

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Journal of Global Legal
Studies

Volume 1 | Issue 1

Article 7

Fall 1993

Global Democracy or Global Law: Which Comes First?

Benjamin R. Barber
Rutgers University

Follow this and additional works at: <http://www.repository.law.indiana.edu/ijgls>

 Part of the [International Law Commons](#)

Recommended Citation

Barber, Benjamin R. (1993) "Global Democracy or Global Law: Which Comes First?," *Indiana Journal of Global Legal Studies*: Vol. 1: Iss. 1, Article 7.

Available at: <http://www.repository.law.indiana.edu/ijgls/vol1/iss1/7>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Journal of Global Legal Studies* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Global Democracy or Global Law: Which Comes First?

BENJAMIN R. BARBER*

This has been an extraordinary week; it started on Monday with an after-breakfast visit from President Clinton at the Whitman Center at Rutgers, and it has culminated this evening in a dinner with your great chancellor, Hermann Wells. I am delighted then to be with you for this sesquicentennial of your great law school and to join with this group of distinguished lawyers and social scientists to talk about the globalization of law. I have only one problem: there is no globalization of law. Law has always been the destitute camp follower of the itinerant armies of transnationalism—traditionally, imperialism, communism, international commercialism, or markets; today, telecommunications, ecology, markets, and pop culture. Law is dragged along behind these forces in the most awkward fashion. The image I have before me is not of a man pulling a somewhat reluctant dog along a smooth path, but of a helicopter hauling a puppy on a long tether across an obstacle course on the ground. The chopper sails along, but the poor puppy dog

There are those who would point to the law of the seas, human rights, space law, the new thrust toward global environmental regulation (the Montreal or Rio treaties, for example), or, most persuasively, to the role of the European Court of Justice (ECJ) in fostering European integration. The ECJ has in fact been well ahead of the region's political institutions. Yet events in Europe since Maastricht suggest the continuing priority of national sovereignty over what remains in almost every realm as "soft law" or no law at all. Hobbes continues to frame the discussion of international law. Law for the purposes of nations is the capacity for enforcement; for sovereign nations its essence lies in its sanctions. Covenants without the sword are still but words, of no use at all to secure man or nations.

There are nonetheless powerful forces of globalization at work in the modern world, and they are drawing law along behind them. Indeed, as you know, it is the purpose of this conference to try to influence, a little bit, the

* Director, Walt Whitman Center for the Culture and Politics of Democracy, Rutgers University. B.A. 1960, Grinnell College; M.A. 1963, Ph.D. 1966, Harvard University.

direction in which law, drawn on by other forces, will go. In almost every recent article that I have read in the international law journals, there is an urgent discussion of how boundaries are being transcended or annihilated—not by globalizing law but rather by ecological, commercial, or technological trends that demand globalizing law, or at least effective international regulation. Thus, Maurice Strong, for example, pleads, “What is needed is recognition of the reality that in many fields, especially environmental issues, it is simply not feasible for sovereignty to be exercised unilaterally by individual nation-states.”¹ But of course power is exercised precisely in this way, and hence, as Oscar Schachter complains, environmental law has in fact remained almost entirely “soft—composed of principles and standards of conduct not clearly accepted as obligatory and uncertain in application.”²

Geoffrey Palmer sounds downright desperate in a recent essay, in which he confesses: “[W]e lack the institutional and legal mechanisms to deal effectively with transboundary and biospheric environmental degradation As matters stand, we lack many of the necessary rules and the means for devising them, we lack institutions capable of ensuring that the rules we have are effective.”³ International law in 1993 is all pleading, a rhetoric of “must,” “should,” and “ought to,” rather than a language of action. The rule of law across boundaries would not then seem to represent the road to globalization, though it may eventually become a consequence of it. Sovereignty, so porous in other areas, remains an obstacle blocking the application of law across borders—thus my embarrassment. However, the defect of law points us in the right direction: democracy. While historically the rule of law often preceded and set the framework for the emergence of democracy (as happened in England), nowadays, at the global level, democratization is likely to precede the establishment of the rule of law.

In order to provide a fuller frame for this discussion, let me address the impact of those trends that *are* globalizing—the tendencies that law shadows but never leads—on democratization. Since, as I hope to show, the rule of law (understood as something more than regulation) is fostered by

1. Maurice F. Strong, *ECO '92: Critical Challenges and Global Solutions*, 44 J. INT'L AFF. 287, 298 (1991).

2. Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457, 457 (1991).

3. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 259 (1992) (citation omitted).

democratic cultures, tracing the trajectory of democratization may offer some clue as to the possibilities of international law.

