The Two World Orders

by Jed Rubenfeld

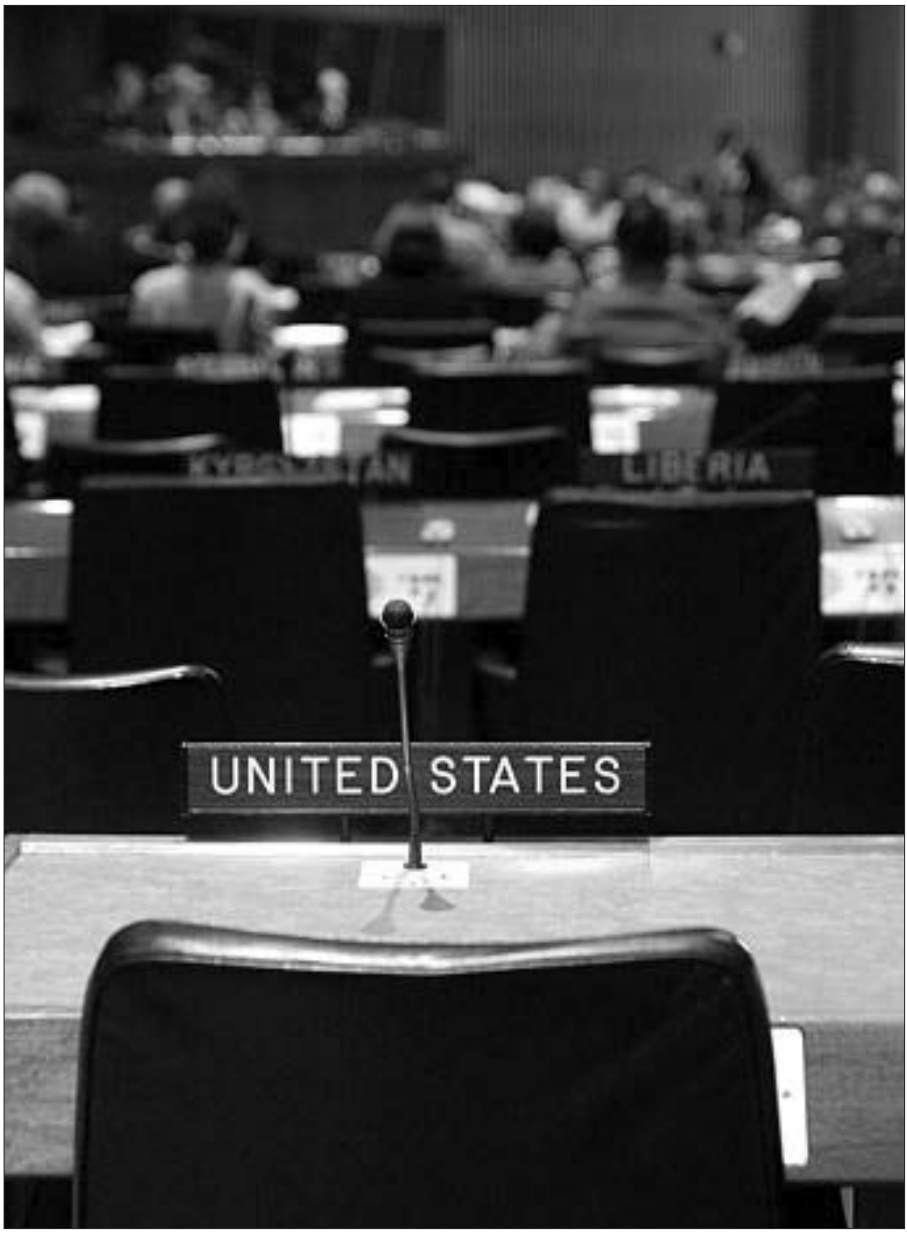
What's the source of America's growing unilateralism? The easy answer is self-interest: We act unilaterally to the extent that we see unilateralism as serving our interests. But the answer prompts a more searching question: Why do so many Americans view unilateralism this way, given the hostility it provokes, the costs it imposes, and the considerable risks it entails? Americans sometimes seem unilateralist almost by instinct, as if it were a matter of principle. Might it be?

It will not do to trace contemporary U.S. unilateralism to the 18th-century doctrine of isolationism, for unilateralism is a very different phenomenon. An isolationist country withdraws from the world, even when others call on it to become involved; a unilateralist country feels free to project itself—its power, its economy, its culture—throughout the world, even when others call on it to stop. Although there may still be a thread of isolationism in the United States today, unilateralism, the far more dominant trend, cannot usefully be derived from it.

