

2012constitutionalist canon

A canon for global constitutionalism

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Message to fellow schmoozistas:

The first text below is my ticket for the 2012 Maryland Constitutional Schmooze. It follows the traditional instructions, which give preference to short and sketchy pieces not overly worried about keeping within the mainstream. There is not a single footnote. The second text is some background; it is an excerpt from “The Project of Law, Moderation and the Global Constitution” Maryland Journal of International Law, 25(2010): 230-63.

Text I:

A canon is an answer to the question: what ought we to teach? A canon of the project of global constitutionalism is what we ought to teach those who would like to participate in the project, to help develop the project, and to make it flourish (and not simply to assure its continuation and survival). Projects with a more developed, more fully articulated and a more settled and agreed upon canon are easier to develop. Global constitutionalism does not have such a canon, and there is no point in acting as if it did. I sketch below my proposal for the canon of global constitutionalism understood as a moderate project capable of civic activism. It would be certainly an unorthodox proposal, if there were an orthodoxy.

Global constitutionalism is a continuation and modification of the liberal constitutionalist project which had its roots in the Enlightenment. The constitutional project we inherited, a project articulated during the Enlightenment (roughly), is state centered, shows its revolutionary roots, and is part of the project of human emancipation. Thanks to political and legal efforts as we emerge from the great crisis of the 20th century we can now attempt to articulate the next stage of this project, more explicit and fulsome in its commitment to moderation, no longer statist, more explicit in its rejection of the revolutionary tradition, and (to put it in a way that echoes the romanticism of Roberto Mangabeira Unger) taking the idea of human beings as creators to the hilt. When we do so we take as paradigmatic large scale shared creation in stages. We work on the development of a universal civilization, built not on a revolutionary rejection or destruction of our inheritance, but on its preservation, reformulation, and renewal. And we work on the development of a global constitution to be its institutional foundation.

A project is the fundamental unit of shared creation in stages. In our capacity as teachers we ought then to develop canons for a variety of projects, prominent among them the project of global constitutionalism.

The project of global constitutionalism can be seen as a culmination (at least for our limited imagination) of the project of law. And it is part of a larger project of moderation. The project of law is neither simply law as it is, even in the distinctive Dworkinian meaning of that phrase, nor simply law as it ought to be. A

project has a history, it exists now (so: law as it is), but as a project it also contains elements that can make its future development easier: its goals and principles, its instrumental guidelines, its exemplars.

What in general should a canon for a project contain?

It should contain what we ought to teach to help develop the project, what helps the project most. Inspired in part by a parallel idea of paradigms or research programs in the history of science, let me suggest the following as a crucial list of elements:

1. A code of principles.
2. The key concepts or ideas of the project, the central elements of its language.
3. A set of exemplars, or cases (for legal projects this can certainly include court cases).
4. Supporting hypotheses and theories.
5. An anti-canon.

What then should be the canon of global constitutionalism?

I. A code of principles

The goal of the project is to establish a global constitution as part of a broader political and moral project of moderation. I would suggest the following as its central principles:

1. Human dignity shall be inviolable [human dignity principle]. The universal human right to have rights derives from the principle of human dignity.
2. Principle of common but differentiated responsibility: “we must decide to live with the sense of universal responsibility, identifying ourselves with the whole Earth community, as well as our local communities. We are at once citizens of different nations and of one world ...” [The Earth Charter]
3. The global constitution and all its component constitutions shall establish, maintain and develop an attractive balance among conflicting legitimating principles [principle of balance]
 - a. Balancing principles in courts: proportionality
 - b. Balancing principles in institutions: separation of powers and institutional balancing, going beyond the model of Montesquieu’s Holy Trinity (executive, legislative, judiciary) to an institutional balancing reflecting the requirements of an administrative and regulatory state, with an autonomous central bank, autonomous public media, autonomous electoral commission, autonomous regulatory agencies and so on.
 - c. Principled and democratic laws and regulations. The goal at all levels will be to reduce the arbitrariness of laws, and to develop new forms of more direct democracy. But direct democracy is not an expression of the ultimate sovereign power of a predefined people, it is