By democracy, I mean not just a form of government or even a kind of civil society; rather, I have in mind what Dewey understood as a “way of life.” Walt Whitman poses the crucial question: “Did you, too, O friend, suppose democracy was only for elections, for politics, and for a party name? I say democracy is only of use there that it may pass on and come to its flower and fruits in manners, in the highest forms of interactions between men, and their beliefs—in religion, literature, colleges, and schools—democracy in all public and private life.”⁴

Do the forces of globalization, dragging law behind them, enhance democracy—which could make law’s journey so much easier? Far from it. The relationship between globalization and democracy, even in its thinnest governmental form, is weak, and in some ways, even contradictory. Moreover, globalization represents only one of two kinds of forces exercising an influence on the nation-state and on democracy.

As I suggested in an article in *The Atlantic* last year, there are not one but two specters haunting Europe:

The first is a retribalization of large swaths of humankind by war and bloodshed: a threatened Lebanonization of national states in which culture is pitted against culture, people against people, tribe against tribe—a Jihad in the name of a hundred narrowly conceived faiths against every kind of interdependence, every kind of artificial social cooperation and civic mutuality. The second is being borne in on us by the onrush of economic and ecological forces that demand integration and uniformity and that mesmerize the world with fast music, fast computers, and fast food—with MTV, Macintosh, and McDonald’s, pressing nations into one commercially homogenous global network: one McWorld tied together by technology, ecology, communications, and commerce. The planet is falling precipitantly apart *and* coming reluctantly together at the very same moment.⁵

4. WALT WHITMAN, *DEMOCRATIC VISTAS* 29-30 (Liberal Arts Press 1949) (n.d.).

5. Benjamin R. Barber, *Jihad versus McWorld*, *THE ATLANTIC*, Mar. 1992, at 53, 53.

Neither democratization nor law have benefitted much from either trend. And in recent months, the forces of retribalization seem to have gained the upper hand in their contest with McWorld. Talk of international law seems almost risible in the context of Bosnia, Iraq, or Somalia. England, France, Germany, and other continental nations were once relatively homogenous. They were nation-states in the nineteenth century sense, with a shared language, culture, history, and religion. In their early history, nationalism was actually a force of integration binding together Burgundians, Normans, and Provençals into a greater France.

Today, these peoples are increasingly fractious and disintegrative—multicultural with a vengeance. The language of tribes has become commonplace in international politics, as new books by Daniel Patrick Moynihan (called aptly, *Pandemonium*) and Joel Kotkin make clear.⁶ The United Kingdom—sceptred isle, blessed plot and all—has absorbed large and increasingly inassimilable populations from its ex-commonwealth: up to one million Hindus and up to two million Muslims, who, when they are not being abused by their hosts, are warring with one another. Since the Second World War, France, hospitable as ever to its French Community ex-colonials, has accommodated over five million citizens from the Maghreb along with many others from French West Africa and the West Indies. The French are no longer sure whether their historical commitment to civic assimilation can work in the face of this resurgent and often angry Muslim culture that no longer is willing to be integrated into a Mother France. Germany is in a fearful tumult with a volume of immigrants that has led to globally reported skinhead excesses.

German developments are eerily reminiscent of the 1920s, suggesting both the radical polarization that destroyed Weimar and the weak state response for which its pallid and legalistic constitution was notorious. Who can predict whether Germany can even absorb its “cousins” from East Germany as “natives,” let alone the flood tide of immigrants from further east? The refugee problem, truly a global challenge, is putting post war German tolerance to a very expensive trial, one whose outcome remains quite uncertain (although there has been a welcome civic response from ordinary Germans who, in candlelight demonstrations attended by hundreds

6. JOEL KOTKIN, *TRIBES: HOW RACE, RELIGION AND IDENTITY DETERMINE SUCCESS IN THE NEW GLOBAL ECONOMY* (1993); DANIEL PATRICK MOYNIHAN, *PANDEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* (1993).

of thousands, have protested against rightist radicalism). Even Switzerland, Europe's traditional standing tribute to sustained multicultural nationalism, is at risk, its Francophone and Germanic populations angrily divided over the new relationship to Europe. In the autumn of 1992, a substantial majority of German speakers, aligned against any deepening of the relationship to the new Europe, outvoted and thereby outraged the French speakers, nearly eighty percent of whom had voted to strengthen the European connection. While the dismantling of the Helvetic Confederation (founded in 1848 in its modern form) is not at hand, Switzerland's troubles bode well neither for Swiss multiculturalism nor for a united Europe.

Strife-ridden ex-nations like the Soviet Union, Afghanistan, Yugoslavia, Liberia, and Czechoslovakia offer their own peculiar pathogenic versions of American multicultural development, and some believe that the experience of the United States as an embattled, but relatively successful, multicultural society cries out today for careful attention in Europe. By the same token, the toxicity of cultural rifts in Europe may give pause to Americans who think cultural difference is exclusively an occasion for celebration and who tend to disregard the warnings of those like Arthur Schlesinger, Jr. who worry about the fragility of American unity.⁷ The startling fact is that less than ten percent of the modern world's states are truly homogenous, and in only half is there a single ethnic group that comprises even seventy-five percent of the population.⁸ Multiculturalism is the rule, homogeneity the exception. Fractiousness, rather than national integration, has become the defining experience of new "nations."

