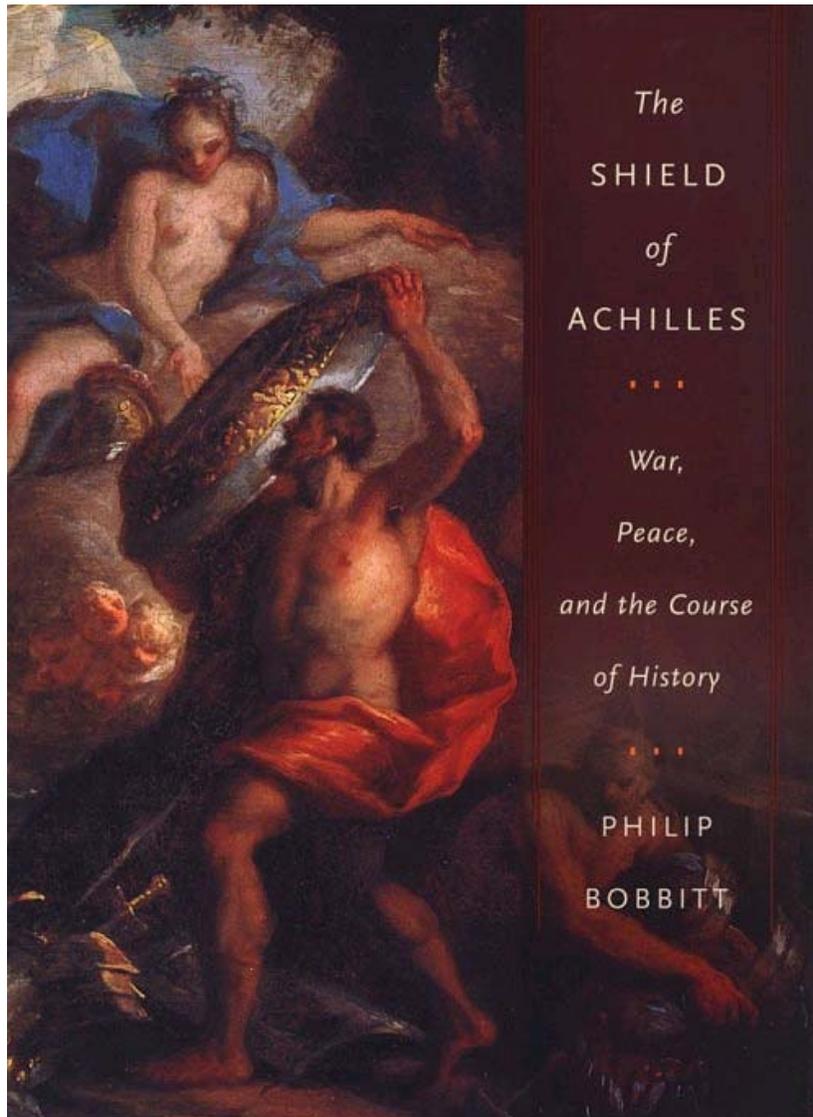


NOTES ON THE SHIELD OF ACHILLES

By Jay Ogilvy



THE SHIELD OF ACHILLES

Phillip Bobbitt
Knopf, New York, 2002

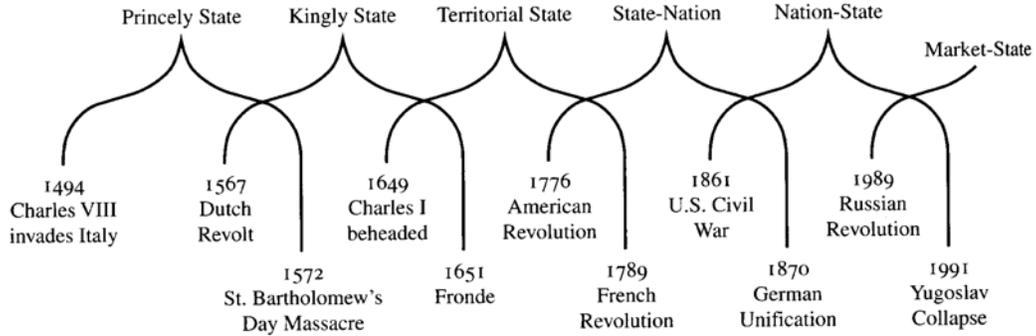
Notes by Jay Ogilvy, Global Business Network
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This truly remarkable book actually needs to be as long as it is—919 pages—but with that length runs the risk of losing readers impatient for the punch line. Hence these notes and outtakes, which serve as a kind of overture that might induce readers to experience the book in its entirety.

The book needs to be as long as it is because Bobbitt's argument depends on a lot of history. Three-quarters of the book consists of historical exposition that explains the periods of war and peace pictured on a set of plates buried deep in the book on pages 346 and 347 (and reproduced here). If you want a really fast introduction to the book's entire argument, ponder those plates for five minutes, then leap to Bobbitt's summary of three scenarios on pp. 721-2, and then vault to the climax of the argument on pp. 773-5. That should whet your appetite sufficiently so that you will want to plumb a layer deeper. And don't miss pages 901 and 902, where Bobbitt acknowledges GBN cofounder Napier Collyns and GBN Network member Betty Sue Flowers as instrumental in ushering this book into print.

