

## The Project of Law, Moderation, and the Global Constitution

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# The Project of Law, Moderation, and the Global Constitution

KAROL EDWARD SOLTAN<sup>†</sup>

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## I. INTRODUCTION

The title of my panel at the conference from which this paper derives was “The Future of Global Legal Regulation.” But neither I nor anyone else can predict a future that will be created by human beings and subject to the unpredictable effects of *fortuna*, as we would say if we were living in Renaissance Italy. The future, including the global legal future, will be also (in part) created by *us*, our children, and their children. I do not propose to predict the new things that will be created in the future. It would be depressing if we could do that. Let us attempt instead to talk about ongoing projects of human creative power, especially big, complex, and attractive projects, really worthy of our support, our loyalties, and our sacrifices.

One such project is the project of global law, which is nothing more than the project of law understood in an ambitious way. Law is one of the great projects of human creative power, and hence one of the great projects of human civilization. Law can be seen as an established practice, or it can be seen as a project. To see it as a project is to attempt to understand it in a manner of a co-creator, not simply a user or a spectator.

Perhaps surprisingly, this way of looking at law is not

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commonplace. But it was one of the distinctive features of Lon Fuller's legal theory,<sup>1</sup> and (being an immense fan of Fuller) this is where I would like to start. Law for Fuller is the enterprise of subjecting human conduct to the governance of rules.<sup>2</sup> Law is an enterprise, a project. Thus far I go with Fuller. But it is a more complex enterprise, related to its context in more interesting ways. It can and should be presented in its biggest and most attractive form.

The purpose of law, then, is not to subject human conduct to the governance of rules. And it is not to establish or promote the rule of law or to establish justice. It is, I would say, to articulate the impartial and attractive principles of a complex, moderate, and universal civilization. That civilization will be the fruit and manifestation of human creative power. It will be engaged in a battle against human destructive capacity. The purpose of law is to articulate those principles in a manner that is usable by both courts and the allies of courts in this struggle.

I sketch in this paper a view of law as an ambitious project, part of an even larger political and cultural project, whose culmination is a global constitution that forms the legal basis for a universal, complex, and modern civilization. The paper cannot stand on its own, for it is part of a larger effort to articulate a theory of civic moderation.<sup>3</sup> But I will try to make it stand on its own as much as possible.

There are both intellectual and practical advantages of looking at law as a project, an ambitious project, and as part of an even larger political and cultural project. The practical advantage is that it can

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1. See generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); WILLEM WITTEVEEN & WIBREN VAN DER BURG, *REDISCOVERING FULLER* (1999).

2. FULLER, *supra* note 1, at 106.

3. For more on my efforts to develop an ambitious conception of moderation, see Karol Edward Sołtan, *Constitution Making at the Edges of Constitutional Order*, 49 WM. & MARY L. REV. 1409 (2007); Karol Edward Sołtan, *Constitutional Patriotism and Militant Moderation*, 6 INT'L J. CONST. L. 96, 99–101 (2008); Karol Edward Sołtan, *Mature Democracy and Global Solidarity*, in GLOBAL DEMOCRACY AND ITS DIFFICULTIES 17, 17–34 (Anthony Langlois & Karol Edward Sołtan eds., 2009). This conception of moderation is my contribution to the effort to develop an intellectual community committed to “civic studies.” For my earlier effort to identify what we eventually called civic studies, see Karol Edward Sołtan, *Selznick and Civics*, in LEGALITY AND COMMUNITY 357, 357–72 (Robert Kagan et al. eds., 2002). This idea is a continuation and elaboration of the project of new constitutionalism. See generally A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY (Stephen Elkin & Karol Edward Sołtan eds., 1993).

and should help us contribute to the project. The intellectual advantage is that it gives our understanding of law a distinctive form of generality and depth, consistent with an overall view of human beings as creators, not playthings of causal forces, and hence as engaged in multiple small and large projects. Arguably, each action is a small project, and so are the project of a global constitution and the most inclusive project of all, the project of universal civilization, a vast mosaic of projects and of products of those projects.

A project, Wikipedia tells us (and no more sophisticated source is needed here), is a “temporary endeavor undertaken to create a unique product, service or result.”<sup>4</sup> Alternatively, according to that other global authority, the Wiktionary, it is “a planned endeavor, usually with a specific goal and accomplished in several steps or stages.”<sup>5</sup> We can think of it as the basic element of the work of human creative power. It is what human creation on the large scale is divided into.

To see law as a project is to see it as movement along a path. The current state of the law is just a time slice, and not necessarily a coherent one. It contains elements of the past and of the starting point. But it contains also elements of various imaginable, more or less attractive, futures. Its legitimacy depends less on its contemporary coherence than on the capacity it exhibits to move toward some attractive end.

Some clarification is needed. We would be well served by distinguishing three kinds of accounts of the law. The first type are accounts of law meant for judges and constrained by what judges properly do. This differs in detail between legal systems and styles of judging. But courts resolve disputes and in general are reluctant to go beyond what is necessary to resolve those disputes. Moreover, judges are supposed to be constrained by the text of the law, when there is such a text, authoritatively determined outside the courts. One is tempted to say this is an account of law as it is. But that is misleading, without a long discussion of Dworkin.<sup>6</sup> In any case, it is an account in which interpretation and dispute resolution are crucial.

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4. Wikipedia, Project, <http://en.wikipedia.org/wiki/Project> (last visited Apr. 7, 2010).

5. Wiktionary, Project, <http://en.wiktionary.org/wiki/Project> (last visited Apr. 7, 2010).

6. For the most elaborate account, see RONALD DWORKIN, *LAW'S EMPIRE* (1986). For a good overview in an introductory text, see ANDREW ALTMAN, *ARGUING ABOUT LAW* (2d ed. 2001).

The second account of law consists of a normative theory of what law ought to be. This is really not an account of law but more nearly a political philosophy: utilitarianism and Rawls's theory of justice would be among the most familiar examples.<sup>7</sup> It need pay no attention to what judges do or to the current (or the past) practice of law.