The search for an explanation should begin instead at the end of World War II. In 1945, when victory was at hand and his own death only days away, Franklin Roosevelt wrote that the world's task was to ensure "the end of the beginning of wars." So Roosevelt called for a new system of international law and multilateral governance that would be designed to stop future wars before they began. Hence, the irony of America's current position: More than any other country, the United States is responsible for the creation of the international law system it now resists.

The decisive period to understand, then, runs roughly from the end of the war to the present, years that witnessed the birth of a new international legal order, if not, as widely reported, the death of the Westphalian nation-state. America's leadership in the new internationalism was, at the beginning, so strong that one might be tempted to see today's U.S. unilateralism as a stunning about-face, an aberration even, which may yet subside before too much damage is done. But the hope that the United States will rediscover the multilateralism it once championed assumes that America and Europe were engaged in a common internationalist project after World War II. Was that in fact the case?

It's undoubtedly true that, after the war, Americans followed the path Roosevelt had charted and led Europe and the world toward an unprecedented internationalism. We were the driving force behind the United Nations, the primary drafters of the initial international human-rights conventions, the cham-



Not present at the creation: The U.S. seat was empty at the opening session of the new International Criminal Court at United Nations headquarters in New York last year.

pions of developing an enforceable system of international law. Indeed, America pressed on Europe the very idea of European union (with France the primary locus of resistance). At the same time, America promoted a new constitutionalism throughout Europe and the world, a constitutionalism in which fundamental rights, as well as protections for minorities, were laid down as part of the world's basic law, beyond the reach of ordinary political processes.

How then did the United States move from its postwar position of leadership in the new international order to its present position of outlier?

The Cold War played an essential role in the change, fracturing the new international order before it had taken root. At the same time, the Cold War

also had the effect of keeping the Atlantic alliance intact for many decades by suppressing divisions that would show themselves in full force only after 1989. When, in the 1990s, the United States emerged as the last superpower standing, it became much easier for the forces of European union to move ahead and for the buried divisions between America and its European allies to be made apparent. The most fundamental of those divisions had been the most invisible: From the start, the postwar boom in international and constitutional law had had different meanings in America and Europe—because the war itself meant different things in America and Europe.

At the risk of overgeneralization, we might say that for Europeans (that is, for those Europeans not joined to the Axis cause), World War II, in which almost 60 million people perished, exemplified the horrors of *nationalism*. Specifically and significantly, it exemplified the horrors of *popular* nationalism. Nazism and fascism were manifestations, however perverse, of popular sovereignty. Adolf Hitler and Benito Mussolini rose to power initially through elections and democratic processes. Both claimed to speak for the people, not only before they assumed dictatorial powers but afterward, too, and both were broadly popular, as were their nationalism, militarism, repression, and, in Hitler's case, genocidal objectives. From the postwar European point of view, the Allies' victory was a victory *against* nationalism, *against* popular sovereignty, *against* democratic excess.

> From the start, the postwar boom in international law had different meanings in America and Europe.

The American experience of victory could not have differed more starkly. For Americans, winning the war was a victory *for* nationalism—that is to say, for *our* nation and *our* kind of nationalism. It was a victory *for* popular sovereignty (*our* popular sovereignty) and, most fundamentally, a victory *for* democracy (*our* democracy). Yes, the war held a lesson for Americans about the dangers of democracy, but the lesson was that the nations of continental Europe had proven themselves incapable of handling democracy when left to their own devices. If Europe was to develop democratically, it would need American tutelage. If Europe was to overcome its nationalist pathologies, it might have to become a United States of Europe. Certain European countries might even need to have democratic institutions imposed upon them, although it would be best if they adopted those institutions themselves, or at least persuaded themselves that they had done so.

These contrasting lessons shaped the divergent European and American experiences of the postwar boom in international political institutions and international law. For Europeans, the fundamental point of international law was to address the catastrophic problem of nationalism—to check national sovereignty, emphatically including national *popular* sovereignty. This remains the dominant European view today. The United Nations, the emerging European

>Jed Rubenfeld *is the Robert R. Slaughter Professor of Law at Yale University and author of* Freedom and Time: A Theory of Constitutional Self-Government *(2001).*

Union, and international law in general are expressly understood in Europe as constraints on nationalism and national sovereignty, the perils of which were made plain by the war. They are also understood, although more covertly, as restraints on *democracy*, at least in the sense that they place increasing power in the hands of international actors (bureaucrats, technocrats, diplomats, and judges) at a considerable remove from popular politics and popular will.