- an institutional elaboration of multiple democratic principles, to be balanced with other principles.
4. The global constitution and all its component constitutions shall establish, maintain and develop an attractive mosaic of cross-cutting republics [mosaic of republics principle]. Only some of those republics will be states, and only some of them will have territorial boundaries.
 - a. The republics shall have principled and democratic boundaries. The goal at all levels will be to reduce the arbitrariness of boundaries.
 - b. The project will create complex polities beyond federations and confederations. It will elaborate the idea of a complex demos, and build democratic institutions based on that idea.
 - c. Both the principle of balance and the mosaic of republics principle will be guided by the ideal of unity in diversity, and a search for attractive and harmonious forms of balance.
 5. Constitution-making proceeds in stages: we abandon the “Philadelphia model,” and weaken the distinction (rooted in the revolutionary tradition) between constitution making and constitution amending.
 6. Constitution making proceeds on the basis of an alliance of constitution-making from above and constitution making from below. So the canon of global constitutionalism has two potential audiences. Those who will create from above will require expert and detailed knowledge of legal principles and institutional design. Those who will create from below will require a mastery of the strategic and tactical skills of non-violent politics, and of the principles of global constitutionalism, and the deeper and broader principles of moderation, expressed in forms best capable of attracting and inspiring both minds and hearts.

II. Key concepts and ideas

Examples: subsidiarity, transformational constitution (South Africa and India), human dignity.

III. Exemplars and Cases

Constitutional development of the EU

Constitutional development of the UN: the making of the Charter, the making of the Universal Declaration of Human Rights, and more broadly of the International Bill of Rights.

The Enlightenment roots of the genre: the making of *The Declaration of Independence* and of *The Declaration of the Rights of Man and Citizen*.

The development of the human rights project. The articulation and codification of the idea of human dignity in the different courts across the world.

German constitutional development: human dignity, militant democracy, constitutional patriotism

South African constitutional development: transformational constitutionalism, integration of domestic and international constitutionalism

Models of constitutional development away from dictatorship. Round table negotiation as a form of constitution-making

Models of constitutional development away from war. UN as a possible guardian of transition

Exceptionalism (protecting and developing constitutional uniqueness): UK constitution, Islamic and Confucian constitutionalism, US constitutionalism, South African exceptionalism

IV. Supporting hypotheses and theories

Presidential v. parliamentary democracy debate, with its multiple hypotheses and theories, and an elaborate development of empirical evidence.

The constitutionalism in divided societies debate (aka Lijphart v. Horowitz), with its own hypotheses and debates, and its own development of empirical evidence

An Enlightenment classic of the genre, using hypotheses and theories to guide constitutional creation:
Federalist

V. The anti-canon

The anti-canon serves primarily to help distinguish the current stage of development of the project from previous stages. It tells us what we no longer want to do, though we did it before. A project must maintain continuity with the past. But to develop, it must also struggle against the past.

The moderate global constitutionalist project needs to be contrasted in this way with its liberal incarnation, whose roots are in the Enlightenment (the long Enlightenment, starting in 1648 and the Peace of Westphalia). For the moderate project of global constitutionalism this centers on three issues: we are no longer statist, we are abandoning ideas rooted in revolutionary experience and revolutionary theory, we are no longer part of the project of emancipation. We diminish the shadow of the state. We diminish the shadow of the revolution. We abandon as incomplete the project of emancipation, replacing it with the alternative project of human beings as creators and co-creators of their world (we might call this the civic alternative).

Liberal constitutionalism is the anti-canon: we use various pedagogical instruments to distance ourselves from it while recognizing and celebrating it as the past of our project. So this is not the anti-canon, identifying a past we now find abominable. The past is what we need to move away from, but we can still appreciate it as the path we have followed even in difficult times when revolutions and states were celebrated.

By way of example, attempting to articulate a conception of justice internal to the project, we would do well to contrast the master idea of “human dignity is inviolable” to the Rawlsian master idea of “fair terms of cooperation among free and equal citizens.”