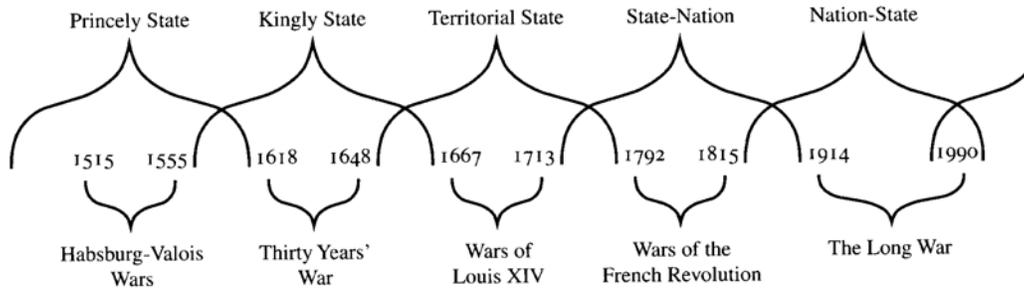
THE SHIELD OF ACHILLES

PLATE I: THE CONSTITUTIONAL ORDERS



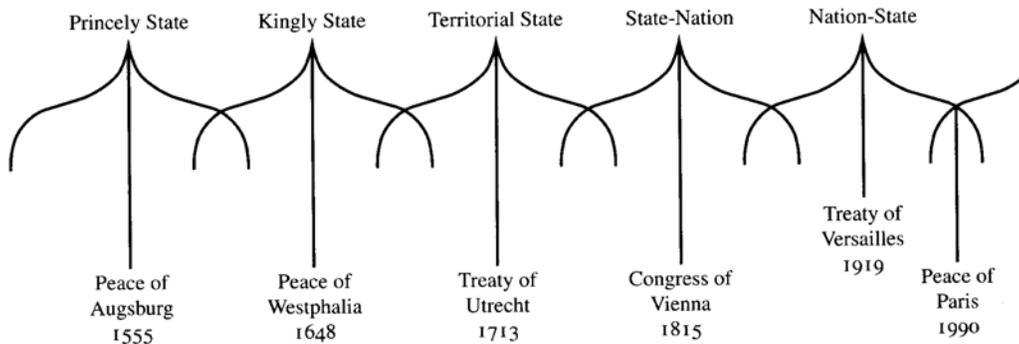
There have been six distinct constitutional orders of the State since it first emerged during the Renaissance.

PLATE II: THE EPOCHAL WARS



Each epochal war brought a particular constitutional order to primacy.

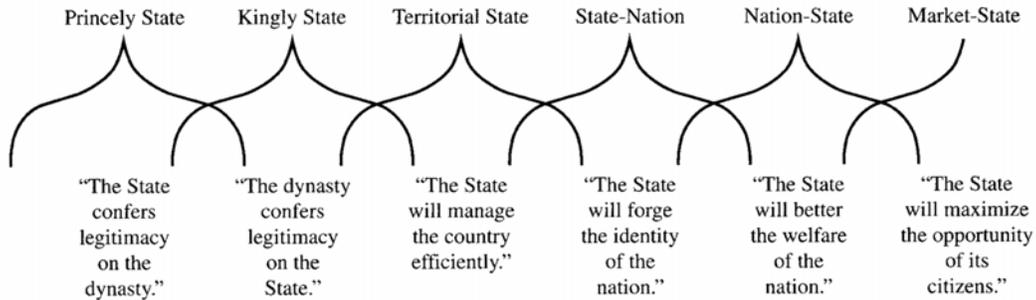
PLATE III: THE INTERNATIONAL ORDERS



The peace treaties that end epochal wars ratify a particular constitutional order for the society of states.

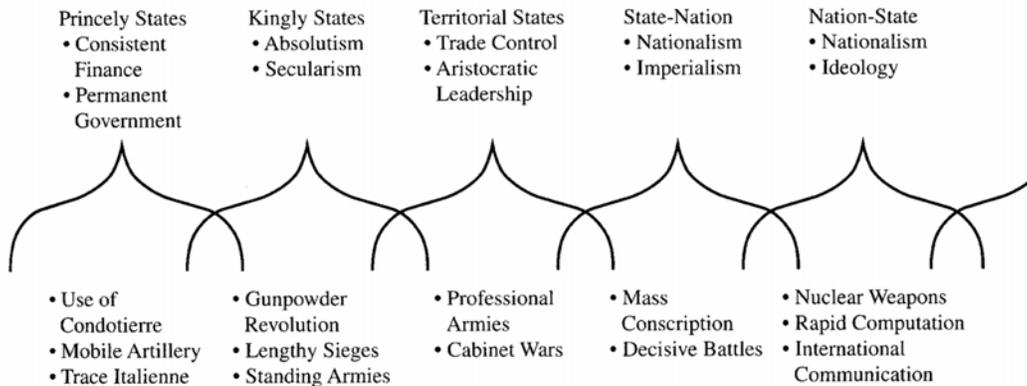
Plates

PLATE IV: BASES FOR LEGITIMACY



Each constitutional order asserts a unique basis for legitimacy.

PLATE V: HISTORIC, STRATEGIC, AND CONSTITUTIONAL INNOVATIONS



A constitutional order achieves dominance by best exploiting the strategic and constitutional innovations of its era.

In the following notes, page numbers are usually listed on the left. Passages in quotation marks are Bobbitt's own words, while sections not in quotes represent my own summaries. In a few places, I've inserted some of my own thoughts in [brackets].

xxi Opening lines: "We are at a moment in world affairs when the essential ideas that govern statecraft must change . . . owing to advances in international telecommunications, rapid computation, and weapons of mass destruction."