In America, the postwar internationalism had a very different meaning. Here, the point of international law could not ultimately be antidemocratic or antinationalist because the Allies' victory had been a victory for democracy (American democracy) and for the nation (the American nation). America in the postwar period could not embrace an antinationalist, antidemocratic international order as Europe did. It needed a counterstory to tell itself about its role in promoting the new international order.

The counterstory was as follows: When founding the United Nations, writing the first conventions on international rights, creating constitutions for Germany and Japan, and promoting a United States of Europe, Americans were bestowing the gifts of American liberty, prosperity, and law, particularly American constitutional law, on the rest of the world. The "new" international human rights were to be nothing other than the fundamental guarantees made famous by the U.S. Constitution. Wasn't America light-years ahead of continental Europe in the ways of democracy? International law would be, basically, American law made applicable to other nations, and the business of the new internationalism would be to transmit American principles to the rest of the world. So of course America could be the most enthusiastic supporter of the new international order. Why would it not support the project of making the world more American?

In the American imagination, then, the internationalism and multilateralism we promoted were for the rest of the world, not for us. What Europe would recognize as international law was law we already had. The notion that U.S. practices—such as capital punishment—held constitutional by our courts under our Bill of Rights might be said to violate international law was, from this point of view, not a conceptual possibility. Our willingness to promote and sign on to international law would be second to none—except when it came to any conventions that might require a change in U.S. domestic law or policy. The principal organs of U.S. foreign policy, including the State Department and, famously, the Senate, emphatically resisted the idea that international law could be a means of changing internal U.S. law. In the 1950s, the United States refused to join any of the major human-rights and antigenocide conventions. The rest of the world might need an American-modeled constitution, but we already had one.

AMERICANS WERE BESTOWING THE GIFTS OF AMERICAN LIBERTY, PROSPERITY, AND LAW ON THE REST OF THE WORLD.

In part, this exceptionalist attitude reflected American triumphalism in the wake of the war; in part, it expressed American know-nothing parochialism; and,

in part, it placated southern fears that U.S. participation in international rights agreements could loosen the chokehold in which American blacks were held. But it reflected something more fundamental as well: a conception of constitutional democracy that had been reaffirmed by the war. It was impossible for Americans to see the new international constitutionalism as Europeans saw it—a constraint on democratic nationalism—for that would have contradicted America's basic understanding of constitutional democracy.

It's essential here to distinguish between two conceptions of constitutionalism. The first views the fundamental tenets of constitutional law as expressing universal, liberal, Enlightenment principles, whose authority is superior to that of all national politics, including national democratic politics. This universal authority, residing in a normative domain above politics and nation-states, is what allows constitutional law, interpreted by unelected judges, to countermand all governmental actions, including laws enacted by democratically elected legislators. From this perspective, it's reasonable for international organizations and courts to frame constitutions, establish international human-rights laws, interpret these constitutions and laws, and, in general, create a system of international law to govern nation-states. I call this view "international constitutionalism."

Let me make the abstract picture more concrete. The Council of Europe—the first postwar organization of European states, and the progenitor of today's European Union—has a quasi-judicial branch, called the Commission on Democracy through Law (also called the Venice Commission), on which I have served for several years as the U.S. representative or observer. One of my first duties was to sit on a committee charged with drafting a constitution for Kosovo. The committee consisted of distinguished jurists and constitutionalists from all over Europe. We met in Paris and Venice, and the proceedings were professional and expert in every respect. But though the committee had visited Kosovo for three days, it had no Kosovar members. Uncertain as to whether their absence was deliberate, I made inquiries among the committee members. It was indeed intentional. The framing of a constitution was a delicate business, I was told, and to have involved Kosovars in the process would have impeded the committee's work and mired it in political infighting.

> The overtly political nature of American constitutional law stuns Europeans.

Might it therefore be desirable, I asked, to draft an explicitly transitional document, on the model of the interim South African constitution, one that created institutions through which local drafting and ratification of a permanent charter could later take place? No, was the committee's answer. We were drafting a *constitution*, and constitutions are not meant to be transitional documents.

The committee's attitude perfectly exemplified international constitutionalism, which is the dominant constitutional worldview in Europe. From this viewpoint, it's not particularly important for a constitution to be the product of a national

participatory political process. What matters is that the constitution recognize human rights, protect minorities, establish the rule of law, and set up stable, democratic political institutions, preferably of a parliamentary variety, in which the chief executive is not directly elected by the people. National ratification of a new constitution might be instrumentally valuable, but having a committee of expert foreign jurists draw up a constitution would be perfectly satisfactory in principle. Having that constitution imposed on the society by an occupying power would be awkward, but so long as the occupying power was recognized as valid under international law, and so long as the constitution took, imposing it by force would be entirely acceptable.