Text II:

Project of a Global Constitution

The global constitution is a project, or better, multiple projects. It is the most ambitious and encompassing formulation of the project of law. A constitution as a project is not to be identified with the character of a political system or a structure of power, whatever it might be. Stalin's Soviet Union was a political system with a distinctive set of characteristics (e.g., the leading role of the Marxist-Leninist Party and state ownership of the means of production), but it had no constitution. Of course, the propaganda documents with the title Constitution of the USSR were not the constitution either.¹ On the other hand, Britain does have a constitution.² And we can perfectly well understand the claim of the French Declaration of the Rights of Man and Citizen that without separation of powers there is no constitution.³

What then is the project of constitution or, for that matter, what is a constitution? It is a project with an intimate connection to the project of law. So let me propose this: a structure of power has a constitution to the extent it is committed to the project of moderation, with some form of a plurality of impartial principles and some of those principles expressing in various ways opposition to the power and effect of human destructive capacity. The commitment can be expressed in legal form, in the form of a law of the constitution that has superior authority and that is hard to amend. But more deeply it must be a political commitment.

Understood in this way, a constitution has a necessary connection to law and the project of law, but it has no necessary connection to the state. And when understood in this way the most ambitious form of constitution is a global constitution, a global commitment to the project of moderation.

So what would a global constitution look like? It would not be an act of a "We the People" but a realm of principle emerging in a sequence of creative acts on a path from a system of "law made consensually between states."⁴ It would also not be a liberal project.

It is a project, so it is not yet in existence. But it can be discovered in trends we can identify and in what appears just over the horizon. Since it is a project, it does not have a unique possible future. That future will emerge, if it emerges at all (being a project, it might not), out of a contest among various possible conceptions of that future. If a constitution is a commitment to moderation, then this project is one in which we develop the legal forms of a global commitment to moderation, those forms which are usable by the courts. Constitutionalization is a process in which we diminish the influence of human destructiveness and enhance the influence of impartial principles. It requires as such neither a state nor a *demos*.

¹ They were mostly fiction and propaganda, with a few facts added. See F. J. M. FELDBRUGGE, ED., THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS (1979).

² For a classic source, see, A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1915). For a contemporary textbook, see COLIN TURPIN AND ADAM TOMKINS (6TH ED.) BRITISH GOVERNMENT AND THE CONSTITUTION (2007). See also McEldowney, *supra* note 58.

³ Declaration of the Rights of Man and Citizen art. 16 (Fr. 1789) ("A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."), available at <http://www.unhcr.org/refworld/docid/3ae6b52410.html> (last visited Apr. 7, 2010).

⁴ International & Comparative Law Symposium, The University of Maryland School of Law, Multilateralism and Global Law: Evolving Conceptions of International Law and Governance (Oct. 23, 2009) (on file with author).

Let me present a sketch of moderate cosmopolitan constitutionalism and its conception of a global constitution by way of contrast with the closest available alternative, or at least the closest alternative I am familiar with, Mattias Kumm's "paradigm of cosmopolitan constitutionalism," which he develops in opposition to what he calls the paradigm of statist constitutionalism.⁵

Both paradigms are presented as accounts of law as it is (though in a Dworkinian spirit), and Kumm argues that the cosmopolitan paradigm is simply a better account, on the dimensions of both fit and value.⁶ He writes:

Cosmopolitan constitutionalism does not just articulate an ideal. The argument here is a legal argument It is not a political program The correct paradigm is the one that best fits legal practice. All conceptual paradigms trying to reconstruct legal practice from an internal point of view necessarily have an idealizing element that complements the conventional element.⁷

Kumm's footnote here is to Dworkin's *Law's Empire*,⁸ and the reference is not to its last chapter, with its effort to articulate something closer to the project of law.⁹

Cosmopolitan constitutionalism is a jurisprudential account claiming to describe the deep structure of public law as it is . . . [and whose] central claim is that a cosmopolitan paradigm is better able than a statist paradigm to make sense of contemporary public law practice, to provide a plausible reconstructive account that both fits that practice and shows it in the best light.¹⁰

Kumm summarizes the contrast between the two paradigms most succinctly when he writes:

Instead of "We the People," statehood and sovereignty as the foundations of a practice of constitutional law that imagines itself as focused on the interpretation of one text, diverse legal materials are identified, structured and interpreted in light of principles that lie at the heart of the modern tradition of constitutionalism. Ultimate authority is vested not in "We, the People" either nationally or globally, but in the principles of constitutionalism.¹¹

These central principles of constitutionalism for Kumm are: the principle of legality, the jurisdictional principles of subsidiarity, the principle of due process, and the principle of human rights and reasonableness.¹²

⁵ Kumm, *supra* note 19, at 258-324.