Indeed, even the world's more traditionally homogeneous integral nations have good reason to examine the relationship among globalism, multiculturalism, and democracy. The increasing economic and communications interdependence of the world means that such nations, however unified internally, must nonetheless operate in an increasingly multicultural global environment. Ironically, a world that is coming together culturally and commercially is a world whose discrete subnational ethnic, religious, and racial parts are also far more in evidence. Forced into incessant contact, post modern nations cannot sequester their idiosyncracies. Europe after Maastricht, while it falls well short of earlier ambitions, has

7. ARTHUR SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (W.W. Norton & Company, Inc. 1992) (1991).

8. Joseph S. Nye, *WASH. POST*, Dec. 21-27, 1992 (Weekly Edition), at 28.

become integrated enough to force a continent-wide multicultural awareness, but the consequences of that awareness have hardly been unifying. The more “Europe” hoves into view, the more reluctant and self-aware its reluctant national constituents become. What Günter Grass said of Germany—“unified, the Germans were more disunited than ever”—applies in spades to Europe: integrated, it is more disintegral than ever.⁹

I have already noted the irony concealed in the revival of nationalism in the post nationalist world. Nationalism was initially a force for unification in Europe; it smashed the great empires of Rome and Germany at the same time that it attacked and then brought together the rival clans, tribes, and feudal vassalage that had supported an universal empire in its local manifestations under the figment of a larger territorial nation, bound together by language and culture, if not blood and kinship. England emerged as a unity out of a hundred years of factional strife (the War of the Roses), just as France found its identity in the nationalist heroics of Jeanne D’Arc.

But having won its victories of integration and sustained integral states for several hundred years, nationalism in time changed its strategy, becoming a divisive force in the territories it once helped tie together. Back in the 1920s, in his *The Revolt of the Masses*, José Ortega y Gasset observed how, during periods of consolidation, nationalism tends to be a unifier with a “positive value,” while in less coherent periods it becomes fractious and negative, a kind of identity “mania.”¹⁰ In its unifying phase, where it precipitated a powerful concept of integral sovereignty, it impeded international law by limiting enforcement to the positive law of national sovereigns. In its divisive modern form, it impedes law per se, by its defiance of all transtribal norms.

Above, I noted that this renewed mania for difference and tribal identity, so redolent of the 1920s, can be associated with tendencies to Jihad: religious and cultural war in the name of difference.¹¹ Daniel Patrick Moynihan has predicted that the next half hundred states likely to come into existence over the next fifty years will all be defined by ethnic conflict—that is to say, by civil war.¹² The United Nations currently has

9. Marla Stone, *Nationalism and Identity in (Former) East Germany*, TIKKUN, Nov.-Dec. 1992, at 41, 44 (quoting Günter Grass).

10. JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 183 (W.W. Norton 1957).

11. Barber, *supra* note 5.

12. Aleksa Djilas, *A House Divided*, THE NEW REPUBLIC, Jan. 25, 1993, at 38, 42 (citing Daniel

peace-keeping forces in thirteen countries—in nearly every case, arrayed against forces of domestic insurrection and civil discord.¹³ The aim of most small-scale wars today is precisely to redraw boundaries in order to divide—say in Kurdish Iraq, Sudan, or Serbian populated sections of Croatia. Countries like Afghanistan, recently fighting a foreign invader in the name of its national independence, have been effectively dismembered: divided among Panthans, Hazaras, Usbeks, and Tajiks. They talk peace again in these countries, but only to certify the new lines defining ethnic particularism. Ethnic membership is thus enhanced via national dismembership, or by expulsion of unwanted contaminants.

With eighty-three percent of the Indian population constituted by Hindus, the radical Bharatiya Janata party has begun to call for a leadership that is exclusively Hindu, if not for a Hindu state. Its handmaiden has been not law but terror, and its armed radical wing, Shiv Shen, has shown a preference for assassinations and bombs as extreme as the Basque nationalists or the IRA. Egypt's eight million Copts (out of a total population of fifty-six million) are under attack, and not exclusively from fundamentalist Muslims. In the Baltic States, the movement to disenfranchise ethnic Russians could lead in time to their effective expulsion. Estonia is only sixty-two percent Estonian and in Latvia, Latvians constitute a bare majority, with its capital, Riga, only twenty-seven percent Latvian.¹⁴ The expulsion of nonnatives here would obviously cause massive dislocations.

In other countries, the problem is ethnic populations that overflow the borders of their countries. The Serbian and Kurdish cases are well known, but it is perhaps Hungary that presents the gravest potential source of instability. Following the 1920 Trianon Peace Treaty completing the breakup of the old Empire, Hungary lost two-thirds of its territory. Its population fell from nearly twenty million to seven and a half million, leaving almost three and a half million Hungarians outside Hungary's post-war borders (five million today), scattered through Romania, Slovakia, and

Patrick Moynihan).

