can bring the promises of a social-democratic constitution to life absent any support from the political branches, especially when the “engine room” of the Constitution – the organisation of power – remains unreformed (MEYER, 2021, p. 101).

What is most striking about Meyer’s account is the multiplication of actors frustrating any adherence to even basic tenets of the rule of law, beyond judicial and military pretensions to moderating power, which has no basis in the 1988 Constitution and appears diametrically opposed to conventional understandings of the division between constituent and constituted power. Challenges include: the many historical and contemporary instances of lawyers and leading judges helping to construct frameworks of “authoritarian legality” by providing legitimacy narratives for starkly authoritarian behaviour such as the 1964 coup (MEYER, 2021, p. 167); the acute concerns raised by the operation of *milícias* and the decline of the state’s monopoly on violence; and the “Wild West” of rampant but unregulated social media and “big tech”. All appear to denote the creeping normalisation of spaces of extra-legality or even a-legality where the law does not apply, whether we see actors as above or outside the law. Worse, with *milícias* we see a blurring of the boundaries between the illegal actors and the state itself, which is a different challenge to the elision of the party-state boundary in states such as Hungary and India (e.g. KHAITAN, 2020), and which, in its coercive and rent-seeking dimensions, brings to mind the concept of the “Mafia state” employed in relation to states such as Hungary and South Africa (BHORAT *et al.*, 2017; MAGYAR, 2016).

5. Conclusion: Brazil’s lessons for the world

Meyer’s book deserves a very wide national and international readership, for any number of reasons. Most directly, both Brazilians and the world simply need to know more about the challenges facing Brazil’s democratic system. More broadly, Meyer’s analysis prompts useful questions, such as whether the complexities of democratic decay worldwide are adequately captured by the literature – especially paradigmatic “masterplan” scenarios such as Hungary.

His careful and incisive dissection of the myriad forces undermining constitutional democracy in Brazil contains powerful insights for the world, including the universal – and era-defining – challenge of addressing the negative

impact of economic insecurity and social media on democratic functioning, as well as particular challenges: better understanding the role of the Supreme Court in undermining democracy in India through its unconstrained adjudication, for instance; or the links between constitutional erosion and democratic erosion, military and political actors in contemporary Indonesia; the endurance of the authoritarian mindset in US political discourse;⁵ or the loosening state monopoly on violence owing to the role of militias in the USA and Poland.

Indeed, Brazil's challenges may be more representative of global challenges than is commonly recognised: the writer Alex Hochuli speaks of "The Brazilianization of the World" as states worldwide face "growing inequality, oligarchy, the privatization of wealth and social space, and declining middle class", with any notion or exercise of citizenship undermined by economic precarity, the corruption and venality of political elites, and liberalism mutated by the extractive power and logics of pervasive digital technology, which serves to reinforce longstanding or prior patterns of domination and extraction. He sums this up, rather bleakly, as "the slow cancellation of the future" (HOCHULI, 2021).

Perhaps Meyer's greatest contribution relates to how he has fashioned analytical tools to better capture the temporal dimension of constitutional erosion, including a laudable sensitivity to historical context, to the nature and enduring effects of the democratic transition, and connecting it to both the challenges of the recent past and rapidly intensifying contemporary challenges such as the negative impact of digital technology. His account complicates the contested distinctions political scientists draw between unconsolidated, consolidated, and more advanced liberal democracies, and raises the question – as the entire phenomenon of democratic decay has – of whether we have misunderstood how long consolidation takes. In this, we see a fundamental, yet clear-eyed, optimism running through the book: in his final chapter, Meyer offers that Brazilian democracy "could be facing construction instead of slow deterioration" (MEYER, 2021, p. 223). His is not a call for complacency but for vigilance, boldness and creativity in finding solutions to today's challenges – and a realistic one that eschews Ackerman's non-solutions of a new constitution and shifting to a parliamentary system (MEYER, 2021, p. 128, p. 228). While it would be far too

⁵ The USA's current challenges can only be fully understood in light of its past experience of "authoritarian enclaves" in the form of highly gerrymandered one-party government at the state level. See R. Daniel Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) *Government and Opposition* 211, 214ff.

much to expect broader potential solutions to the deeply-rooted pathologies in Brazil's political development, some measures are debatable (e.g. the risks of yet another impeachment), and the role of the people remains for others to address, the identification of key institutional and regulatory measures such as shifts in adjudication and attempting a democracy-compatible regulation of digital technology presents the prospect of steering the country in a new direction. In that sense, Brazil provides lessons for the world on resilience, constitutional innovation, and hope. The future is not yet cancelled.

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