This book "is principally concerned with the relationship between strategy and legal order."

xxii It used to be that states threatened states. Now the model of territorially sovereign states is challenged by five developments:

1. Recognition of human rights
2. Weapons of mass destruction
3. Threats that transcend state borders (e.g., migration, disease, famine)
4. Globalization of the economy
5. Global communications network

xxv This era is pivotal because "it lays bare the neglected relationship between the strategic and the constitutional—the outer and inner faces of the State. . . . The modern state came into existence when it proved necessary to organize a constitutional order that could wage war more effectively than the feudal and mercantile orders it replaced."

xxvi "A great epochal war has just ended. The various competing systems of the contemporary nation-state (fascism, communism, parliamentarianism) that fought that war all took their legitimacy from the promise to better the material welfare of their citizens. The market-state offers a different covenant: It will maximize the opportunity of its people."

6 "Law cannot come into being until the state achieves a monopoly on the legitimate use of violence. Similarly, a society must have a single legitimate government for its strategic designs to be laid; otherwise, the distinction between war and civil war collapses, and strategy degenerates into banditry."

7 Bobbitt argues that the end of ideological conflict has left states unable to articulate strategies for the commitment of troops. "'Ad hoc strategies' is almost a contradiction in terms, because the more states respond to the variations of the hour, the less they benefit from strategic planning."

9 "Neither military nor economic success alone could have ended the Cold War, because neither alone could deliver legitimacy to the winning state, or deny it to the loser." Here, Bobbitt makes a case against those who think that war is avoidable.

- 13 “Compellance”—a term introduced by Thomas Schelling as a complement to deterrence. Another concept, “reassurance,” was introduced by Sir Michael Howard.
- 15 “The problem for the United States has become to identify its interests and future threats so that it can use its power to strengthen the world order that it has fought, successfully, to achieve, and that can, if properly structured and maintained, re-enforce American security to a far greater degree than the United States could possibly do alone. This is essentially an intellectual problem . . . [but] who is eager to take the bureaucratic and political risks inherent in accepting this challenge? How much more likely it is that we will extrapolate from the world we know, with incompetent villains and heroic (and recent!) success stories.”
- 16 “The constitutional order of a state and its strategic posture toward other states together form the inner and outer membrane of a state. That membrane is secured by violence; without that security, a state ceases to exist. What is distinctive about the State is the requirement that the violence it deploys on its behalf must be legitimate; that is, it must be accepted within as a matter of law, and accepted without as an appropriate act of state sovereignty. Legitimacy must cloak the violence of the State, or the State ceases to be. Legitimacy, however, is a matter of history and thus is subject to change as new events emerge from the future and new understandings reinterpret the past.”
- 16 “The nation-state is dying, but this only means that, as in the past, a new form is being born. This new form, the *market-state*, will ultimately be defined by its response to the strategic threats that have made the nation-state no longer viable. Different models of this form will contend. It is our task to devise means by which this competition can be maintained without its becoming fatal to the competitors.”
- 25 Bobbitt argues that Bismarck separated German national aspirations from the liberal background that had formerly nurtured them. Through a series of short wars, he placed at the apex of the German state a radically conservative, militarist class whose only claim to pan-German legitimacy was that it alone was able to realize the ambitions of national unity. This new German nationalism was the prototype for fascism, “as its expression in the Constitution of 1871 confirms.”
- 26 Bobbitt argues against the significance of contingency when he makes the case that the world wars were predetermined by the strategies and constitutions in place. He objects to A.J.P. Taylor’s *War by Timetable* and Tuchman’s *Guns of August* to the extent that they make it look as if World War I “was all a ghastly mistake, unintended by any of the parties, the result of complicated alliances and railroad timetables.”
- 33 Bobbitt argues that Churchill was probably wrong to declare World War II “the unnecessary war” because, with or without it, we still had to settle the conflict among fascism, communism, and parliamentarianism. [What occurs to me is that each of these systems presupposes a view of the human condition—a better phrase than “human nature,” which is insufficiently historical and insufficiently open to cultural variation.]

- 61 “Between 1914 and 1990, the population of the world tripled—but an estimated 187 million persons, about 10 percent of the population of 1900—were killed or fated to die by human agency.”
- 61 “Each of the three contending state systems was the outcome of a particular nineteenth and twentieth century attitude about mankind, attitudes that I will roughly call the biological, the sociological, and the legal. The fascists believed in a sort of social Darwinism for states, by which the competition for survival among species was mirrored in the struggle among genetically determined groups.... The communists took a sociological view of man, by which man could not only be wholly described according to his behavior in groups, but could be changed by manipulating the incentives of groups transcending states.... Liberal democracy agreed that impartial rule of law, and not simply the political power of the individual or group, should govern the outcome of state decisions.... Each promises that it can best deploy the State to enhance the welfare of the nation.”
- 62 After the end of the Long War, “What had ended was not just the Cold War, but a century of conflict over the basis of the State itself. And this accounts for the sense of bewilderment that followed. It wasn’t like the usual end of an ordinary war but rather like the end of a way of living.”
- 63 “Now the fundamental constitutional problem of the Long War has been answered. Government by consent, freely given and periodically capable of being withdrawn, is what legitimates the nation-state. Government under law—not government that is above the law—provides the means by which states are legitimated. So the next question intrudes itself: what are the *strategic* consequences of the peace?”
- 64 “What will this new world look like, and how should a state make its way in it? Will such a world be so chaotic without the overarching framework of the Long War that we will look back on the era of the Cold War as a golden age?”