13. U.N. troops are on the borders between Israel and its hostile neighbors, on the frontiers dividing India and Pakistan and Iraq and Kuwait. But they are inside of Cyprus, Lebanon, Angola, El Salvador, the Western Sahara, former Yugoslavia, Cambodia, Somalia, and Mozambique. *U.N. Peacekeeping Operations to Date*, REUTERS, Sept. 27, 1993, available in LEXIS, Nexis Library.

14. Steven Erlanger, *In the Baltics, There May Be No Home for Russians*, N.Y. TIMES, Nov. 22, 1992, at A1, A4.

Serbia, where they are both organizing their own secessionist movements and are subjects of continuing persecution by dominant ethnic majorities in those countries. The vice-president of the ruling Hungarian Democratic Forum, Istvan Csurka, has openly talked about the need for "Hungarian living space" (*lebensraum*).¹⁵

The recognition of Macedonia as a state threatens to draw Turkey and Greece into the kind of confrontation that already characterizes their interface in Cyprus. The sensitivity of the issues is clear from the debate about whether it actually should be *named* Macedonia, as if its raw nationalist scent could be concealed by calling it something other than a raw nationalist rose.¹⁶ As traditional multicultural nation-states are destabilized, subnationalist movements have a nightmarish tendency to crop up like cancerous cells within cancerous cells, each anarchic fragment threatening to destroy the larger segments of which it is a nominal part. Russia's secession from the Soviet Union was scarcely completed when Northern Ossetia became an internal problem for Russia. Since then, the Ingush minority (less than ten percent of North Ossetia's population of 650,000) has risen against the Ossetians, with Russian troops trying at once to keep the two factions from each others' throats and to preserve the unity of Mother Russia from the secessionist inclinations of both. Yeltsin's deputy administrator in Vladikavkaz has said "the task is to make a man forget his memories"¹⁷—a task about as promising as pursuing universal peace by announcing that the task is to get men to give up their will to aggression. This is certainly not a task for lawyers.

If not law, then what? The civil religion that undergirds the rule of law? Perhaps. My question here then becomes: Is it possible that America's constitutional faith proffers a solution to Europe's recidivist tribalisms? Is there an equivalent of constitutional faith for India, Nigeria, Yugoslavia, or Somalia that would pull the tribes off each other and nurture a framework for political unity? In America, constitutional faith has lost its novel artificial look. It is anything but legalistic. Rather, it has become

15. Anna Husarska, *Budapest Postcard: His Kampf*, THE NEW REPUBLIC, Nov. 30, 1992, at 10, 10.

16. Of about two million inhabitants, 67% are Macedonian (Greek Orthodox), 20% are Albanian Muslims, 4.5% are Turks, 2.3% are Serbs, and 2.3% are gypsies. Henri Guirehoun, LE NOUVEL OBSERVATEUR, Nov. 19-25, 1992, at 39.

17. Dorinda Elliott and Steve LeVine, *An Ethnic Nightmare in the Caucasus*, NEWSWEEK, Dec. 7, 1992, at 34, 34.

conventional. Like an old shoe, it fits comfortably and its wearers need not examine too carefully how it was cobbled or whether its origins are legitimate or rooted in civil codes.

But beyond American shores, constitutional faith has to be manufactured afresh each time a fractious nation-state tries to dissuade its fragments from flying apart. In the absence of a history of commitment to common civil practices, such an aridly secular faith is unlikely to draw much fealty. The mere promulgation of a faith is unlikely to establish a civil religion. And what is its substance to be? Who is the “We” in Europe’s or India’s or Russia’s “We the people”? Are the common principles exclusively commercial and technological, as Eurocrats in Strasburg and Bruxelles often intimate? Or is there a potential civic element as well? For example, democracy?

I. OLD IDEOLOGIES AND A NEW CONSTITUTIONAL FAITH

In truth, old memories linger on, poisoning every attempt at establishing new forms of artificial unity, defeating those who would weave the pieces together with the thread of law. There were once colonial and neocolonial alternatives to constitutional faith—effective, if costly, antidotes to ethnic factionalism—but their time is past. Ethnic nationalism was frequently kept in check and the politics of difference offset by imperialism in both its capitalist-colonialist and its neocolonialist-communist variants.

Ironically, these two versions of civic faith have themselves been rival ideologies for the last one hundred years, not least of all during the Cold War. Yet both communism and capitalism hoped to unify the peoples over whom it sought dominion through the imposition of radical economic secularism, whether in the form of transnational capital markets or transnational proletarian rule. The cry “Workers of the world unite!,” like the call for free trade and open markets, is always a threat to ethnic identity. Imperialist economic strategies (whether statist or market), however odious they might have been, did keep rival ethnic factions in check. The great nineteenth century empires, rooted in economic rather than ethnic suzerainty, held together quite astonishing coalitions of peoples who were naturally at odds. They also offered common civil codes, common courts, and common laws, even though their codes were sanctioned by authoritarian rather than democratic force.