In between these two is the third type of account, an account of law as a project. It is given a rough sketch in the last chapter of Dworkin's *Law's Empire*.<sup>8</sup> But it is marginal in Dworkin's theory, which is centrally an account of law for the judges.

Tushnet has famously argued that we should take seriously the Constitution outside the courts (the U.S. Constitution, in his case).<sup>9</sup> This is to see the Constitution as a project. Indeed, Tushnet suggests a thin account of the Constitution to serve as the centerpiece of this project. It is "a law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble. More specifically it is a law committed to the principle of human rights justifiable by reason in the service of self-government."<sup>10</sup>

We can generalize the idea, and work to develop a thin account of the global constitution to put at the center of the project of law, understood as something to be pursued in courts but also outside courts. To be pursued by whom and how? Tushnet suggests the responsibility for law be distributed broadly among the people and adopts for himself the populist label.<sup>11</sup> It is more in line with the project of law and the project of a global constitution (as well as the U.S. Constitution) to be more institutionally specific. The most

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7. For a good overview of utilitarianism, see generally WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 9–49 (1990). The most prominent contemporary utilitarian is Peter Singer. See PETER SINGER, *PRACTICAL ETHICS* (1979). For further reading on Rawls' main works, see JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press 1972) (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*]; JOHN RAWLS, *POLITICAL LIBERALISM* (1996) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. For a later restatement, see JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001) [hereinafter, RAWLS, *JUSTICE AS FAIRNESS*].

8. DWORKIN, *supra* note 6, at 400–13.

9. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

10. *Id.* at 181.

11. TUSHNET, *supra* note 9. For further discussion of the populist nature of Tushnet's work, see generally Mark Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373 (2000); Mark Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 90 GEO. L.J. 233 (2001).

promising institutional instrument for the development of this project are self-limiting, organized social movements in the style of Gandhi, Martin Luther King, and many others. These are movements committed to principle, rational deliberation, experimentalism, and nonviolence (the People are not always and everywhere so committed). Like courts, they are instruments of a form of ambitious moderation on which I elaborate below.

## II. INSTITUTIONAL INSTRUMENTS

The project of the emerging global constitution is certainly a big project. It is part of an even larger project of creating a universal complex civilization. This is work with a long history and for the long term. It is said that people routinely overestimate how much the world can change in 5 years and routinely underestimate how much it can change in 50 or 100 years (think how the world appeared in 1910 or even in 1960). So if the project of a global constitution seems unrealistic, that may be simply because you are thinking short term.

Nonetheless, to make the project as realistic as possible, we need more institutional instruments beyond the ones we have at hand. Sovereign territorial states, especially the most powerful ones, will resist. International organizations, established and controlled (to a large degree) by states, are not likely to be reliable instruments.

But on the political horizon we can see something else. We can see more than the chaos of initiatives from the bottom up, the global civil society, or the global civic society as it should be called, since it is the domain of multiple civic initiatives, each a potential embodiment of the civic ideal. Domestic precedents suggest a more coordinated institution could emerge from this chaos: a union (more than a network, less than a federation) of self-limiting social movements (human rights, environmental, civic renewal) pursuing their goals in a Gandhian style.

If we are to be politically realistic about the global project of law, with global constitutional law at its core, we should take as its instrument not courts alone but an alliance of courts, constitutional states, and self-limiting social movements, so the principles of the global constitution must be formulated to be usable by courts, officials of constitutional states, and self-limiting social movements.

Courts alone do not get very far with the moderate project and the project of law. Only courts embedded in a broader institutional

context (an alliance of institutions if you like) and embedded in an intellectual context (a helpful understanding of law and moderation, and a helpful disciplinary reorganization of the modern culture) can take us much further.

An alliance with constitutional states is for courts old news. And it is obviously problematic for the project of the law of the global constitution. In that part of the project, states, even constitutional states, play mostly (though not exclusively) the role of Madisonian factions, each protecting and promoting its narrow interests above all, little concerned with the global common good, or with universal principles codified in law.

There must be more: some form of organized pressure from below, some moderate equivalent of the revolutionary party of the Leninist type. Nothing exists at the moment that fits the bill, certainly not the open networks of organizations that go under the collective label of global civic society (actually global civil society, but that is simply a misnomer). But here too we have seen enough precedent, both domestic and global, to be able to identify what could be a promising instrument if it were created: a global union of self-limiting social movements committed to impartial principle and taking human destructiveness as the enemy. Gandhi is for them an exemplar. To be substantively specific, the cause of moderation and hence of the global constitution would be best served by a global union of three kinds of social movements: movements for human rights, environmental movements, and movements for civic renewal. I like to call such a potential organization Global Solidarity.

### III. LAW AS A PROJECT

Thus, the project of a global constitution and its law will be best served by an alliance of courts, constitutional states, and a future Global Solidarity. And the principles of a global constitution must be usable by all three. They must have a legal expression to be usable by courts. They must be usable by states outside courts and by international organizations that are the products of states. But the novel component is the third: they must also be usable in self-limiting social movements.

The idea of law as a project is both familiar and obscure. It seems both central to the practice of law and somehow external to it. It is expressed in often-repeated phrases. In the common law tradition,

nothing beats the words of Lord Mansfield: “The common law that works itself pure by rules drawn from the fountain of justice, is for that reason superior to an act of parliament.”<sup>12</sup> The claim of superiority of common law to acts of parliament is now best forgotten, but of common law Fuller still says: “The common law works itself pure and adapts itself to the needs of the new day.”<sup>13</sup>

Ronald Dworkin opens his article *Law’s Ambitions for Itself* with three formulations of the idea.<sup>14</sup> In addition to “[l]aw works itself pure,” he writes, “[t]here is a higher law, within and yet beyond positive law, toward which positive law grows” and “[l]aw has its own ambition.”<sup>15</sup> These are mostly slogans aiming for a striking phrase and a memorable metaphor. But the idea is widespread and important, and it can be expressed more prosaically as Fuller does when he tells us that law is “the enterprise of subjecting human conduct to the governance of rules.”<sup>16</sup> Similarly, Selznick has identified the reduction of arbitrariness as the ideal of law.<sup>17</sup>

Law, one might say, is the project of building a community of principle (Dworkin),<sup>18</sup> a project of creating a world subject to public reason (Kumm),<sup>19</sup> or a project of the reduction of arbitrariness and the expansion of the sphere of decision making constrained by the impartial justification. But to stop there is to fail both to identify the distinctive qualities of law and to articulate some of the important ways in which law is worthy of our loyalties and sacrifices.