The alternative to international constitutionalism is American, or democratic, national constitutionalism. It holds that a nation's constitution ought to be made through that nation's democratic process, because the business of the constitution is to express the polity's most basic legal and political commitments. These commitments will include fundamental rights that majorities are not free to violate, but the countermajoritarian rights are not therefore counterdemocratic. Rather, they are democratic because they represent the nation's self-given law, enacted through a democratic constitutional politics. Over time, from this perspective, constitutional law is supposed to evolve and grow in a fashion that continues to express national interpretations and reinterpretations of the polity's fundamental commitments.

In American constitutionalism, the work of democratically drafting and ratifying a constitution is only the beginning. Just as important, if not more so, is the question of who interprets the constitution. In the American view, constitutional law must somehow remain the nation's self-given law, even as it is reworked through judicial interpretation and reinterpretation, and this requires interpretation by national courts. By contrast, in international constitutionalism, interpretation by a body of international jurists is, in principle, not only satisfactory but *superior* to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes.

The overtly political nature of American constitutional law stuns Europeans; indeed it's one of the features of the American system at the root of the differences between American and European constitutionalism. Claims about "American realism" are often exaggerated, but there is undoubtedly in the United States a greater understanding than in Europe that all law, including judge-made law (i.e., judicial decisions), and even judge-made *constitutional* law, is a political product. From an American point of view, if the law is to be democratic, the law and the courts that interpret it must retain strong connections to the nation's democratic political system. By contrast, the processes through which EU law has emerged so far betray a disconnection with, and even a disrespect for, democratic processes that would be unacceptable as a basis for constitutional transformation in the United States.

Americans at bottom do not believe in the claims made for a nonpolitical, neutral constitutional law. They know that judges' values inevitably inform constitutional law. Europeans tend to have a different understanding. To be sure, there was for a long time, and perhaps still is, a European tradition of distrust of

judges, especially constitutional judges, shared by left-wing and right-wing European political thinkers. Yet this skepticism about "government by judiciary" coexisted with a belief in the possibility of an expert, neutral bureaucratic rationality and a dogmatic, apolitical legal reason. The result was a deeply ambiguous attitude toward judicial review and constitutional law. Before World War II, Europe had some constitutional courts, but these courts had almost no power to strike down laws on the ground that individuals' rights had been violated.

Postwar European constitutionalism has shed this equivocation. European constitutionalism today invests courts with full jurisdiction over individual rights, without fully acknowledging that judicial decisions about the meaning of constitutional rights are fundamentally political in character. On the contrary, what makes the new European constitutionalism cohere, and gives European constitutional courts their claim to legitimacy, is the ideology of universal or "international" human rights, which owe their existence to no particular nation's constitution, or which, if they derive from a national constitution, possess nonetheless a kind of supranational character, rendering them peculiarly fit for interpretation by international juridical experts. In America, by contrast, it would be nothing short of scandalous to suggest that U.S. constitutional questions had to be decided by an international tribunal claiming supremacy over our legal system.

From the American perspective, national constitutional courts are an essential feature of constitutional law, and it's critical that constitutional interpretation remain interwoven with the nation's processes of democratic self-governance. This is done in various ways: through a politically charged judicial nomination mechanism; through judges' membership in the national polity and the nation's particular political and legal culture; through the always-open possibility of amendment; and, perhaps most important but least understood, through periodic but decisive contests between the judicial and political branches. (The most famous 20th-century example was the confrontation between Franklin Roosevelt and the Supreme Court of the 1930s, which repeatedly struck down New Deal legislation—a battle Roosevelt won only after proposing to appoint six additional justices to the court.) These clashes are too often portrayed as moments of institutional peril to be avoided at all costs. In reality, they play a crucial role in maintaining the judiciary's connections to a nation's long-term democratic development. The ideal is not to make constitutional courts responsive to popular will at any given moment, but to make sure that constitutional law remains answerable to the nation's project of political self-determination over time.

> THE U.S. CONSTITUTION DID NOT SPEAK IN THE LANGUAGE OF UNIVERSAL RIGHTS. IT SPOKE IN THE LANGUAGE OF POPULAR SOVEREIGNTY.