The Ottoman, the Austro-Hungarian, and the Russian empires were among the most inclusive associations of peoples the world has known, at least since the time of the Roman Empire. Whatever their depredations with respect to liberty, rights, and self-determination, they did inhibit the centrifugal instincts of the multiple tribes and factions they held together through a combination of coercion, civility, and economic interest, and they inoculated the nineteenth century against large-scale war (if not revolution) in a manner that has been the envy of our own sanguine century. Indeed, the colonial empires built by the Europeans in Africa were studiously oblivious to local tribes and peoples to an extent that fairly exterminated all boundaries organized around identity. A modern map of Africa reveals colonial, now ex-colonial, statist aggregations that ignore natural tribal frontiers altogether—albeit today it is precisely these occluded frontiers which have become the fissure lines for Africa's multiplying interstate tensions and civil wars. The Vance-Owen map proposing a settlement for Bosnia is a tortured attempt to bring frontiers into accord with ethnic boundaries so minute that not even *The New York Times* can get them right (it published erroneous versions twice in the winter of 1993).

Communism played a similar role in holding together the old Russian empire after its dissolution, keeping the lid on secessionist and fractious sentiments among the nationalities by the ruthless imposition of a secular ideology of collectivism. It was perhaps only a tribute to Machiavelli, who counseled, “[I]t is better to be feared than loved,” but in the Soviet Union, communism as both carrot and stick, lion (force) and fox (stealth), worked against domestic insurrection for over seventy years. Even in Eastern Europe and the Baltics, where communism came as an entirely alien intrusion imposed by force, it kept rival peoples from one another's throats for at least forty years.

The rapid disintegration of whatever unity had been achieved in the Baltics, Eastern Europe, Yugoslavia, and the Soviet Union reveals both how important to continuing transnational unity the victory of communist imperialism was and how Pyrrhic, in the long run, it turned out to be. What, then, is left that can bind together multiethnic and multireligious societies? Neither liberals concerned with individual rights and the rule of law, nor communitarians interested in local democracy, are happy with the choices. No one wishes to support the classical nineteenth century liberal principle of self-determination which achieved its acme after World War I in President Wilson's dream of a planet of self-determining nations, for fear

of underwriting global balkanization. President Wilson's own Secretary of State, Robert L. Lansing, failed to share the President's enthusiasm, asking whether self-determination would not "breed discontent, disorder and rebellion? The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. What a calamity that the phrase was ever uttered! What misery it will cause!"¹⁸ No wonder that even Amitai Etzioni, an ardent supporter of communitarianism today, worries about the "evils of self-determination,"¹⁹ while Joseph S. Nye editorializes for *The Washington Post* about "the Self-Determination Trap"²⁰ And in the final instance, the rule of global law will have to follow from, rather than initiate, some form of global politics.

The capitalist market remains an alternative of sorts: I have already alluded to "McWorld"—those economic and ecological forces that are pressing nations into one commercially homogenous global network—a McWorld tied together by technology, ecology, communications, and commerce. McWorld certainly remains Jihad's most formidable rival, and in the long run, it may even manage to attenuate the force of the globe's current recidivist tribalisms.

McWorld is ecological and technological, but most of all it is a product of popular culture driven by expansionist commerce. Its template is American. Its form is style, though it is style as produce to be sold for a profit. Its goods are as much images as material, an aesthetic as well as a product line. Thus it is about culture as commodity, and apparel as ideology. Music, theater, books, films, and video are all construed as image exports creating a common world taste around common logos, advertising slogans, starts, jingles, trademarks, videos, and celebrities. It is a new world of global franchises where, in place of the old cry "Workers of the world unite! You have nothing to lose but your chains," is heard the new cry "Consumers of the world unite! You have everything to gain from our chains!"

18. David Binder, *As Ethnic Wars Multiply, U.S. Strives for a Policy*, N.Y. TIMES, Feb. 7, 1993, at A1, A1 (quoting Robert L. Lansing). Of course Lansing was no friend of Wilson's vision, and actually worked to undermine aspects of his policies. See generally THOMAS J. KNOCK, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* (1992).

19. Amitai Etzioni, *The Evils of Self-Determination*, 89 FOREIGN POL'Y 21 (Winter 1992-1993).

20. Joseph S. Nye, *supra*, note 8, at 28.

McWorld brings with it an extraordinary new Esperanto. In nearly every country in the world, in the most remote towns, you can hear the new global language: Nike. Madonna. Coke. Michael Jackson. Toys 'R Us. McDonald's. Tina Turner. MTV. Sly Stallone. CNN. Madonna. The Dream Team. Levi's. Wendy's. Pepsi. Michael Jordan. Taco Bell. Dunkin' Donuts. Madonna. Madonna. Madonna. What was once a symbol of the universal Roman Catholic Church is now a symbol of the universal American pop cultural temple: Madonna, Madonna, Madonna.