Law is not simply a project of subjecting human conduct to the governance of rules. It is, if anything, a project that involves balancing *rules* and *principles*. More generally, the process of balancing multiple principles seems to be at the heart of law. If that is

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12. *Omychard v. Barker*, (1744) 26 Eng. Rep. 15, 23.

13. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940). See also FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 105 (2009).

14. Ronald Dworkin, *Law’s Ambitions for Itself*, 71 VA. L. REV. 173, 173–74 (1985).

15. *Id.* at 173.

16. FULLER, *supra* note 1, at 106.

17. See generally PHILIP SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* (1969). For a more recent general presentation of Selznick’s views, see PHILIP SELZNICK, *THE MORAL COMMONWEALTH* (1992).

18. DWORKIN, *supra* note 6, at 211, 213–14.

19. See generally Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism*, in *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (Jeffrey Dunoff & Joel Trachtman eds., 2009).



true, then law cannot be seen as the application of one logically coherent theory. So law does not maximize wealth.<sup>20</sup> And law is not fully captured, even in its most idealized form, by, say, a Rawlsian theory of justice<sup>21</sup> or a Dworkinian principle of equality.<sup>22</sup> Balancing and proportionality are at the heart of the rule of law,<sup>23</sup> including balancing between principles and rules.

But those who attempt to articulate what is distinctive about the practice and the project of law by simply specifying its goal (subjecting human conduct to the governance of rules) always seem to end up with a picture of law fundamentally at odds with widely perceived appearances. Somehow law is everywhere or almost everywhere. For Fuller, law is everywhere human conduct is subjected to rules, and that seems to take us a very large distance away from lawyers' law, or law as it is practiced in courts. It seems more faithful to the inherited distinctions that govern our thinking about law to define the project of law in a way that includes both ends and means. For the project of law, *courts* are the central means. And it matters that courts are instruments for the resolving of conflicts; they are peace-making instruments. This suggests also a third element in the goals of law: opposition to the power and effect of human destructiveness.

I would put it this way: to understand law, we need to articulate a larger *moderate* project, a form of moderation that is both intellectually and politically ambitious. When we do so, we will be able to see the project of law as *servicing moderation through courts*.

The project of law is, I suggest, part of a larger moderate project of institutional and political reform. Moderation (in the relevant sense) has three pillars. Commitment to impartial principle (public reason)

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20. See generally Richard Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEG. STUD. 103 (1979). For a recent overview, see generally KLAUS MATHIS, *EFFICIENCY INSTEAD OF JUSTICE?* (2009).

21. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 7; RAWLS, *POLITICAL LIBERALISM*, *supra* note 7. For a later restatement, see RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 7.

22. See generally Ronald Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *What is Equality? Part III: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What is Equality? Part IV: Political Equality*, 22 U.S.F. L. REV. 1 (1987).

23. See DAVID BEATTY, *THE ULTIMATE RULE OF LAW* 159–88 (2004).

or reduction of arbitrariness (and hence a certain kind of impartial deliberation) is one of those pillars. The second is a commitment to pluralism and diversity, hence also to attractive and harmonious balances among principles. Harmonious balance, not coherence or integrity, is on this view the master virtue of law. Complexity and unity in diversity are among its attractive features. The third pillar of moderation is opposition to human destructiveness. So some of the principles we endorse guide improvement and creation, but others diminish the power and effect of destructiveness. Peace is an ideal of moderation, but so are freedom understood as diminishing the power of coercion and order understood as increasing the predictability in coercion.

#### IV. MODERATION

The project of moderation is not restricted to law. Law seems to me best seen as that part of the larger project which uses courts as instruments and hence elaborates rules and principles which courts can use in the service of moderation. When we speak of law as a system of rules and principles, we mean just that: these are rules and principles which courts can use in the service of the project of moderation, with its three pillars of commitment to public reason and impartial rationality, diversity and pluralism (pluralism of ideals, institutions, and creative projects), and a struggle against the power and effect of human destructiveness.

These three pillars can be elaborated in multiple ways. Impartial rationality requires a commitment to the giving of impartial reasons for decisions and to the making of decisions based on impartial reasons. But beyond that, rationality requires error prevention (and hence various deliberative procedures) and error correction (and hence something like Popper's open society).<sup>24</sup> It requires also a social differentiation, a division of labor that Smithian economics emphasizes, and a broader differentiation and specialization of the normative structures, which we develop for the handling of different issues: rationality requires what we might call an embedded fragmentation of the institutions to handle the difficult problems, requiring complex institutions and complex skills. Embedded fragmentation of global law and global constitution is just one aspect

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24. See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966); RALF DAHRENDORF, *REFLECTIONS ON THE REVOLUTION IN EUROPE* (Transaction 2005) (1990).

of this broader feature of what rationality requires.

The division of labor and differentiation that is both the featured characteristic of Smithian argument for markets as instruments of economic growth, and a featured characteristic of modernity according to many sociological accounts, is only one kind of division of labor. We might call it the division of labor into tasks. Rationality also supports division of labor into stages, with its characteristic requirement of the maintenance of continuity between stages in order to be able to create over time. This form of division of labor is best explained by citing a homely example familiar in an academic setting. When we write papers, we divide our task into stages we call drafts. Each draft is a draft of the whole paper (though it may be incomplete). Thus we distinguish two kinds of divisions of a creative project, such as a paper. We can separate a paper into parts and work on each part separately. But we also divide the writing into stages. The first draft of a paper, even if it is complete in that it includes all parts, will typically mark the end of only the initial stages of the work. There are likely to be many subsequent stages. This is not Dworkin's weird chain novel written one chapter at a time<sup>25</sup> but rather an all-but-universal pattern of large scale creation. We do not simply begin with the first chapter; we begin rather with some sketch of the whole, which we then fill in, usually (but not necessarily) starting at the beginning. And as we proceed we also keep modifying the overall plan. We work incrementally for the most part, although occasional breakthroughs can rearrange the whole project. But even then continuity must be maintained, unless of course we abandon the project completely. So what has already been created constrains the process of creation in the present.