⁶ *Id.* Interpretations must fit the legal facts, and justify them as much as possible, in accordance with what is also known as the principle of charity in interpretation. The slogan is: "make it the best it can be."

⁷ *Id.* at 311.

⁸ *Id.* at 311 n.106.

⁹ DWORKIN, *supra* note 6, at 400-13.

¹⁰ Kumm, *supra* note 19, at 262.

¹¹ *Id.* at 271-72.

¹² *Id.* at 277.

When Kumm elaborates the last of these principles, he provides us with another succinct formulation of the contrast between his two paradigms: “Within the statist paradigm . . . constitutional rights are rights whose authority is traced back to the will of the national constitutional legislator The cosmopolitan conception, on the other hand, takes as basic a commitment to rights-based public reason”¹³

Since my aim is to articulate an alternative form of cosmopolitan constitutionalism, let me call Kumm’s version “rights based” and contrast it with a “moderate” alternative, which is also concerned with contributing to the project of human creative power and not simply to a codification of existing legal practice from the internal point of view.

If we see law, particularly constitutional law, as a project, we will be less concerned than Kumm with the question whether the statist or the cosmopolitan paradigm provides the best fit to legal practice. Law is now, as always, in transition. The best fit to legal practice would be obtained if we admit as much. For the purposes of the project of cosmopolitan constitutionalism, current practice can be best accounted for as part of a transition from the statist to a cosmopolitan paradigm, inevitably containing elements of both. And our task is to articulate the cosmopolitan paradigm not as an account of the deep structure of law as it is and not simply as a political ideal, but as a project of law, integrated with a larger political ideal and with larger, moderate, political institutional complexes and moderate political practice.

The moderate conception of cosmopolitan constitutionalism can be best presented when we reformulate slightly Kumm’s contrast. The moderate cosmopolitan constitutionalism is best contrasted with an eighteenth century paradigm, in which the core moderate commitments of constitutionalism are constrained and distorted in at least three ways: by the Westphalian and statist constraints to be sure, but also by the distinctive context of eighteenth century revolutions (in the name of “We the People”), and by a one-sided preoccupation with rights, a preoccupation backed by social contract theory. The eighteenth century framework is statist, revolutionary, and rights-centered.

The moderate cosmopolitan alternative preserves and modifies the sovereign territorial states, subjecting them more thoroughly to universal principle. It preserves and modifies the revolutionary tradition, eliminating the (Cartesian?) idea of a grand moment of creation by the People *ex nihilo*, and restoring the old idea of a revolution as renewal and rebirth. And finally, it preserves and modifies the commitment to universal human rights by combining it with universal human responsibilities. In all three dimensions (and we could add more) the contrast is between an eighteenth century paradigm of constitutionalism (or an Enlightenment paradigm, if you prefer) and a moderate cosmopolitan paradigm, designed for the next stage of the modern transformation (the post-Enlightenment stage).

This moderate cosmopolitan alternative is addressed not just to courts (though it certainly needs to be addressed to courts) but to multiple institutional audiences, notably to an emerging self-limiting global social movement, which needs to be part of this project, if the project is to move forward. The fundamental principles of this project must be fundamental principles of the project of moderation in its current stage, not simply principles of constitutionalism. They must

¹³ *Id.* at 304–05.

be capable of formulation in a manner that appeals to courts, and hence to lawyers, but also to a broad civic movement.

A moderate alternative, addressed in this way to both courts and the people organized in self-limiting social movements might build a global constitution around five principles: (1) the principle of universal human rights, codified into a distinctive, moderate, conception of global justice, which incorporates a commitment to democracy and to due process; (2) the principle of universal human responsibility; (3) the principle of unity in diversity, as an expression of the moderate commitment to pluralism; (4) the principle of subsidiarity, as a reflection of both the principle of equal human dignity and the commitment to pluralism; and (5) the principle of the effective pursuit of the goals of humanity.