Like Dewey's democracy, global culture's McWorld is a way of life, a style for everyman and everywoman—a style, of course, that must be purchased. Even the staid *New York Times*, ever on top of what is fit to print, has introduced a "Style" section among its multiplying Sunday supplements.

The past dozen years have changed the face of the globe, erasing national cultural distinctions. In Japan in 1992, the number one restaurant by volume of customers was McDonald's. Number two was the Colonel's Kentucky Fried Chicken. In France, they talk now of the *Sixième République*, adding quickly, "la République Americaine." And Jacques Lang, longtime cultural minister who only a decade ago was cursing "franglais" and its mangling of authentic French and calling for legislation to protect the French language, in 1992 saw fit to bestow upon Mr. Rocky himself, Sylvester Stallone, the *Chevalier des arts et lettres*. In Bombay, even as fanatic Hindu extremists murder Muslims, over 100,000 upper class homes are wired with cable so that their inhabitants can receive satellite transmissions from TNT and CNN, pretending that their true country is the world.

In England, where football (soccer) and cricket once dominated weekend television, viewers now can watch the NFL Game of the Week, and even in France there is an American football *jeu de semaine*, complete with an American born announcer whose breathless description of plays, rendered in an intentionally atrocious American accent, runs on, "alors, quelle finesse! Regardez le quarterbacksneak de Dan Marino, ça marche vraiment parfaitement, n'est pas?"

In Budapest, they are watching "The Cosby Show" on rerun—but in German, since Magyar dubbing is not yet available. Back in the 1980s, "The Cosby Show" was a favorite among *white* South African viewers; how far behind could the dismantling of Apartheid be? Coca Cola now makes thirty-six percent of its profits outside of the United States, while

McDonald's now has nearly one third of its 12,000 franchises abroad, with almost 400 in Japan. At the beginning of 1993, the number one film in a dozen foreign countries was "The Bodyguard," a film as atrocious as it was profitable.

In Yeltsin's Russia, T.V. viewers can watch a rip-off of "Wheel of Fortune" called "Field of Wonders" on which lucky winners receive Sony VCR's with which they can view the wildly popular American films now available on video there. Oh yes, and *Pravda* was just sold to a Greek publisher.

Finally, Poland, free from tyranny, is apparently set on returning as quickly as possible to the nineteenth century. The state recently introduced a Church inspired ban on abortion, and the number one selling book at the start of 1993 was *Scarlett*, trailed by *Scarlett's* prequel, *Gone With the Wind*.

These extraordinary changes hasten globalization; they invite law to regulate the anarchy of rival national markets and smooth the way for global markets. They mandate rules that will permit human survival. But they neither democratize nor liberalize and they can point backwards as easily as forward.

And only in the esoteric world of rational choice theory does economic calculation outweigh ethnic passion. Only in the imagination of advertisers can Nikes and a Walkman prevent their wearers from murdering their neighbors. Only in the small minds of political scientists who think democracy can be established by Fed Ex-ing a copy of the Bill of Rights to an ex-communist country with no other foundation can the rule of law be established by the stroke of a pen. In a McWorld where sovereignty continues to constrain the enforcers of global public goods (like law), even as markets liberate the agents of global privatization and thus hasten the pursuit of public "bads," we cannot really look to global commerce as a source of liberal or legal solace, let alone democratization.

II. DEMOCRACY AND CONFEDERALISM

There may be a form of constitutional faith that responds to the new tribalism, but it will not be a faith simply borrowed lock, stock, and barrel from America, Switzerland, or some other successful multicultural society. Nor will it be based on the importation of another society's civil codes. Nor can it, in the long run, be derived from unilateral actions by superpowers

acting as surrogates for the missing world government (the Pax Americana idea), although this may actually attenuate the force of subversive nationality in the short term. Civic faith depends in part precisely on its adaptability to the circumstances and conditions of particular peoples at particular historical moments. Attempting to paper over the fissures in ex-Yugoslavia by importing an American civic ideology is no more likely to succeed than attempting to prop up its democracy by importing American party institutions. Technology transfer sometimes works; institution transfer almost never does. Democratic institutions succeed because they are molded to the landscape in which they are to be grounded—planted in the soil of a well established civil society. This has been the lesson of all political theory from Montesquieu and Rousseau to Madison and de Tocqueville, each of whom demanded a *new* science of politics for a new society.

Nonetheless, there are several formal principles involved in establishing a successful civil society that are relevant. A constitutional faith pertinent to nations comprised of rival ethnic fragments requires a civic ideology in which difference itself is recognized and honored. This is the secret of Switzerland's remarkable multicultural, multiconfessional success: Italian, though the language of only a tiny minority of Swiss, remains a national language; Raeto-Romansch, though spoken by only a few tens of thousands in the single canton of Graubunden, is an official language of that canton.²¹ However stressed it may be, the Helvetic Union persists.