Impartial rationality as we see from the above discussion imposes a complex system of requirements. The second pillar of moderation, the requirement of pluralism, is also complex. We need to keep in mind at least three dimensions of pluralism. First, we insist on a pluralism of projects. Some of these are projects for individuals, in fact a project of self-creation, self-discovery, and self-cultivation for each individual in the world. Others are shared projects, local or universal, which are shared by a countless variety of cross-cutting and over-lapping groups. Each such project can be thought of as a little *res publica* within the boundaries of those who pursue it.

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25. DWORKIN, *supra* note 6, at 228–29.

In a world dominated by the utilitarian style of thought and its various aggregative cousins (such as cost-benefit analysis),<sup>26</sup> it is worth emphasizing that not all of these shared projects are composites made up of smaller projects (in the way the utilitarian goal is composed of individual goals). And when a project is a composite, the elements need not be individual projects or preferences. The most encompassing project is therefore best seen not as the global pursuit of human welfare but rather as the development of a universal moderate civilization, understood as composed of all the projects of humanity consistent with moderation, and of their products.

The second dimension of pluralism supports at any level and for any project a plurality of principles, ideals, or legitimate interests. This favors complex projects, aiming for various forms of *harmonious balance*.

Finally, a third dimension of pluralism is one that supports contests among different projects and among different conceptions of the same project. Such contests are the best way to test the quality and attractiveness of projects. We moderate support contests in the economy (markets), contests in the polity (competitive elections), contests in the realm of ideas, and contests in countless other realms of human creative endeavor. Contests require a plurality of contestants, without which improvement is hard to sustain.

Pluralism, like impartial rationality, imposes a complex system of requirements. The same can be said of the third and final pillar of moderation. The opposition to the power and effect of human destructiveness is also complex. There are different ways in which we try to defeat destruction. Three are familiar.<sup>27</sup> Peace is an obvious way to defeat destruction and destructiveness. Order (what Hayek calls justice) and predictability (based on general rules) in state use of violence allow us to avoid the destructiveness of the state. This is at the heart of the classic form of *Rechtsstaat* and the importance of

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26. For two good introductions to cost benefit analysis, see ANTHONY BOARDMAN ET AL., *COST BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* (2005); E.J. MISHAN & EUSTON QUAH, *COST BENEFIT ANALYSIS* (2005). For an excellent collection of critical discussions of cost benefit analysis, see generally Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

27. Hayek writes of “peace, freedom and justice: the three great negatives.” FRIEDRICH HAYEK, *LAW, LEGISLATION AND LIBERTY* 130 (1979). By justice, Hayek means something closer to order and predictability. *Id.*

general rules in law.<sup>28</sup> And we achieve freedom, understood as the absence of coercion, to the extent we diminish the power of the instruments of destruction.

If we are more aggressive in the war against destruction, we go beyond any of these ends. We attempt to reverse destruction. Renewal, rebirth, restoration, and renaissance are the most ambitious ways to defeat destruction, stronger and more far-reaching than peace, order, and freedom.

We now understand also, as increasingly we must, that human destructiveness takes more forms than those traditionally recognized. The moderate project, opposed to destructiveness in an advanced industrial society, needs to recognize the destructiveness of human economic activity. A certain kind of environmental concern must become an integral element of our opposition to destructiveness. So the contemporary moderate project will be necessarily also an environmentalist project: it will see traditional constitutionalism and a certain form of environmentalism as part of the same task.

The most ambitious goal of the struggle against destruction and destructiveness is to reverse it, to destroy the effects of destruction. In the post-Enlightenment age of the nineteenth century (certainly with echoes into the twentieth), this took the form of reactionary politics attempting to turn the clock back and return to the past. If we are engaged in a battle between creation and destruction, this is not an attractive proposition: it undoes the destruction as well as the improvements.

The idea of a rebirth, or renewal or restoration, is more attractive. It is not an attempt to go back into the past but to restore greater continuity with the past. So when we restore an ecological system, an urban neighborhood, or a whole city (as my home town Warsaw was restored after World War II), you do not go back to the past. It is better to put it this way: your aim is create what might have developed (an ecosystem, a neighborhood, a city) if human destructiveness had not intervened so massively. We have a choice here: we are free to choose the most attractive form of what might have developed. The river is restored to what it might have become, and Old Town of Warsaw is restored to what it might have become as well.

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28. *See generally* FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* (1960).

## V. UNDERSTANDING THE PROJECT OF LAW

How should we best understand the project of law? It is not enough to understand it as the courts would understand it, though it is the business of a lawyer to understand it that way if she is to be successful. Why not? There is a simple answer: the project of law cannot be sustained without support from outside the courts, and it certainly cannot prosper without such support. We must consider the project of law outside the courts, in some ways parallel to Mark Tushnet's populist constitutional law as a project of the U.S. Constitution (the thin constitution) outside the courts.<sup>29</sup>

Judges' understanding of law is in various ways restricted by the distinctive tasks of courts in the project of law. For judges the problem of motivation is diminished; they are paid to do what they do. But the project of law in general depends on the work of people whose incentives are not necessarily so well aligned with what will make the project prosper. Motivation is a crucial issue.

Courts have a central but necessarily limited role in the project of law. The precise nature of those limits is controversial and variable. Its details differ in different legal systems and they evolve over time. But it is a central function of courts to resolve disputes, for example. If that is the business of the judge, then she needs an understanding of the project of law sufficient to resolve the conflict before her, but not more. Or to take another example, in broad areas of law there are authoritative legal texts, and it is not the business of the courts to change those texts. A judge needs to understand only the law as written. So the work of law is largely a certain form of interpretation. It is not the business of courts to change the text but to promote the law within the text (so to speak).