Book I, Part II: A Brief History of the Modern State and Its Constitutional Orders

- 67 “Thesis: The interplay between strategic and constitutional innovation changes the constitutional order of the state.”
- 71 “In the chapters that follow, I will trace developments in strategy from roughly the end of the fifteenth century onward and relate these developments to changes in the constitutional structures of the states of Europe.”
- 72 Parrott’s question: What is the relationship between strategic development and constitutional innovation? And which way does the causality run?

- 73 “Biogenetic evolution is punctuated; why can’t the evolution of states also be?”
- 74 “I propose, in the brief historical narrative that follows, to treat the relationship between state formation and strategic change as that of a *field*, as contrasted with those causal relations that are usually characterized along a *line*. . . . If we stand in Poland, we see the evolutionary process differently than if we view events from the perspective of Spain. But this is not because they are disconnected, but rather because the connection is not linear, with one a dependent variable of the other. Individual choice and sheer contingency have a role to play that is a necessary part of, not an annoying intrusion on, such field relations. It is choice, after all, that determines where we begin our story, and where it is set.”

Chapter 6: From Princes to Princely States (1494-1648)

- 75 “The defining legal characteristic of medieval society was its horizontal nature, reflected across these two pervasive dimensions of ecclesiastical and feudal power.”
- 80 Machiavelli argued that no walls could withstand artillery: “Suddenly walls, towers, moats—all were rendered obsolete. As a result, princes and oligarchs made a pact with an idea: The idea was that of the State, and its promise was to make the ruler secure.”
- 81 “We can date the appearance of such a way of looking at the State to the time when the legal and material attributes of a human being were ascribed to the State itself. All the significant legal characteristics of the State—legitimacy, personality, continuity, integrity, and, most importantly, sovereignty—date from the moment at which these human traits, the constituents of human identity, were transposed to the State itself.”
- 82 “This transition from prince to princely state provides us with an initial example of a strategic imperative animating a constitutional innovation—an instance, that is, where the insistent question of security in a specific context (geography, wealth, small population) yields a new legal solution and requires a story to rationalize that solution.”
- 86 Quoting Machiavelli: “Although I have elsewhere maintained that the foundation of states is a good military organization, yet it seems to me not superfluous to report here that without such a military organization there can neither be good laws nor anything else good.”

Chapter 7: From Kingly States to Territorial States (1648-1776)

- 118 Bobbitt offers six institutional structures that typified the kingly state: (1) a standing army, (2) a centralized bureaucracy, (3) regularized taxation, (4) diplomatic representatives abroad, (5) economic policies, and (6) a king as head of the church.
- 143 The territorial state was characterized by a shift from the monarch as embodiment of sovereignty to the monarch as minister of sovereignty.

Chapter 8: From State-Nations to Nation-States (1776-1914)

See page 146 for a pithy paragraph defining the difference between the state-nation, where the nation acts on behalf of the state, and the nation-state, where the state exists to further the interests of the nation.

- 153 "... but for Napoleon, France would have joined the society of territorial states instead of attempting to supplant it. And this speculation is important for our wider study, because it suggests that a revolution in military affairs is not sufficient, without further human agency, to bring a new constitutional order into being. ... The nationalism of the state-nation, which created the imperial state, focused the will of the nation in serving the state, building in a kind of paradox at the inception: The great state-nations existed to promote liberty and equality, constitutionalism, and the rule of law; and yet in order to aggrandize the state, which was the deliverer of national identity and political liberty, other nations were subjugated and alien institutions superimposed upon them."
- 154 Napoleon wrote: "Strategic plans are like sieges: concentrate your fire against a single point. Once the breach is made, the balance is shattered and all the rest becomes useless." This strategy could not work in Russia, which refused to present such a single point and instead retreated before Napoleon, who entered Moscow on September 14, 1812, and left on October 19 on a long march that cost the lives of 300,000 of his troops.
- 174 "Law and strategy are mutually affecting. All of these historians realize that, though none identify the reason this is so. The causal model these scholars have in mind, by which strategic innovation forces constitutional change, or sometimes vice versa, tends to obscure the fact that the link between the two is not merely causal but relational. Every change in the constitutional arrangements of the State will have strategic consequences, and also the other way around, so that innovation in either sphere will be reflected in the degree of legitimacy achieved by the State, because legitimation is the reason for which a constitution exists, for which the State makes war."*

* "Two metaphors are helpful in understanding the State: (1) that the State acts as a network, conveying decisions made by the responsible parties so that it is both the medium of constitutional and strategic change, and also the expression of constitutional and strategic change; and (2) that the State depends on society the way a virus depends on the nuclear material of a cell, so that it is both made in

time—has a birth and life and decay—and made of time, that is, what we know of it is the narrative of this morphology, the story of its adaptation to the conditions of society. The State, that is, both composes history (1) and is composed of history (2).”

- 177 “Every era asks, ‘What is the State supposed to be doing?’ The answer to this question provides us with an indication of the grounds of the State’s legitimacy, for only when we know the purpose of the State can we say whether it is succeeding.”
- 196 “It is no coincidence that the appearance of the nation-state—in the U.S. owing to the Civil War, in Europe owing to the unification of Germany—was accompanied by the strategic style of total war. If the nation governed the state, and the nation’s welfare provided the state’s reason for being, then the enemy’s nation must be destroyed—indeed, that was the way to destroy the state.”

Chapter 9: The Study of the Modern State

- 205-6 Open any textbook on constitutional law and you will find nothing about war; open any textbook on war and you will find nothing about constitutions. “Societies, all societies, are constituted in a certain way, and this way is their constitution. States, which direct the political affairs of most national societies, are also constituted in a particular way, and this is not merely reflected in their law, it *is* their law. But even the more sophisticated contemporary books on geopolitics do not deign to mention law, unless it is to denigrate lawyers and “legalistic” thinking. And so it is that the fundamental force fields of the State—the relation between law and war, and between legitimacy and violence: relations that yield the State’s most basic expression of its identity, indeed that gave birth to the modern state—are rarely even mentioned, much less addressed.”