To summarize: International constitutionalism contemplates a constitutional order embodying universal principles that derive their authority from sources outside national democratic processes and that constrain national self-

government. American or democratic national constitutionalism, by contrast, regards constitutional law as the embodiment of a particular nation's democratically self-given legal and political commitments. At any particular moment, these commitments operate as checks and constraints on national democratic will. But constitutional law is emphatically not antidemocratic. Rather, it aims at democracy over time. Hence, it requires that a nation's constitutional law be made and interpreted by that nation's citizens, legislators, and judges.

Let me give three illustrations—in turn, historical, theoretical, and practical—that make plain the contrast between American and European conceptions of constitutionalism. In 1789, the popular assembly of France promulgated the Declaration of the Rights of Man. The document spoke in the language of universal rights. The rights of *man* were at issue, not merely the rights of Frenchmen. That same year, the U.S. Congress promulgated the Bill of Rights, which, far from proclaiming universal law, originally applied only to the federal government and not to the state governments. Thus, the First Amendment forbade *national* religious establishments but not religious establishments in the *states*. The U.S. Constitution did not speak in the language of universal rights. It spoke in the language of popular sovereignty: "We the People of the United States . . . do ordain and establish. . . ." American constitutional law was understood from the outset to be part of the project of popular self-government, as opposed to an external force checking that project. The American language of constitutional rights, properly understood, does not claim the authority of universal law. It claims, rather, the authority of democracy.

> EUROPEANS HAVE SHED THEIR SKEPTICISM ABOUT THE POSSIBILITY OF AN EXPERT, NEUTRAL BUREAUCRATIC RATIONALITY.

A second illustration of the contrast between the two types of constitutionalism makes the point at the level of theory. Contemporary American constitutional theorists are unendingly concerned with the so-called countermajoritarian difficulty: Because constitutional law allows unelected judges to override the outcomes of the majoritarian democratic process, it's potentially in conflict with democracy. Europeans constitutionalists used to share this obsession, but since 1945, and particularly with the recent explosion of "international human-rights" law, the countermajoritarian difficulty rarely figures in European thinking any more. The reason is that Europeans have embraced international constitutionalism, according to which the whole point of constitutional law is to check democracy. For Americans, constitutional law cannot merely check democracy. It must *answer* to democracy—have its source and basis in a democratic constitutional politics and always, somehow, be part of politics, even though it can invalidate the outcomes of the democratic process at any given moment.

The third contrast is more practical. It involves the question of whether there must be one order of human rights applicable to all nations. In the European view, human rights transcend national politics and ought, at least ide-

ally, to be uniform throughout the world. For example, European nations—or at least European governments—now see capital punishment as a human-rights violation. Accordingly, European diplomats and politicians not only excoriate the United States for allowing the death penalty but even call for our expulsion from international organizations such as the Council of Europe. The American view holds that democratic nations can sometimes differ on matters of fundamental rights. For example, freedom of speech is stronger in America than in many other nations; an individual has the constitutional right in the United States to make statements in favor of Nazism that might land the person in jail in Germany. Yet the United States does not demand that Germany change its law on this point or risk expulsion from international organizations. Again, in America today, it's a bedrock principle of constitutional freedom that there be no established church at any level of government. But the American position does not require every nation with an established church—such as England or Italy—to disestablish.

For Europeans, a great marker of successful constitutional development is international consensus and uniformity. They point to such consensus as if agreement throughout the "international community" were itself a source of legal validation and authority. The more consensus there is on a constitutional principle throughout the international community, the greater the strength of that principle. Americans do not share this view. We've learned to see our own constitutional judgments as worth defending even during periods when most of the nations of Europe scorned or violated them. For Americans, a democratic nation's constitutional law is supposed to reflect that nation's fundamental legal and political commitments. Consensus in the "international community" is not the compelling source of legal or constitutional authority that it's made out to be in the European perspective.

EUROPEANS EXCORIATE THE UNITED STATES FOR ALLOWING THE DEATH PENALTY AND EVEN CALL FOR OUR EXPULSION FROM INTERNATIONAL ORGANIZATIONS.

Whether out of hubris or principle, or both, the United States has not understood its support for international law and institutions to imply a surrender of its own commitment to self-government. As the international system became more powerful, and international law diverged from U.S. law, the United States inevitably began to show unilateralist tendencies—not simply out of self-interest but because the United States is committed to democratic self-government. The continental European democracies, with their monarchical histories, their lingering aristocratic cultures, and their tendency to favor centralized, bureaucratic governance, have always been considerably less democratic than the American democracy. It's not surprising, then, that in forging the European Union they should be so tolerant of what Europeans casually refer to as the Union's "democratic deficit."

War crimes? Because the U.S.-led bombing campaign that brought peace to Kosovo was not authorized under international law, U.S. officers could conceivably face prosecution.