Courts are the central institutional instrument of law as a project, so this understanding of law from the courts' perspective is indispensable. But the project of law would never have gotten as far as it has, and it could never develop further, if it operated only within courts. A constitutional state with a balanced constitution, with both autonomous courts and an executive willing to enforce what the courts decide, obviously requires a larger political program, not just law within the courts. Law cannot exist except as it serves the courts and is served by them. But it would be nothing if it were limited to

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29. TUSHNET, *supra* note 9, at 181.

the courts. And a deeper development of the project of law on the global scale requires an even broader understanding of the project of law, just as it requires a broader range of institutional instruments.

If it is not enough to understand law as the judges should, what then? There are no doubt many possibilities. I will pick from among them one that reflects a larger normative commitment to strengthen and improve human creative capacity. I will outline an understanding of the project of law that is *as helpful as possible* to the project of law. This effort is then part of a larger enterprise (a larger project, if you can tolerate so much word repetition) of helping projects and thus helping human creative capacity.

Since this way of formulating my goal is bound to bring to mind Dworkin's interpretive stance, with its slogan "make it the best it can be," let me explain it more fully by way of contrast with Dworkin.

Dworkin contrasts two attitudes toward shared practices.<sup>30</sup> We can treat those practices "as taboos," as governed by fixed rules that need only to be obeyed, no matter how arbitrary, not justified or interpreted. Or we can take an interpretive attitude, in which our fidelity to the practice involves also giving it the best possible interpretation. The latter attitude may then also cause us to obey more selectively and creatively in light of our interpretation of the practice.

There is a third alternative suggested at the end of Dworkin's *Law's Empire* and in the various slogans I have presented above.<sup>31</sup> Law can be taken as a project. Fidelity to a project requires more than charitably interpreting a text or a text analogue. It requires participation in a continuing process of creation, in a way that is as helpful to that process as possible, which means preserving what is being created, improving it, and more generally, bringing it closer to completion.

Interpreting a text requires attributing to it a meaning that makes it the best it can be. But the process of interpretation leaves the text unchanged and attaches no significance to sequence and history. Not so, if we consider law as a project. Nothing, then, about the law is to be treated as finished, though each change must preserve the continuity of the project. We experience law not as a judge experiences the text of the law but more like the judge experiences

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30. DWORKIN, *supra* note 6, at 47.

31. *See id.* at 400–13.

the constraint of the law in common law and, more generally, the way you must experience any process of creation divided into stages and occurring over time: the later stages must build on earlier stages; creation *now* must be constrained by the process of creation that it has inherited.

Interpretations of a text are to be evaluated on two dimensions: fit and value. Understanding a project is best evaluated also on those two dimensions but with two crucial modifications. We are not restricted to changes in meaning, though we are constrained by the requirements of continuity (hence the value of incrementalism and precedent). And the dimension of fit is sensitive to sequence and history. In identifying a project, we search for trends in history worthy of articulating and extending into the future. These are the projects we judge valuable. A project produces a trend, but the trend may be noticeable only when the project is articulated. And the trend is not inevitable: any project can be abandoned. Projects do not constitute historical laws identifying an inevitable future. Projects are simply distinct units of human creative power, extended over time, as they must be to overcome the sheer difficulty of creation on a large scale.

To understand a project in a way faithful to it requires therefore a distinctive kind of historical analysis, an identification of trends, and an articulation of their possible extension into the future. The trends in question need not be linear, identifying a direction of progress and moving in that direction. Large-scale creation through projects works differently, as we see rather clearly when we look at creation in science. The relevant pattern in science was first noted by T. S. Kuhn, who described it as a sequence of periods of normal science and scientific revolutions.<sup>32</sup> It has since been more adequately described by others.<sup>33</sup> A scientific research program<sup>34</sup> or a research tradition<sup>35</sup> is a sequence of scientific theories. Each successive theory builds on the previous one. Each theory must be evaluated not in isolation but on the basis of its place in the sequence and the value of the sequence as a whole. A research program or tradition usually develops

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32. See T.S. KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

33. See, e.g., PETER GODFREY-SMITH, *THEORY AND REALITY* (2003).

34. See generally IMRE LAKATOS, *THE METHODOLOGY OF SCIENTIFIC RESEARCH PROGRAMMES* (1978).

35. See generally LARRY LAUDAN, *PROGRESS AND ITS PROBLEMS: TOWARDS A THEORY OF SCIENTIFIC GROWTH* (1978).



incrementally in what Kuhn has called “normal science.”<sup>36</sup> But sometimes it undergoes a radical transformation (a scientific revolution), while maintaining a certain amount of continuity with the past: Newtonian mechanics, for example, is preserved as a special case of relativity theory.<sup>37</sup> So, we have a kind of cycle: periods of deep creative transition alternating with periods of incremental growth, which tend to be more linear and predictable.

Ideas about how to make a shared practice the best it can be are a part of what this understanding of a project requires, since a project is a process of continuing creation and improvement. But a helpful understanding of the project would also, for example, make it as realistic as possible. This is usually taken to mean: make it small. I think proper attention to the relevant problems of motivation suggests something close to the opposite tack: make it a big project that can be pursued in small steps.

#### VI. THE PROBLEM OF MOTIVATION

Large-scale human creative projects, as has been recognized in the case of politics since at least the Axial Age of the various civilizations, appear to have a choice. They can be organized in a thoroughly hierarchical way and extend in this way the creative power of the individual who is placed at the top of the hierarchy through some effectively organized system of incentives, of rewards and punishments. This is how the pyramids were built and how the Qin empire was created in ancient China under legalist influence.

Alternatively (and this is the moderate alternative) they can proceed in a more decentralized way, but they then face what modern social science has called social dilemmas or problems of collective action.<sup>38</sup> At the heart of the decentralized form of large-scale human creativity is then the problem of motivation. Markets provide one solution to this problem, but it is widely recognized that they are not a sufficient solution. The problem of motivation remains: how can we

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36. KUHN, *supra* note 32, at 2.