“There is a mutually affecting relationship between strategy and constitutional law such that some strategic challenges are of so great a magnitude that, rather than merely requiring more taxes, or more bureaucrats, or longer periods of war service, they encourage and even demand constitutional adaptations; and that some constitutional changes are of such magnitude that they enable and sometimes require strategic innovation.”

Chapter 10: The Market-State

- 213 “The reason that the constitutional order of the nation-state is undergoing a transformation is that it faces a crisis of legitimation. When the American state changes to reflect a new constitutional archetype, it will do so in response to demands for new bases for legitimacy, demands that arise in part as a consequence of the strategic innovations that won the Long War. In light of this new constitutional form of the State, the Americans will desire an appropriate national security paradigm ... because the Wilsonian internationalism that guided us throughout the Long War was derived from the constitutional order of the nation-state.”

- 219 “Bandits, robbers, guerillas, gangs have always been part of the domestic security environment. What is new is their access to mechanized weapons, another product of the technological environment of the Long War, and the unique political role of such groups, which pits them against noncombatants as a means of war against the State itself. Against these threats, the nation-state is too muscle-bound and too much observed to be of much use. The mobilization of the industrial capacity of a nation is irrelevant to such threats; the fielding of vast tank armies and fleets of airplanes is as clumsy as a bear trying to fend off bees.”
- 220-2 Bobbitt makes the case for the volume of global financial trade dwarfing the power of any single nation-state to control its own currency.
- 228 “In summary, no nation-state can assure its citizens safety from weapons of mass destruction; no nation-state can, by obeying its own national laws (including its international treaties) be assured that its leaders will not be arraigned as criminals or its behavior be used as a legal justification for international coercion; no nation-state can effectively control its own economic life or its own currency; no nation-state can protect its culture and way of life from the depiction and presentation of images and ideas, however foreign or offensive; no nation-state can protect its society from transnational perils, such as ozone depletion, global warming, and infectious epidemics. And yet guaranteeing national security, civil peace through law, economic development and stability, international tranquility and equality, were the principal tasks of the nation-state.”
- 229 Bobbitt on the emergence of the market-state: “Where the nation-state justified itself as an instrument to serve the welfare of the people (the nation), the market-state exists to maximize the opportunities enjoyed by all members of society.... If the function of law in the nation-state is process-oriented ... the market-state pursues its objectives by incentive structures and sometimes draconian penalties, not so much to assure that the right thing is done as to prevent the social instability that threatens material well-being.”
- 230 “Operating through the state-nation, the State sought to enhance the nation as a whole. In the era of the nation-state, the State took responsibility for the well-being of groups. In the market-state, the State is responsible for maximizing the choices available to individuals.”
- 232 “The market-state is, above all, a mechanism for enhancing opportunity, for creating something—*possibilities*—commensurate with our imaginations.... I am inclined to think that something of the market-state’s indifference to fate and sensitivity to risk is related to this reorientation, where the illusion of limitless opportunity meets the reality of choice.” [Bobbitt adds reflections on bio-tech and its capacity to turn what used to be fate into choices and possibilities for those who can pay.]

233f “The transition to the market-state is bound to last over a long period and put into conflict the ideals of the old and new orders. It should be emphasized that just what particular form of the State ultimately emerges from this process cannot confidently be predicted. It is a failure of imagination, however, to assume that the only thing that will replace the nation-state is another structure with nation-state-like characteristics, only larger. It is in some ways rather pathetic that the visionaries in Brussels can imagine nothing more forward-looking than equipping the E.U. with the trappings of the nation-state.”

234 “The market-state will live within three paradoxes: (1) it will require more centralized authority for government but all governments will be weaker; (2) there will be more public participation in government, but it will count for less, and thus the role of the citizen *qua* citizen will greatly diminish and the role of the citizen as spectator will increase; (3) the welfare state will have greatly retrenched, but infrastructure security, epidemiological surveillance, and environmental protection ... will be promoted by the State as never before.”

[There follow several pages of speculation on what dealing with these paradoxes will mean for U.S. policy regarding security, politics and representation, and welfare.]

236 “Our expectations about what the law should be have been shaped by the endgame of the nation-state and its close identification of the State with the nation. When these expectations change, the glamour and prestige of the presidency will suffer. As an institution it will find itself in competition with the media to a greater degree even than with its traditional competitors in the other two branches. It will be important to ensure that the president’s ability to govern, in the limited areas of responsibility given to the market-state, be enhanced.”

237 Bobbitt notes the unwieldiness of the attempt to serve a warrant at Waco: “If, as Martin van Creveld speculates, ‘the day-to-day burden of defending society from low-intensity conflict will be transferred to the booming security business,’ this mixture of devolution and privatization will become commonplace in the market-state. This is a harrowing prospect, but one with which we may have to learn to cope.”

238 Regarding politics and representation, Bobbitt foresees more use of referenda, not literal votes, but the increased use of polling: “These are a kind of virtual-reality referenda, allowing the politician to test the results of a proposal. Like aircraft landing simulators, these polls give guidance to the politician without his actually putting himself at risk by calling for a referendum that he would have to support (or oppose), and with the results of which he would then have to live.”