Three specific developments over the past decade helped press the United States toward unilateralism: the 1999 military intervention in Kosovo; a growing skepticism about international law, including the concern that international law might be used as a vehicle for anti-Americanism; and the events of September 11, 2001. Each merits additional consideration.

For many in the United States, the Kosovo intervention stands today as a unilateralist precedent. Because the UN Security Council never approved the use of force in Kosovo, international lawyers regarded the U.S.-led bombing as plainly illegal. But this asserted illegality has not caused Americans to regret the intervention. On the contrary, it has reinforced the view that events in the former Yugoslavia represented an appalling failure on the part of the international law system, the United Nations, and, in particular, the nations of Europe. From the American perspective, if the UN-centered international law system could not bring itself to authorize the use of force in Kosovo, then that system was incapable of discharging the responsibility that is an essential corollary of authority.

The United States had no compelling territorial, imperial, or economic interests in Kosovo. The intervention sought rather, at least in the American account, to prevent manifest, grotesque, genocidal crimes. And if the United Nations did not respond to the most blatant, wanton, and massive of human rights violations in Kosovo, how could it be trusted to respond to less demonstrable but perhaps more dangerous threats elsewhere?

Kosovo is a doubly significant precedent because it illustrates how Americans do not quite recognize the UN Charter as *law*. American society is notorious for turning political questions into legal ones. Yet Americans, including American lawyers, were and are largely uninterested in the Kosovo bombing's asserted ille-

gality under the UN Charter. The same broad indifference would emerge again when internationalists claimed that the war in Iraq was illegal.

To be sure, some American international-law specialists are interested in these issues, but they are often perceived by the rest of the U.S. legal world to be speaking a foreign language, or not so much a language as a kind of gibberish lacking the basic grammar—the grammar of enforceability—that alone gives legal language a claim to meaning. Kosovo symbolizes not merely an exceptional, exigent circumstance in which the United States was justified in going outside the UN framework, but rather an entire attitude about that framework, according to which the UN system, while pretending to be a legal system, isn't really a legal system. And what, in this view, is the United Nations really about? The several possible answers to the question are not attractive: hot air, a corrupt bureaucracy, an institution that acts as if it embodied world democracy when in reality its delegates represent illegitimate and oppressive autocracies, an invidious wonderland where Libya can be elected president of a human-rights commission.

A second spur to U.S. unilateralism has been a growing skepticism about the agenda the "international legal community" has been pursuing. The skepticism is partly due to the proliferation of human rights conventions that are systematically violated by many of the states subscribing to them. A good example is the convention banning discrimination against women, which the United States has been almost alone in refusing to ratify. But what is one to make of the fact that the signatory nations include Saudi Arabia and other states not exactly famous for respecting women's equality?

A deeper reason for the skepticism lies in the indications that international law may be used as a vehicle for anti-American resentments. A case in point is the position taken by the "international community" with respect to the continuing use of capital punishment in some American jurisdictions. Most Americans, whatever their view of capital punishment, can respect the moral arguments that condemn the death penalty. But what many Americans have trouble respecting or understanding is the concerted effort to condemn the United States as a human-rights violator because of the death penalty and to expel the United States from international organizations on that ground. When the international community throws down the gauntlet over the death penalty in America while merely clearing its throat about the slaughter in Yugoslavia, Americans can hardly be blamed if they see a sign that an anti-American agenda can be expected to find expression in international law.

> KOSOVO IS A DOUBLY SIGNIFICANT PRECEDENT BECAUSE IT ILLUSTRATES HOW AMERICANS DO NOT QUITE RECOGNIZE THE UN CHARTER AS *LAW*.

This is not a purely speculative concern. Given that the U.S.-led military interventions in Kosovo and Iraq were probably in violation of international law, might U.S. officers therefore be liable to criminal prosecution in international courts? No, say the international lawyers. Americans need not fear criminal repercus-

sions because international law "clearly" distinguishes between *jus ad bellum*, the law that determines whether the use of military force is legal, and *jus in bello*, the law that determines whether particular acts undertaken during armed hostilities are criminal. But academic certainty about the "clear" meaning of law has never been a reliable predictor of how the law will actually be interpreted by courts. How can Americans be certain that the international law system will not embrace the perfectly reasonable logic under which an *unlawful* bombing becomes a *criminal* act, especially when Americans have acted unilaterally? This possibility may help explain U.S. resistance to the International Criminal Court.

> THE UNFORTUNATE REALITY IS THAT INTERNATIONAL LAW IS A THREAT TO DEMOCRACY.