37. *See generally* Kuhn, *supra* note 32. More precisely, Newtonian mechanics is reformulated, making it an approximation to a special case of the new relativity theory. Some people read into Kuhn’s *Structure of Scientific Revolutions* radically irrational claims that deny even this limited continuity in scientific revolutions. But whatever Kuhn said or meant, this much continuity does exist.

38. *See* MANCUR OLSON, *LOGIC OF COLLECTIVE ACTION* (rev. ed. 1971); MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* (1987); ELINOR OSTROM, *GOVERNING THE COMMONS* (1990).

motivate large numbers of people to sacrifice their narrow interest for larger projects, even in settings where, if they do all sacrifice, they will all be better off?

To generate motivation we should formulate the project in a way that appeals to both the heart and the mind, so that the project engages the passions as well as reason. Let me focus on one aspect of the problem most directly relevant to the project of the global constitution.

A good way to begin the discussion is with the Parable of the Two Bricklayers. Those who are serious about promoting human creative power like to repeat this parable. I have encountered it in the writing of Harry Boyte, a key thinker in the contemporary American civic renewal movement, and in the writings of Mikhail Gorbachev.<sup>39</sup>

Two bricklayers are working side by side building a wall. One thinks he is building just a wall. The second sees himself as building a cathedral. The second finds inspiration in his work and puts much creative energy into it. For the first it is just a damn job.

The first bricklayer has an incompletely theorized approach to his work.<sup>40</sup> He might be concerned that, while there appears to be an overlapping consensus<sup>41</sup> on building a wall, others might have different comprehensive theories of the cathedral, or the bricklayer next to him might derive his commitment from the conviction that he is building a brothel. But big projects inspire and motivate, and the project of law badly needs inspiration.

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39. Boyte and Kari write that:

“[p]ublic work” is work by ordinary people that builds and sustains our basic public goods and resources—what used to be called “our commonwealth.” The story of the two bricklayers who were asked what they were doing conveys this sense. One said, “building a wall.” The other said, “building a cathedral.”

HARRY C. BOYTE & NANCY N. KARI, *BUILDING AMERICA: THE DEMOCRATIC PROMISE OF PUBLIC WORK* 16 (1996). Gorbachev’s version is more elaborate:

There is an old story: A traveler approached some people erecting a structure and asked one by one: “What is it you’re doing?” One replied with irritation: “Oh, look, from morning till night we carry these damn stones . . .” Another rose from his knees, straightened his shoulders and said proudly: “You see, it’s a temple we’re building!” So if you see this lofty goal—a shining temple on a green hill—then the heaviest of stones are light, the most exhausting work a pleasure.

MIKHAIL GORBACHEV, *PERESTROIKA* 15–16 (rev. ed. 1987).

40. *Cf.* CASS SUNSTEIN, *DESIGNING DEMOCRACY* 49–66 (2001).

41. *See* RAWLS, *POLITICAL LIBERALISM*, *supra* note 7.

Contemporary political and legal theories, to which I allude in the paragraph above, are preoccupied with the problem of disagreement and suppress the elaboration of encompassing projects, because it is difficult to agree on the nature of such projects. They do not seem to be concerned with the problem of motivation. But the world will not move unless and until people are motivated to move it. This exclusive preoccupation with disagreement is a recipe for the betrayal of human creative power. The problem of motivation is central, and it requires the elaboration of large and encompassing projects. Yes, there will be disagreements, but the bricklayers can build the wall, each with a cathedral in mind, even if each bricklayer's cathedral is different and even if some think they are building a brothel. The bricklayers need not agree on exactly what kind of grand and awesome structure they are building; they need only sufficient overlapping consensus to actually build the wall.

So the most helpful understanding of the project of law will include, so to speak, guidance on the building of walls, but it will also include a conception of the grand cathedral we are building. It will allow us to contribute in micro-detail to the project of law, and it will also allow us to see each small detail as part of some immense and comprehensive project.

We will disagree with others about the nature of that project, but we can agree on the details. And we can support each other as part of the solidarity that connects builders of cathedrals (even different cathedrals) as against those who only care about walls.

It appears that people have a powerful inclination toward selfishness and short-sightedness. And human organizations do as well. I believe we should give an account of the project of law that is maximally helpful in diminishing this motivational problem. Hence, among other things, we should present the project of law as part of building a cathedral (or a very impressive brothel, if you prefer) and not a wall.

## VII. NEW MEDIEVALISM

What then is the big project that encompasses global law? Here is the somewhat simple version of the answer I would propose. The larger project is the creation of a complex and moderate universal civilization, a universal civilization composed of less universal civilizations, cultures, and multiple projects of human creative power,

a world of human creation that is both diverse and unified. And global law articulates those impartial and attractive principles of a complex and universal civilization that are usable by the courts. This is a big project, the most encompassing project of human creative power. And it is a project with a long and dramatic history, with a number of parallel civilizational paths (China, India, Islam, the West) and dramatic crises and renaissances restoring continuity with the past.

This immense project was in the past associated with the projects of *universal empire*, empires aspiring to govern the entire civilized world, as it then appeared, such as the Han empire of China or the Roman empire. In the West, this project was revived in medieval Europe by a dual system of Holy Roman Empire and Papacy, both aspiring to civilizational universality. The project collapsed with the religious divisions of Christendom and the political divisions characteristic of the Westphalian system of sovereign territorial states. But there are signs of its renaissance. Observing those signs, many now talk of a “new medievalism.”

Scholars in international relations,<sup>42</sup> international law,<sup>43</sup> international political economy,<sup>44</sup> and European Union studies,<sup>45</sup> among others, have suggested that we may be witnessing on the global scale, especially after the end of the Cold War, a return to political and legal patterns characteristic of medieval Europe. Some have advocated such changes, but of course only selectively and with much modification. We can certainly find intriguing analogies between contemporary developments and medieval history. But I think there is more to this.