239 Bobbitt on campaign finance: “We will reflect on our current fundraising practices with revulsion and an amazement that we tolerated them for so long. But that does not mean that we will replace these practices, which seem so violative of the ethos of the nation-state; it is likelier that we will keep the practices and change the ethos.”

Chapter 11: Strategic Choices

245 Bobbitt makes an argument against adhococracy and in favor of a strategy that can support legitimacy: “We can extend our influence beyond our temporary hegemony if we take this moment to craft a system of rules with our allies that is compatible with our basic understanding of state responsibility. Yet without some general understanding of our strategy in the world, we cannot begin to even draft such rules.”

246-282 Contains an extremely useful taxonomy of current views toward U.S. interests in the world, with five basic approaches or paradigms:

1. The Anarchic Society and the New Nationalism

In 1977, Hedley Bull published *The Anarchical Society*. Tonelson adds, “America’s future is best assured by restoring and consolidating its own military and economic strength.” Page 251: “In place of a ‘global pacification strategy,’ the anarchic paradigm of the New Nationalist accepts the condition of chaos as an irremediable feature of the state system.” This is espoused not only by the Republican right. “Paul Kennedy has eloquently presented a history of states whose power declined when strategic overreach impelled them to divert more and more of their resources into unproductive security investments.” He closes with echoes of this paradigm in George W. Bush’s campaign for president, and notes a shift from “thinking like lawyers” to “thinking like economists.”

2. The Multicultural Society and the New Internationalism

James Nolan and John Steinbrunner in *Global Enlargement: Cooperation and Security for the Twenty-first Century*, from Brookings: “This proposal, in all its variants, relies on a structure of collective security. It is therefore a pole away from an autarkic, nationalist strategy.” (p. 253) This is a multilateralist paradigm. See also Richard Rosecrance.

3. International Society in Balance: The New Realism

“If the nationalist’s fundamental objective is making the U.S. the fittest for survival, and the internationalist’s the achievement of world peace, then the principal goal of the new realist is achieving world stability.” (p. 259) “The New Realist assumes that America’s current position is both too weak to impose world peace and too strong to have to content itself with passively waiting for hostile forces outside our control to coalesce against us.” (p. 260)

4. The Democratic Society: The New Evangelism

In 1993, Clinton announced his policy of “democratic enlargement,” which was different from the previous policy of “democratic engagement.” (p. 265) “Realists, nationalists, and internationalists all treat the world as relatively static. The Cold War has ended, but their prescriptions generally forecast more of the same. The New Evangelist has more dynamic developments in mind, and these lend support to his position: History seems to

be moving in his direction (the number of democracies is increasing), at least in the short term.” (p. 268)

5. The Sole Remaining Superpower: The New Leadership

Other paradigms presume a weakening U.S., but not the New Leadership. This is the paradigm most in keeping with the notion of asymmetry. “The Long War was fought over issues of legitimacy; the resolution of that war in favor of the democratic republics has given us a postwar order over whose protection the U.S. is well placed to preside. To abandon this role will not only threaten that victory, it will inevitably invite the chaos that is most costly to a status quo power such as the U.S. We have the most to lose by our own passivity and no other way to lose it.” (p. 274) It is probably safe to assume that Bobbitt favors the New Leadership, except that, in the following section, entitled “Paradigms and Policies,” he writes:

“The first thing to be said about these proffered ‘new paradigms,’ however, is that they are not paradigms at all. In fact, the entire intellectual enterprise that has yielded these proposals has been triggered by a profound misunderstanding as to what has been lost and what can serve to replace it.” (p. 275) “A paradigm is a worldview that members of a political community share; a policy is what some portion of them put into place in pursuit of the goals of that paradigm.” (p. 275) “What the proffered candidates for the ‘new paradigm’ in fact offer are policies. Indeed they are the same policies we have more or less been recycling throughout the Cold War, and all sit quite comfortably within the Wilsonian paradigm for the nation-state.” (p. 277) “Each of the current elements in the policy portfolio was once a paradigm of statecraft. When the sort of state for which it was essential changed, the paradigm ceased to have the force of a consensus worldview. Paradigms decay into policies.” (p. 278)

There follow a few pages correlating the different paradigms with appropriate historical examples. Then: “Finally we come to the transition from the state-nation to nation-state, which gave us the paradigm within which we currently strive. This may be stated thus: The State is constituted to improve the material well-being of the nation.” (p. 280) But, for the several reasons given, we are outgrowing this paradigm, and we lack a new one: “It could be that the vacillation of American foreign policy has no deeper cause than the poverty of its leadership ... [but] I doubt this.... I am inclined to believe, however, that it is not simply the absence of a structuring idea, a shared way of understanding the challenges we face, that pervades all the current proposals and disquieting performances, but rather the clinging to a paradigm that has lost its usefulness.... We have lived in a state of war for so long that, paradoxically, we are unable to make appropriate security plans for peace.” (p. 281)

Chapter 12: Strategy and the Market State

This chapter lays out the logic of three different versions of the market-state:

- 283 “The fundamental choice for every market-state is whether to be (1) a mercantile state, i.e., one that endeavors to improve its *relative* position vis-à-vis all other states by competitive means, or (2) an entrepreneurial state, one that attempts to improve its *absolute* position while mitigating the competitive values of the market through cooperative means, or (3) a managerial market-state, one that tries to maximize its position *both absolutely and relatively* by regional, formal means (trading blocs, etc.).” Examples: Japan, U.S., and the E.U., respectively.
- 288 “The very nature of the entrepreneurial state, however, with its decentralization, its economic evaluation of all policy, its meritocratic competitiveness, and, above all, its taste for irony and amusement, will not make either leading or following easy. It is, however, a sense of purpose that is most required by the entrepreneurial state, because only such a sense—cultural, intellectual, artistic, as well as political—can endow a national history sufficient to move our distracted people to take up the distant and abstract burdens of such a state.”
- 289 Whatever choice we make, we will have to find a way to compensate for the market-state’s inherent weaknesses—its lack of community, its extreme meritocracy, its essential materialism and indifference to heroism, spirituality, and tradition.”
- 292 On strategy and the entrepreneurial market-state, and a security paradigm for the U.S.: “If we are to avoid another world-rending war, then my hopes lie with the entrepreneurial state. Only it offers the chance, through constant and costly vigilance, steadily to release the pressures attendant in the shifting distributions of global power among competitive states.”
- 293 “If the U.S., in the new context in which it finds itself, is to maintain its leadership in order to thrive as an entrepreneurial state, it will endeavor to do two things: to preserve its freedom of action abroad by limiting, to the greatest degree possible, the coercive harm other states can do to it; and to act consistently with its traditional moral aspirations but prudently within its means to ‘make the world available,’ that is, to maximize the degree to which the persons of the world are able to choose their own destinies. If the security paradigm for the American nation-state was to make the world safe for democracy, then the paradigm of the American market-state must be to make a world that is hospitable to the individual conscience, that is, *available*. Individual goods, like economic opportunity and freedom of religion, do not exist in the world without nurturing practices. They are linked to ‘collective goods,’ that is, things of benefit to the world as a whole.”
- 293 There follow some dense pages outlining “problems” for this view. For example, with regard to security: “(1) what technology should the U.S. exploit; (2) what force structure

should we deploy; (3) what criteria do we apply to potential cases for intervention; and (4) to what threats do we give priority?”

296 On (1), the revolution in military affairs (RMA) is crucial: “Current U.S. strategic planning largely ignores these possibilities in exploiting the RMA, in part because U.S. intervention doctrine is in such disarray. One question with which this book began—what are the appropriate criteria for the use of force, like the question ‘Which RMA?’—cannot be answered in the absence of general strategic plan.”

299 On (4): “In other words, we cannot decide which RMA to pursue, what force structure to provide, or what criteria to set for intervention until we have a clear idea of the threats we will face.” And then an answer on pp. 302-303: “Instead the U.S. should use the RMA as a basis for changing its forces’ roles and missions, leveraging from the promise of technology a rational basis for reorganizing the services. The RMA should not be treated as merely a happy event that is useful to our current strategic planning but rather as both a driver and a reflection of the broad period of change in strategy and the international order that we are now entering.” This places the RMA squarely in the context of the market-state, thus, on p. 305: “The market-state can—relatively cheaply—have far more impact, far more quickly than arms control agreements” [by simply *buying* nukes from Russia].

307-9 These pages contain a tightly argued passage on the relationships among RMA, nuclear weapons, the evolution of strategy, and the post-Cold War world.

310ff. “There are seven possible programs to enhance the security of the U.S. in a world of market-states.” The U.S. can:

1. “Take the lead in reforming NATO.”
2. “Manage the world community’s efforts to keep weapons of mass destruction out of the hands of hostile powers.”
3. Organize a North Asia Security Council: “No two states have as great an interest in preventing the proliferation of weapons of mass destruction as do Russia and China.”
3. “Resist the regionalization of trade.”
4. Provide warranties for the security of important regional states.
5. Develop an action program of lease-hire security insurance.
6. “At the highest levels, create a strategic planning group analogous to the ‘vision teams’ used by private industry.”

314 Bobbitt quotes Kees van der Heijden, and extols the merits of scenario planning.

315 “Let me be clear about the purpose of the seven proposals thus far canvassed. I am not proposing that the main force of the U.S. be converted from a large conventional army into a boutique force, capable only of high-tech special operations and humanitarian interventions. I strongly believe the greatest threats to American security in the early twenty-first century will come from powerful, technologically sophisticated states—not from ‘rogues,’ whether they be small states or large groups of bandits. And I believe that

large defense budgets will be required to deter or, if necessary, meet these threats without resort to nuclear weapons.”

318 “If economy in lives risked and efficiency in resources used to accomplish the goals of the public are the two guideposts of the market-state, then let us see how we might judge some of these seven programs.”

321-4 A fascinating passage on the Iran-Contra debacle, especially given Bobbitt’s role as legal counsel to the Senate Select Committee on the Iran-Contra affair.

Chapter 13: The Wars of the Market-State—Conclusion to Book I

335 “Why is it so difficult to decide when to use force today? Is it the nature of modern conflict with its non-state actors, terrorism, transnational threats, and so on? Or a more complex geopolitics perhaps, now that the Soviet Union has collapsed? Or poor leadership? I think the difficulty is that before Sept. 11, we didn’t know what it was we were fighting for, and thus could not judge the appropriate costs. And that was because the market-state has not fully emerged or been fully realized and accepted by any society. So we did not yet agree on the fundamental constitutional order that we must secure. It was rather the attacks on this emerging order that gave it definition.”

336 “And without an understanding of the constitutional source of war and the strategic basis for law, and, most important, the link between the two that has provided the choices that account for the transformations of the State over five centuries, we will be unprepared to understand the next transformation of the State and its strategic and constitutional consequences.”

“The State is born in violence: only when it has achieved a legitimate monopoly on violence can it promulgate law; only when it is free of the coercive violence of other states can it pursue strategy.”