The events of September 11, 2001, had obvious implications for U.S. unilateralism. There was a critical period in the weeks following the massacre when a renewed U.S. multilateralism in the prosecution of the war against terrorism seemed a distinct possibility. Americans were stunned by the prevalence and intensity of anti-American sentiments expressed all over the world. Even Europeans who condemned the attacks frequently suggested, implicitly and explicitly, that the United States had it coming, that the motives behind the attack were understandable, and that the massacre, though reprehensible, might have a salutary effect on U.S. policy. A period of soul-searching followed in the United States. It lasted maybe a month and ended with a characteristically American reaction: to hell with them.

So began the rhetoric that continues to escalate today. The White House took increasingly belligerent positions, which elicited new denunciations of our bullying, and the denunciations spurred Americans to feel more and more that they would have to fight this world war on their own. The fighting in Afghanistan hardened that resolve. For whatever reason, the European nations, with the exception of Great Britain, contributed almost nothing to the war, and instead issued repeated warnings that the war might be illegal, that the bombings could be considered war crimes if too many civilians died, and that the fight, in any case, would be unwinnable once the opposition took to the mountains. Did we win? That remains to be seen. But the American experience of the Afghan campaign was of an overwhelming, unexpectedly swift victory—achieved essentially without the help of the international community. And this made possible the war in Iraq.

Because of that war, U.S. unilateralism is now identified in many people's minds with U.S. military aggression and the occupation of Iraq. I am not arguing here either for or against the Iraq War; the case for U.S. unilateralism does not turn on the justifiability of that war. The fundamental question is this: Which of two visions of world order will the United States use its vast power to advance? Since World War II, much of "old" Europe has been pursuing an antinational, antidemocratic world constitutionalism that, for all its ide-

alism and achievements, is irreconcilable with America's commitment to democratic self-government.

There is, among international lawyers, a hazy notion that the emergence of the international community in the world of law and politics is itself a democratic development. The unfortunate reality, however, is that international law is a threat to democracy and to the hopes of democratic politics all over the world. For some, that may be a reason to support internationalism; for others, a reason to oppose it. Either way, the fundamental conflicts between democracy and international law must be recognized.

The United Nations and the other institutions of international law take world government as their ideal. In theory, there's no necessary conflict between democracy and the ideal of a world government. A world government could be perfectly democratic—if there were world democracy. But at present, there is no world democracy, and, as a consequence, international governance organizations are, at present, necessarily and irremediably antidemocratic.

The antidemocratic qualities of the United Nations, the International Monetary Fund (IMF), and other international governance organizations—their centralization, their opacity, their remoteness from popular or representative politics, their elitism, their unaccountability—are well known. Internationalists counter this criticism by pointing to the growing influence of "nongovernmental organizations" (NGOs) in international law circles, as if these equally unaccountable, self-appointed, unrepresentative organizations somehow spoke for world public opinion. But the fundamentally antidemocratic nature of international governance is not merely a small hole that NGOs might plug. World government in the absence of world democracy is necessarily technocratic, bureaucratic, diplomatic—everything but democratic.

Nor are international organizations undemocratic only in themselves; they undermine the hopes and vitality of democratic politics elsewhere. The point is familiar to every nation in Latin America that has seen its internal policies dictated by IMF or World Bank directives. To an increasing extent, democratic politics throughout the developing world is being displaced by a relentless demand for competitiveness and growth, which are authoritatively interpreted by international organs to require the implementation of designated social, political, and economic policies (so far, these have had rather mixed success in delivering competitiveness and growth, though they have contributed to several national catastrophes, as in Argentina).

The irony is that the United States remains the world's greatest champion of internationalism in economic affairs. Weaker countries correctly perceive U.S.-led marketization programs as deeply undercutting their own ability to decide for themselves what their social and economic policies should be. To be sure, the United States does not exactly force economic policy on other countries. Ruling elites agree to the emasculation of their countries' politics in order to get their hands on the money. But the result is the same: Democracy is hollowed out.

So all the talk of U.S. unilateralism needs an important qualification. The United States plays utterly contradictory roles on the international stage: It champions multilateralism on the economic front, because worldwide free

trade and marketization are perceived to serve U.S. interests, and resists it elsewhere. But if a commitment to democracy is what underlies America's growing unilateralism today on matters of war, criminal law, human rights, and the environment, that commitment is violated wherever U.S.-led international economic organizations cripple the possibilities of democracy under the guise of free-trade principles and loan conditionality.