We could see this constitution as establishing a union of semi-autonomous and cross-cutting republics of a new kind (more on this below), subject to universal principles: a principle of universal human rights which we can codify into an account of global justice and a principle of universal human responsibility.

Global justice would not build on the contractarian idea (elaborated by Rawls, but with roots in the social contract theories of the Enlightenment) of fair terms of social cooperation among free and equal citizens. It builds instead on an idea that emerges from the hard experience of the twentieth century: the equal inviolability of human dignity.¹⁴ Fair terms of social cooperation leave us cold. But when the German nation commits itself for eternity to the proposition that human dignity is inviolable,¹⁵ we are moved to tears.

I. A UNION OF REPUBLICS

Consider first the components of a global constitution designed for a complex universal civilization. I have called them republics. These republics are not (necessarily) states. They are bounded domains within which distinctive impartial principles, distinctive public ends and purposes, and distinctive interpretations of universal principles can be articulated. In the Westphalian system, it was natural to think only of territorial states as republics. But even in the Westphalian system it would have been good to think of corporations as potential republics as well.

In fact, if we allow for incomplete autonomy, we can see a great multitude of republics-in-the-making across the world. And what we need as part of this project of global constitution, which is a form of the project of globalization, is not the elimination of boundaries. If anything, we need additional boundaries to create and sustain the autonomy, which the multiple inchoate republics need in order to develop. We need boundaries of different types. Some are territorial boundaries, corresponding to contemporary territorial states, regional “unidentified political objects” (such as the European Union), provinces and localities within states, or regions across boundaries of states (as these are defined in EU, for example). Some are boundaries between

¹⁴ Universal Declaration of Human Rights, G.A. Res. 217A, pmb., U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/udhr/index.shtml>.

¹⁵ GRUNDGESETZ [GG] [Constitution] art. 1(1) (F.R.G.) (“Human dignity is inviolable. To respect and protect it shall be the duty of all state authority.”).

groups of people (say those who speak French, those who speak Flemish, and those who speak German, if you are in Belgium). And some are boundaries between issue areas, distinguishing what we have come to call regimes (a trade regime, a health care regime, a climate regime, and so on).

In a system of multiple and cross-cutting republics, there will be multiple and cross-cutting boundaries. A complex civilization requires such a system; it requires a fragmented law. But as we constitutionalize a union of republics, these boundaries will cease to be (over time) set by the balance of military force in past wars, or dynastic arrangements in a long forgotten past, or past calculations of how to establish stable peace. They will be less arbitrary and less preoccupied with the power of human destructiveness. They will be more principled than the territorial boundaries we inherit. They will also be less vague than the regime and sub-regime boundaries we inherit. The problem of fragmentation in international law is not so much a problem of fragmentation itself (after all, federal systems are also systems of fragmented law). It is rather a problem of the absence of well defined and principled boundaries, separating what ought to be the semi-autonomous legal systems, or what I have called the semi-autonomous republics.

Not any boundary will do. It should be precise enough to allow within-republic consistency. It should be flexible enough to allow easy change as the situation changes. The principle of flexibility is important in the European Union. Schengen,¹⁶ the Euro zone,¹⁷ and the multiple other derogations and exceptions in effect create many different kinds of boundaries within the EU. The boundary's location should be determined by impartial principle. Boundary setting by referenda is a good case in point, best exemplified by the establishment of the Swiss Canton Jura,¹⁸ and less well exemplified by various boundary setting referenda in the immediate aftermath of World War I. Finally, this system of overlapping republics should have boundaries which are limited by principles determining who can cross, what goods can cross, which legal cases can cross, and so on.

The project will thus preserve and enhance complexity and hence boundaries. But not arbitrary boundaries. They will be set in principled ways. Their power as boundaries will be limited by principle, and they will be flexible. Vague inter-regime boundaries will be made more precise, as is being done all the time, perhaps most explicitly by various courts and court-like institutions. There is nothing incoherent about complexity and fragmentation if the boundaries are not vague and if unifying principles exist.