Second, the honoring of difference must be accompanied by some territorial or geographical expression of it, ideally through federal or confederal institutions. Partition destroys a civil society; federation preserves it while acknowledging the relative autonomy of the parts. The Owen-Vance solution for Bosnia tries to find its way between partition and federalism, in a situation that manifests the worst case situation: hostile ethnic groups intermingled in populations that are not geographically discrete and nearly impossible to disentangle other than by relocation (a euphemism for expulsion); or, as with the Owen-Vance plan, carving ethnic "regions" into units the size of a town street or three or four adjacent houses or apartments! In the case of Bosnia-Herzegovina, the difficulties are overcome by giving Muslims the short end of the stick, a politically prudent but morally dubious solution at best, and one the Clinton administration

21. See Benjamin R. Barber, *Participation and Swiss Democracy*, 23 *GOV'T AND OPPOSITION* 30 (1988).

initially refused to accept. In any case, solutions that do no more than try to keep rival groupings apart are not so much dealing with, as yielding to, bigotry and hatred—as has happened in the Balkans, where Owen-Vance is as moribund as Sarajevo. Bloody as the American Civil War was, it was fought in the name of union, not dissolution. Most modern civil wars are fought by both sides in the name of partition, the point of contention being only who gets how much of what.

Furthermore, in the American case, separation has always been a short term tactic that belongs to a long term strategy of integration. The parts are honored so as to strengthen their ties to the whole and demonstrate that the ideology of the whole represents not the hegemony of one group but a (potentially) genuine inclusiveness. Unless working together is seen as crucial to the survival of the parts, the parts will inevitably come to view themselves as a diaspora of some other (perhaps invisible) blood nation, whose reconstruction will come to be seen as the only avenue to preservation. Unhappily, the antagonism of one group may actually ignite a defensive separatist identity in some other group that had previously seen itself as assimilated. Thus, Bosnian and Croatian Muslims, secularized and assimilated into Yugoslav life, have only become self-consciously Islamic and separatist in the face of continuing aggression by their erstwhile fellow countrymen and neighbors. Likewise, a Greek Orthodox minority that is not respected inside of Croatia becomes a force, not only for an independent Macedonia, but a likely candidate for Greek (and then Turkish) intervention into Croatian affairs.

Federalism is probably too aggressive and centralist a solution for countries as fractured as Croatia or Afghanistan. Confederalism may be more promising. *The Federalist Papers* have been required reading for such disintegrating countries; I would urge them rather to read the *Articles of Confederation*. Article III of the *Articles* would seem to provide a relatively modest framework for holding rival nations like the Czech Republic and Slovakia or Serbia and Croatia together. It provides for the full autonomy of the member states and honors their independence, but it also declares that:

The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks

made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Article IV provides that “the free inhabitants of each” state “shall be entitled to all the privileges and immunities of free citizens in the several states, and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce.” Similar provisions held together the Helvetic Confederation from 1291 down to 1800 when Napoleon tried in vain to impose a unitary constitution on the recalcitrant cantons, under the guise of unified law codes (the same ruse he used in conquering all of Europe and part of Asia). The splintered factions of many a ruptured nation could do worse than reconceive themselves in terms of a “firm league of friendship” around their common liberties.

The problem remains what to do with minorities *within* each confederal region. Initially, in the most volatile regions where, as in Bosnia, deeply hostile groups are inextricably mingled (the Vance-Owen map trying to separate them was a nightmarish yet ultimately futile exercise in microgerrymandering), some form of external intervention will probably be required—a security shield that protects them from civil fratricide while they labor to establish a civil society. The shield need not necessarily be the United Nations, which has had a mixed record in its peace-keeping efforts. A coalition of forces like NATO, the Common Market, or a powerful neighbor (Russia in Serbia, the United States in Haiti, for example) can also offer outside authority if there is the political will to do so. Ultimately, however, as I have already suggested, no one nation, itself defined by sovereignty, can for long act as a surrogate for the missing international enforcer. It certainly seems unlikely that any map, however tortured, can bring peace to Armenia, Yugoslavia, or the Sudan in the absence of armed enforcement. No lasting peace can exist without war, or its threat. Even America failed to secure its multiculturalism in a setting of tolerance until it had fought a bloody civil conflagration.

Yet, the presence of foreign peacekeepers, even where effective in the short term (and often, it is not), cannot do more than buy time and a provisional setting for long term internal solutions. Neither Haiti nor Somalia proved responsive to external intercession. The American Civil War set the stage for a reconstruction that failed to pay off on the promise of justice. How much did Lincoln’s battle for the American soul achieve?

The struggle continues today: we are still two nations rather than one, a house still divided by race, if not section. The proof ultimately is in the internal, noncoercive settlement.