Those who invoke the analogy see the world, and Europe

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42. See, e.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY* 245–46, 254–66 (2d. ed. 1995); Marek Cichocki, *Nowe średniowiecze*, 1(5) *NOWA EUROPA* 310, 310–29 (2007).

43. See, e.g., Paolo G. Carozza, *My Friend Is a Stranger: The Death Penalty and the Global Jus Commune of Human Rights*, 81 *TEX. L. REV.* 1031, 1036 (2003).

44. See, e.g., Stephen Kobrin, *Back to the Future: Neomedievalism and the Postmodern Digital World Economy*, 51 *J. INT’L AFF.* 361 (1998); Jörg Friedrichs, *The Meaning of New Medievalism*, 7 *EUR. J. INT’L REL.* 475 (2001).

45. See, e.g., Peter Koslowski, *Die Europäische Union und das Ende der Einheit von Staatsvolk und Staat* (International Centre for Economic Research, Working Paper No. 11, 2004); Peter Koslowski, *Unia Europejska a koniec jedności narodu i państwa*, 1(5) *NOWA EUROPA* 273 (2007).

especially, as returning in some ways to the middle ages, to structures of rule more like medieval Europe, with its Church, Holy Roman Empire, universal values, and common law (Civil and Canon), but also with its fragmentation and complexity, kingdoms and principalities, cities and towns, leagues of cities and towns, law merchant, manorial law, and so on.<sup>46</sup>

The *locus classicus* for the working out of this analogy in international relations is the work of Hedley Bull.<sup>47</sup> In more recent political economy, the most substantial and interesting seems to me an article by Kobrin.<sup>48</sup> In international law, we see it invoked, for example, by Carozza in his work on the law governing the death penalty.<sup>49</sup>

What are we to make of this new medievalism? I think we should take it seriously. These are not simply intriguing analogies. What then? Are we in fact returning to the middle ages? Are we returning to the Holy Roman Empire? In some ways the answer is obvious: no. But I think there is a more interesting answer possible, identifying not just a trend but a project worthy of our support, which does not require us to go medieval but does indeed involve restoration of continuity with the age before the Treaties of Westphalia (to use those much abused treaties, once again, as a symbol).

We return in fact to a very ancient project with its roots, we might say, in ancient Sumer, if not earlier. This is an effort to create a complex universal civilization, with the project of a global constitution as part of that larger project. So we can be seen as restoring continuity with the effort in medieval Europe, which was itself a restoration of continuity with the ancient effort, Roman in the Western tradition, of building a universal complex civilization, including its legal and political framework. And the analogies of new medievalism can be elaborated into a distinctly non-Kantian view of the project of global law, as part of a project of complex universal civilization, in which there is room for fragmentation and pluralism as well as universal principles and higher law.

A number of theoretical historians now see the Roman Empire as

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46. See HAROLD BERMAN, *LAW AND REVOLUTION* (1983); HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1994).

47. BULL, *supra* note 42.

48. Kobrin, *supra* note 44.

49. Carozza, *supra* note 43, at 1036.

just one among a number of such efforts rooted in what we might call, after Jaspers, the axial transformation.<sup>50</sup> The earlier efforts to establish universal civilizations and Universal Empires were religiously based (the Han Empire based on Confucianism, Asoka's empire based on Buddhism, the Islamic caliphate). And of course the medieval European such effort was also religiously based, and it was finally killed by religious divisions and religious wars. Those who speak of a new middle ages do not propose to give new global authority to the pope in Rome.<sup>51</sup> But they both see trends and in some cases (indeed, in my case) support those trends toward a return to the project of a universal complex civilization, this time secular in form. If we are to return to this project, then global law and the law of the global constitution would be at its center.

So what may seem to be simply an intriguing analogy or a way of using history to free our imaginations from the Westphalian prison can also be seen as more than that. It can be seen as an inkling of perhaps the largest of human creative projects, the project of building a universal complex civilization, proceeding over millennia in fits and starts in a pattern followed by all complex creation: a cycle that begins with the slow articulation of a creative project, its flourishing, crisis, and then renewal in modified form.

This is the grand and encompassing project of human creative power guided by impartial principle and the many creative projects which are its expression, including the project of law and the project of moderation, with its most ambitious, cathedral-like goal of building a universal civilization. Such a civilization would contain a multiplicity of creative projects, each with some autonomy from the others but also connected to the others in various ways. Each individual life would count as a separate project, among others, individual and collective.

These multiple projects would be cross-cutting and would generate cross-cutting and multiple loyalties, with a complex system of cross-cutting boundaries and conflicting ends. Territorial states would be one type of project among many, one instrument through which

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50. KARL JASPERS, *THE ORIGIN AND GOAL OF HISTORY* (1953). For the more recent dramatic revival of the idea, see SHMUEL EISENSTADT, *THE ORIGINS AND DIVERSITY OF AXIAL AGE CIVILIZATIONS* (1986); *AXIAL CIVILIZATIONS AND WORLD HISTORY* (JOHANN ARNASON ET AL., EDS., 2005).

51. *See supra* notes 47–50.

human creative power attempts to make the world better. But territorial states would lose their dominance.

The political and legal foundation of such a civilization would look more like the European Union than anything else that now exists. A project needs exemplars (or paradigms), and the European Union can serve as its exemplar. An exemplar is not to be slavishly copied, and no one in his or her right mind would slavishly copy the EU. No, an exemplar is supposed to be an aid to creative power, to suggest new lines of development and new principles first only glimpsed through trial and error and the kind of blind incrementalism that has been for the most part the construction method of the EU.

In many ways the European Union looks more like the Holy Roman Empire than like the modern nation state. So medieval and renaissance institutions, as well as medieval and renaissance ideas, are now again invoked as guides to our project of creation. Althusius,<sup>52</sup> the great theorist of the Holy Roman Empire, as we might consider him, is now taken with new seriousness and used to do intellectual battle against both Hobbes<sup>53</sup> and Kant.<sup>54</sup> And Switzerland, which has preserved continuity with the Holy Roman Empire more than any other state,<sup>55</sup> emerges as a constitutional model of consensual and consociational democracy in the influential work of Arend Lijphart.<sup>56</sup>

By restoring continuity with the past we move forward in the project of universal civilization; we enact another stage in the sequence of renewals Peter Koslowski identifies as drivers of the European civilization.<sup>57</sup> They are not exclusively European, however. Through a sequence of rebirths and renewals, a *modern* stage of the project of universal civilization is slowly articulated. So we do not return to the middle ages but move forward to the next stage of

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52. See JOHANNES ALTHUSIUS, *POLITICA* (Liberty Fund 1997) (1614).