This union of semi-autonomous and cross-cutting republics in the slowly emerging global constitution enacts the principle of unity in diversity. The diversity is protected by the principle of subsidiarity. The unity is provided by two universal substantive principles. A principle of universal human rights has been a visible part of the emerging global constitution for some time. If we are to formulate this constitution in a way usable by social movements as well as courts, we can plausibly now attempt to articulate it more fully into a conception of justice based on

¹⁶ See generally Convention Implementing the Schengen Agreement, June 14, 1985, 30 I.L.M. 73.

¹⁷ See CHRISTIAN N. CHABOT, UNDERSTANDING THE EURO: THE CLEAR AND CONCISE GUIDE TO THE NEW TRANS-EUROPEAN ECONOMY 25, 175–76 (1999).

¹⁸ STEINBERG, *supra* note 55.

human dignity, in a format that lends itself to comparison with, say, Rawls's conception of justice (or other philosophical conceptions).¹⁹

The basic principle of global justice that might emerge from a codification of the emerging human rights practice would be nothing like Rawls' fair terms of social cooperation among free and equal citizens. Human dignity would necessarily be the featured idea, so we might suggest a principle of the equal inviolability of human dignity (or more simply, in the German manner: human dignity is inviolable). Most philosophical theories of justice, not just Rawls, simply marginalize human dignity.²⁰ Those that do not (such as Nussbaum) identify the dimensions of human dignity in a manner that bears no relation to the emerging practice of human rights. On various occasions, Nussbaum has listed ten conditions (not always the same ten) necessary for a life worthy of human dignity.²¹ Her lists are not supported by legal practice, nor could they be.

But a different set of dimensions of human dignity does emerge from legal practice. It arguably constitutes that ideal of global justice which is part of the project of the global constitution.

Clapham, drawing on legal sources, has identified at least four aspects of the concern for dignity:

- (1) the prohibition of all types of inhuman treatment, humiliation, or degradation;
- (2) the assurance of possibility for individual choice and the conditions for each individual's self-fulfillment, autonomy, and self-realization;
- (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; and
- (4) the creation of necessary conditions for each individual to have their essential needs satisfied."²²

So we have four dimensions of human dignity: a prohibition of degrading and cruel treatment; a requirement of equal respect, demanding individual liberties and civil and political rights; protection of what gives human lives meaning and purpose (religion and nation, for example); and an economic and social guarantee.

Each of these dimensions of human dignity is capable of a distinct articulation, codification, and formalization. Each deserves its own distinct limitation clause. The priority among the dimensions can be expressed through these limitations clauses, avoiding the awkward choice between two seemingly unacceptable alternatives: no priorities at all or lexical priority of the kind Rawls proposes.

This ideal of justice is in no way contractarian. The core idea is the inviolability of human dignity. And this core idea is elaborated not by considering in more detail the meaning of

¹⁹ See RAWLS, *A THEORY OF JUSTICE*, *supra* note 7; MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* (2006).

²⁰ Among those who marginalize human dignity, one can cite all the main representatives of the contemporary contractarian tradition, John Rawls prominent among them, and all the main representatives of the Lockean traditions, such as Robert Nozick. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

²¹ NUSSBAUM, *supra* note 77, at 76–78.

²² ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 545–46 (2006).

human dignity in general and the history of the concept's use.²³ Nor is it elaborated, as in Nussbaum's theory, by some independent consideration of what is necessary for a life worthy of human dignity.²⁴ There is a real project of human rights in place; its elaboration proceeds through legal and political deliberation and struggle. The theoretical task is to expand on the articulation and codification that are occurring as part of this deliberation and struggle. The work of lawyers and political movements seems here more significant than the work of philosophers.

Rawls's theory of justice²⁵ and Dworkin's theory of equal concern and respect²⁶ recognize only two of these four dimensions. They have no room for the distinctive treatment of cruel and degrading treatment or hence for the distinctive evil of torture and genocide. They also have no room for the protection of what gives human life meaning and of groups that are carriers of what gives life meaning: cultures, religions and national traditions. Arguably, the recognition of the four dimensions, rather than the two in Rawls and Dworkin, marks our moderate conception as more inclusive than the mainstream liberal theory of justice. The contrast with mainstream liberalism goes further.