Some still think there is hope in economics, but as our discussion of McWorld above suggested, economic markets, while they may attenuate the sharpness of internecine divisions, do little to soften hatred or reduce the sorts of deep-seated bigotry that lead to tribal war, ethnic cleansing, or genocide. Germany's economic miracle and its leadership in the Common Market did not translate into immunity against domestic violence or against the rage aimed at foreigners. Its pop culture has proven as adept at facilitating hate as in fostering unity—as the popularity of skinhead hate rock groups suggests.

A civil religion of reciprocal rights and mutual respect is not to be contrived from scratch, but must emerge out of civil institutions like public schools, common work, communal customs, and a shared civic consciousness—the very institutions that either have never taken root or have failed in so many of Eastern Europe's disintegrating states. Law gives legitimacy to a civil society, but cannot establish it, unless, as with common law nations such as England, it has been a part of the civil fabric from the start.

It is civil society and its supporting institutions that create the basis for multiple identities—crosscutting cleavages that allow people to think of neighbors, separated from them by ethnic or religious background, as sharing other objectives and ends, the common values arising out of, for example, union, parent-teacher association, or political party membership. Difference needs not only to be offset against common membership, but also understood as a claim *to* common membership: “As African-Americans, we deserve equal respect and equal treatment before the law!” rather than an argument for separation: “As Croatians, we deserve a country of our own!” In America, difference has served to legitimize inclusion; in Europe, it has too often served to rationalize exclusion. Our civic faith in “We the people” as a formula for inclusion has much to do with whatever success Americans have had.

Most important of all in establishing a viable constitutional faith, however, is democracy itself, in Whitman's generic sense. Democratic civic and cultural institutions put flesh on the bones of civic identity. They turn mutual respect into a set of necessary political practices. More than anything else, it has been the absence of a culture of democracy in Russia,

Yugoslavia, Afghanistan, Somalia, Liberia, Czechoslovakia, and all the other disintegrating multicultural nations that has aided and abetted tendencies to ethnic fragmentation and national dissolution. By the same token, it has been in America, Canada, Belgium, and Switzerland that democratic civic practices have held together peoples and tribes that have on their own been little less vulnerable to the siren call of ethnicity than the Yugoslavs or the Afghans. To the degree that the new Europe has ignored political participation in favor of commercial and technological integration, it too risks long-term failure.

As strategy, this suggests a need to reprioritize: put democracy first as the foundation of civil society, and resistance to fragmentation may follow. Ethnicity is unlikely to create a form of democracy that can contain and limit it; democracy can create a form of ethnicity that is self-limiting. When rights get taken seriously and are permitted to define individuals, it is easier to attach them to minority ethnic groups under pressure and to persuade majority ethnic groups that their own identity, expressed as exclusion, is in violation of their civil faith. Putting democracy first means treating it as a way of life and not just as a set of institutions. When democratic political practice is rooted in membership in the community and empowers community members in a larger civic polity, ethnic and religious traits grow less crucial in forging a public identity. The American separation of church and state not only protected the state from religion, it protected religion from the state and from other rival religions, and thus strengthened it. When liberal democracy separates public and private, it actually enlarges the space for the exercise of private religion and ethnicity, while insulating them from the baleful consequences of making them public—official intolerance, for example.

Ethnicity is a healthy expression of identity which, however, like a healthy cell, is susceptible to pathologies that turn the growth mechanism against itself. The resulting cancer destroys not only the body around it (the larger nation) but the cell itself (the ethnic entity). Democracy seems to be ethnicity's immunological key—the source of its normalcy and its capacity to control its own growth, so as to make it compatible with the growth of other cells, and hence the basis for its ability to participate in the building of a stable body politic. Perhaps the time has come for those states around the globe falling into warring pieces to stop worrying about how to keep the parts together and to start worrying about how to make the parts democratic; to recognize that the true source of America's measured and all too partial,

but still significant, success as a multicultural society, is its democratic civic faith.

It may be that globalization, and with it, the globalization of law, are more likely to succeed genuine democratization than the other way around. It has often been remarked that democratic nations are less prone to make war on each other than other kinds of nations, and whatever success Europe has had has arisen out of its common democratic civic culture—certainly not from its historically rival ethnic and national cultures. We noted at the outset that law has played a powerfully integrating role in Europe, but I would suggest this is a consequence of its democratic sensibilities.

A genuinely democratic Bosnia and a genuinely democratic Serbia might not only cease to make war on Muslims or Croats, but might discover in their democratic ideals and practices sufficient common ground to refashion a confederation that would permit renewed civic coexistence. If the democratic solution sounds improbable, think of the “realistic” solutions currently being debated—whether expulsion, partition, dismemberment, United Nations Trusteeship, or foreign intervention—and consider how improbable it is that they will succeed in restoring sanity, let alone stability, to peoples caught up in the spreading global fires of ethnic Jihad.

In a nation at war, Lincoln saw in democracy a last and best hope. On our paradoxical planet today, with nations falling apart and coming together at the same moment for some of the same reasons, and with toothless international law hardly able to talk, let alone bite, democracy—however frail, however demanding—may now have become our first and best chance.