The American and French revolutions tied democracy to the ideal of a self-determining nation. (If the European Union should successfully forge itself into a democratic mega-nation, it would be another example of this linkage, not a counterexample.) Two hundred years later, there remains no realistic prospect of world democracy, and if there *were* such a prospect, the United States would resist it, because world decision making would very likely be unfriendly to America. But though the United States would be no friend of world democracy, it ought to be a friend to a world *of* democracies, of self-governing nation-states, each a democracy in its own politics. For now, the hopes of democratic politics are tied to the fortunes of the nation-state.

Europeans tend to neglect or minimize the damage that universal constitutionalism does to the prospects for variation, experimentation, and radical change opened up by national democracy. So long as democracy is allied with *national* self-government rather than with *world* governance, it remains an experimental ideal, dedicated to the possibility of variation, perhaps radical variation, among peoples with different values and different objectives. Democratic national constitutionalism may be parochial *within* a given nation, but it's cosmopolitan *across* nations. Democratic peoples are permitted, even expected, to take different paths. They're permitted, even expected, to go to hell in their own way.

That is what the ideology of international human rights and of a global market will not allow. Both press for uniformity among nations on some of the most basic questions of politics. Both, therefore, stand against democracy.

The response from the Right will be that a market economy is a precondition of a flourishing democracy, so international free trade and lending institutions cannot be called antidemocratic. Rejecting the Right's claim to the transcendental democratic necessity of the IMF or the World Trade Organization, the Left will reply that the existence of a capitalist economy and the particular form it should take are matters for independent nations to decide for themselves. But the Left, for its part, will insist that international human rights, the abolition of the death penalty, and environmental protections are necessary preconditions of democracy. To which the Right will reply that these are matters for independent nations to decide for themselves.

Claims that any particular multilateral order, whether humanitarian or economic, is a necessary condition of democracy should be received with extreme skepticism. We all tend to sympathize with such claims when they're made in behalf of policies we support, but to see through the same claims when they're in behalf of policies we oppose. To be sure, in some cases of national crisis and political breakdown, international governance has brought about stability and democratization. And for the many nations incapable at present of sustaining a flourishing democratic politics, interna-

tional law offers the hope of economic and political reforms these nations cannot achieve on their own. But every time a functioning, self-determining nation surrenders itself to the tender mercies of international economic or political regimes, it pays a price. The idea that men and women can be their own governors is sacrificed, and democracy suffers a loss.

The justification of unilateralism outlined here is not intended to condone American disdain for the views of other nations. On the contrary, America should always show a decent respect for the opinions of the rest of mankind, and America would be a far safer, healthier place if it could win back some of the support and affection it has lost. Unilateralism does not set its teeth against international cooperation or coalition building. What sets its teeth on edge is the shift that occurs when such cooperation takes the form of binding agreements administered, interpreted, and enforced by multilateral bodies—the shift, in other words, from international *cooperation* to international *law*. America's commitment to democratic self-government gives the United States good reason to be skeptical about—indeed, to resist—international legal regimes structured, as they now are, around antinationalist and antidemocratic principles.

The unilateralism I am defending is not a license for aggressive U.S. militarism. It is commanded by the aspirations of democracy and would violate its own essential principles if it were to become an engine of empire. But the great and unsettling fact of 21st-century global governance is that America is doomed to become something like a world policeman. With the development of small, uncontainable nuclear technologies, and with the inability of the United Nations to do the job, the United States will be in the business of using force abroad against real or feared criminal activity to a far greater extent than ever before.

This new American role will be deeply dangerous, to other nations and to our own, not least because American presidents may be tempted to use the role of world's law enforcer as a justification for a new American militarism that has the United States constantly waging or preparing for war. If the United States is going to act unilaterally abroad, it's imperative that in our domestic politics we retain mechanisms for combating presidential overreaching.

Since September 11, 2001, the White House has flirted with a dangerous *double* unilateralism, joining the president's willingness to act without international consent abroad to an effort to bypass Congress and the judiciary at home. In December 2001, without congressional approval, the president announced the withdrawal of the United States from an important missile treaty with Russia. In early 2002, the White House began claiming a presidential power to deem any individual, including an American citizen arrested on American soil, an "enemy combatant" and on that basis to imprison him indefinitely, with no judicial review. Later that year, the president came close to asserting a power to make war on Iraq without express congressional authorization.

This double unilateralism, which leaves presidential power altogether unchecked, is a great danger. If we are to be unilateralists abroad, we have a special responsibility—to ourselves and to the world—to maintain and reinvigorate the vital checks and balances of American constitutionalism at home. ❑