A moderate conception of the global constitution can be uncompromising in its commitment to universal human rights and an ideal of global justice that codifies human rights. But it can also be equally uncompromising in its commitment to universal human responsibility. Liberal conceptions are likely to be reticent on this second front. To the extent this is true, liberal conceptions of global constitution are bound to be unbalanced and incomplete. The principle of universal human responsibility, I would argue, is just emerging on the global horizon, mostly in the rather specialized context of environmental concerns, with nothing like the history of the principle of universal human rights and hence without the elaboration, codification, and legal standing.

It emerges as such in the Earth Charter,²⁷ where the distinctive concern is with sustainability and protecting the ecological integrity of the Earth. Or we can use the principle of "common but differentiated responsibility"²⁸ taken from the climate regime (and applied there to states), but which can be reformulated more broadly.

The Earth Charter is a declaration first suggested in the Brundlandt Report's call for a "universal declaration" and a "new charter."²⁹ The 1992 Earth Summit in Rio failed to agree on any such charter, so it became an initiative of what we like to call the global civil society, developed under the leadership of Maurice Strong and Mikhail Gorbachev. No other document

²³ See Jeremy Waldron, "Dignity, Rank and Rights." Tanner Lectures, University of California at Berkeley (April, 2009).

²⁴ See generally NUSSBAUM, *supra* note 77.

²⁵ RAWLS, A THEORY OF JUSTICE, *supra* note 7.

²⁶ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) at 272-3.

²⁷ The Earth Charter Initiative, The Earth Charter, http://www.earthcharterinaction.org/invent/images/uploads/echarter_english.pdf (last visited Apr. 7, 2010) [hereinafter Earth Charter].

²⁸ U.N. Conference on Environment and Development, June 14, 1992, Rio Declaration on Environment and Development princ. 7, U.N. Doc. A/ CONF.151/5/Rev.1 ("In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities . . .").

²⁹ See KLAUS BOSSELMAN, THE PRINCIPLE OF SUSTAINABILITY (2008) at 2.

has generated so much support from below across the globe. But it has limited support from states; it is not even soft law.

Law, however, can emerge also from human interaction,³⁰ and from below. If law is a project, and global law its most ambitious formulation, then the principles of the Earth Charter may tell us something about where this project is aiming.

We must join together, the Earth Charter proclaims in its Preamble, to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice and a culture of peace. . . . To realize these aspirations, we must decide to live with the sense of universal responsibility, identifying ourselves with the whole Earth community, as well as our local communities. We are at once citizens of different nations and of one world . . .
„³¹

One way to understand the Earth Charter is to see it, with Klaus Bosselman, as articulating above all a principle of sustainability.³² But there is another way, which connects environmental concerns that inevitably dominate the principle of sustainability with a broader ethic of responsibility: *we are citizens of one world*.

So one can perhaps say this: the principle of universal human rights expresses the conception of justice contained in the global constitution. The principle of universal human responsibility expresses a conception of a *civic ideal* contained in the global constitution, as it is now emerging just over the horizon of law.

II. CONCLUSION

The dominance of the West may be one reason why our articulation of the global constitution is unbalanced in favor of human rights. Other civilizations (the Confucian tradition comes to mind) have preserved more fully a concern with responsibilities. The project of law, according to the moderate conception, culminates in a *moderate* global constitution – not anti-liberal, but not simply liberal either.

It will be³³, it ought to be, a constitution that balances rights and responsibilities, and one that anticipates the renewal of non-western civilizations, such as the Confucian one. In its rights-based conception of global justice it will recognize at least four dimensions of human dignity, and hence also – perhaps especially – the significance of what gives meaning to human lives. It will support and express the complexity of a universal civilization, itself unique, but also protecting and enhancing the uniqueness of its component parts. It will be a constitution whose

³⁰ See LON FULLER, *Human Interaction and the Law* in KENNETH WINSTON, ED., *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER* (1981).

³¹ Earth Charter, *supra* note 85, pmb1.

³² See generally KLAUS BOSSELMAN, *supra* note 87.

³³ This is not a prediction of the future (see the first paragraph of this paper). It is an effort to articulate a moderate form of the project of a global constitution.

principles reflect an engagement in the struggle against the power and effect of human destructiveness. And, finally, it will be a constitution, whose principles are formulated as law, for the use of courts, but also as principles for the guidance of self-limiting social movements, struggling in the service of the moderate project.