53. See THOMAS HUEGLIN, *EARLY MODERN CONCEPTS FOR A LATE MODERN WORLD* (1999).

54. See JOHN KEANE, *GLOBAL CIVIL SOCIETY* 125 (2003) (“[A] theory of global civil society needs less Kant and more Althusius.”).

55. For a good discussion of the Swiss case, see JONATHAN STEINBERG, *WHY SWITZERLAND?* (1996).

56. AREND LIJPHART, *PATTERN OF DEMOCRACY* (1999); AREND LIJPHART, *THINKING ABOUT DEMOCRACY* (2008). See Brendan O’Leary, *Debating Consociational Politics: Normative and Explanatory Arguments*, in *FROM POWER SHARING TO DEMOCRACY* 3–43 (Sid Noel ed., 2005).

57. Koslowski, *supra* note 45.

modernity, slowly freeing ourselves from its Enlightenment-era constraints and distortions. And the new stage of modernity restores continuity with the project of building a polycentric universal civilization, which in Europe was itself an attempt to restore continuity with ancient Rome.

I think this may be a good context, the largest context also, for considering the project of the global constitution and its law.

### VIII. GLOBAL CONSTITUTION

If we are going to restore continuity with the medieval project, we should perhaps also try not to be imprisoned by the eighteenth century idea of what a constitution is. A constitution need not come in the format of a sovereign act by a sovereign people. We can learn much yet from the British constitution, which maintained continuity (and restored it after it was broken) with its own medieval projects of law.<sup>58</sup>

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.<sup>59</sup> On

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58. John McEldowney writes of the United Kingdom's constitution that "[c]ontinuity is seen as one of [its] self-perpetuating features . . ." Memorandum by Professor John McEldowney, University of Warwick, para. 21 (Sept. 8, 2003) [hereinafter McEldowney Memorandum] available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldconst/168/16809.htm#note92> ("address[ing] the [e]ffects of the proposed European Constitution on the constitution of the United Kingdom"). And he continues:

The absence of a single or codified constitution leaves the working out of the practicalities of the constitution to the system of laws, conventions and customs that are the hallmark of the medieval inheritance. A notable feature is the use of conventions . . . that comprise the common practices and workings of government that link the modern with the ancient, medieval constitution.

*Id.* para. 2.3.

59. They were mostly fiction and propaganda, with a few facts added. See generally THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS (F. J. M. Feldbrugge ed., 1979).



the other hand, Britain does have a constitution.<sup>60</sup> 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.<sup>61</sup>

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.”<sup>62</sup> 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

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60. See McEldowney Memorandum, *supra* note 58. 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 & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION (2007).

61. 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>.

62. The University of Maryland School of Law—International & Comparative Law Symposium, Multilateralism and Global Law: Evolving Conceptions of International Law and Governance, <http://www.law.umaryland.edu/faculty/conferences/detail.html?conf=86> (last visited May 14, 2010) (description of conference).

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*.

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.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

Kumm's footnote here is to Dworkin's *Law's Empire*,<sup>66</sup> and the reference is not to its last chapter, with its effort to articulate something closer to the project of law.<sup>67</sup>

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

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63. Kumm, *supra* note 19, at 258–324.

64. *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."

65. *Id.* at 311.

66. *Id.* at 311 n.106.

67. DWORKIN, *supra* note 6, at 400–13.

plausible reconstructive account that both fits that practice and shows it in the best light.<sup>68</sup>

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.<sup>69</sup>

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.<sup>70</sup>

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 . . . .”<sup>71</sup>

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

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68. Kumm, *supra* note 19, at 262.

69. *Id.* at 271–72.

70. *Id.* at 277.

71. *Id.* at 304–05.

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 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.<sup>72</sup> 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,<sup>73</sup> we are moved to tears.

#### IX. 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

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72. 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>.

73. 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.”).

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 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,<sup>74</sup> the Euro zone,<sup>75</sup> 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,<sup>76</sup> 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 human dignity, in a format that lends itself to comparison with, say, Rawls's conception of justice (or other philosophical conceptions).<sup>77</sup>

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

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

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

76. STEINBERG, *supra* note 55.

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

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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup>

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

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78. 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).

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

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



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 human dignity in general and the history of the concept's use.<sup>81</sup> Nor is it elaborated, as in Nussbaum's theory, by some independent consideration of what is necessary for a life worthy of human dignity.<sup>82</sup> 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 justice<sup>83</sup> and Dworkin's theory of equal concern and respect<sup>84</sup> 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

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81. See Jeremy Waldron, Dignity, Rank, and Rights, Tanner Lectures, University of California at Berkeley (Apr. 21, 2009).

82. See generally NUSSBAUM, *supra* note 77.

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

84. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272–73 (1977).

the principle of universal human rights and hence without the elaboration, codification, and legal standing.

It emerges as such in the Earth Charter,<sup>85</sup> 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”<sup>86</sup> 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.”<sup>87</sup> 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 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,<sup>88</sup> 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 an 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 . . . .<sup>89</sup>

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

86. 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 . . .”).

87. See KLAUS BOSSELMAN, *THE PRINCIPLE OF SUSTAINABILITY 2* (2008).

88. See Lon Fuller, *Human Interaction and the Law*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER* (Kenneth Winston ed., 1981).

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

One way to understand the Earth Charter is to see it, with Klaus Bosselman, as articulating above all a principle of sustainability.<sup>90</sup> 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.

#### X. 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 be<sup>91</sup>, 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 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.

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90. See generally BOSSELMAN, *supra* note 87.

91. 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.