337 “In my view the U.S. ought to encourage the development of entrepreneurial states rather than other forms in order to avoid international conflict, including sabotage, industrial espionage, and even armed warfare. I speculate that leadership for this move is likelier to come from the leaders of multinational corporations and nongovernmental organizations (NGOs) than from leaders of the national security apparatus and the political establishment, but I concede that business leaders are generally not prepared for such a role today.”

“The State is not withering away, nor is it going to be replaced, but its form—its constitutional order—will undergo an historic change.... The study of law must be at the center of the history of the society of states.... Contrary to our usual assumptions, international law is derived from the constitutional order.”

342 “The epochal war we are about to enter will either be a series of low-intensity, information-guided wars linked by a commitment to re-enforcing world order, or a gradually increasing anarchy that leads to intervention at a much costlier level or even a cataclysm of global proportions preceded by a period of relative if deceptive peace. It is ours to choose.”

And so ends Book One, except for the extremely helpful diagrams on pp. 346-347 that succinctly summarize the history of war and peace since 1494.

Book II: States of Peace

353 “By ‘strategic’ I do not mean simply ‘planned’ or ‘economic,’ but rather an approach that focuses on the use of force as the principal arbiter of international affairs.”

354 “The first strategic consequence of the new peace is that strategy alone must be augmented.... We will have to change our ideas about international law, and the principles of this new international law will have to reflect the end of the Long War and the Peace of Paris. That is, these principles must reflect the emergence of a society of market-states in which law and strategy have begun to merge—where war often looks like crime and vice versa, where borders have less to do with defining the State than do more intangible perimeters like language and technological compatibility. One might say these new principles will be less about *international* law because the basis for the State will be less about nations and more about markets, because these will have a greater role in defining the purpose of the State and its legitimacy.”

355 “When we lengthen our gaze, we will see more clearly that law and strategy have always been mutually excited switches on the same circuit, and that the State itself, as we have seen in Book I, is the mechanism of feedback.”

363 “I will take up the emerging constitution of the new society of market-states. I will suggest that American principles of limited sovereignty better serve such a society than the European concepts that currently structure international law. I will imagine various constitutional orders of the society of market-states and conclude by arguing that, by varying the degree of sovereignty retained by the people, states will develop different forms of the market-state, yielding a more pluralistic constitution for international society. In some ways that constitution, and its international law, will resemble that of medieval society with its overlapping and complex system of jurisdictions (a society, in other words, that had no modern concept of state sovereignty based on the European model). [Or, to use the concept that I borrow from McCulloch and Bateson, a *heterarchy* rather than a hierarchy or anarchy.] ... It is the nation-state that is dying, not the State. With it will go much of the power and influence of the great international institutions of the society of nation-states, the international Court of Justice. This void will be filled by institutions and rules that reflect the new society of market-states because, as we shall see, international law and its structures arise from the constitutional order of states; when

this order changes, as is now happening, the institutions of the society composed of states inevitably change also.”

Chapter 14: Colonel House and a World Made of Law

- 379 The story of Edward Mandell House’s role as Woodrow Wilson’s advisor and confidante: “What makes House interesting to us, however, is that he proposed an especially American constitutional vision of the nation-state to be the basis for the *society* of nation-states, an extrapolation that is only now basically complete just as it is about to become outmoded.”
- 394f. Bobbitt is generally more sympathetic to House and Wilson than many other commentators (e.g., Keynes, who regard them as naïve). “America went to war in 1917 in order to create a system of nation-states whose legitimacy would be based on democracy and self-determination. Within this system all states were to be legally equal, because Wilson and House believed that such a system would prevent future wars against the democracies.”

Chapter 15: The Kitty Genovese Incident and the War in Bosnia

- 415 After describing the murder of Kitty Genovese under the witness of her paralyzed neighbors: “So it was with the horrifying events of the three years 1991-94 in the former state of Yugoslavia: fascinated, frightened, appalled, the civilized world was anything but apathetic. And yet, like Kitty Genovese’s murderer, the killers in Bosnia returned again and again, once the threat of outside intervention dissipated, leaving the rest of us as anguished bystanders.”
- 416ff. Bobbitt takes issue with Clinton’s claim that the current conflict goes back to the eleventh century. [But one could take issue with Bobbitt, not over his claims of changing orders of constitutionality, but on the point that tribalism and a high degree of anti-authoritarian behavior has a very long history in that part of the world, as is clear from documents on the history of Gnosticism, and the testimony of historians all the way back to Herodotus.]
- 467 “One might say that the lifespan of the ‘New World Order’ can be dated from its beginning in Kuwait City to its demise in Srebrenica. It would be more accurate to say that the society of nation-states that was forged in the Long War acted swiftly and with assuredness in Kuwait, where it offered a classic nation-state answer to a classic state problem of aggression to acquire resources; and that this sure-footedness vanished when that same society was faced with a more puzzling conundrum arising from its own identity: when does a ‘nation’ get a state? What made this failure so significant—for it is hardly the first time this question has arisen—is that it occurred in the context of the emergence of the new market-states.”

Chapter 16: The Death of the Society of Nation-States

- 468 “The Achilles’ heel of the society of nation-states—the problem of self-determination for national peoples—provided the crucial ambiguity that invited the diffusion of responsibility that so consistently characterized the Third Yugoslav War.”
- 469 “The globalization of (1) strategic threats ... (2) markets ... and (3) culture ... put the nation-state under enormous pressure to enlarge.... Yet lengthening the membrane that enclosed the State also meant thinning it.”
- 470 “The shift to the market-state does not mean that states simply fade away, however. If the acquisition of more territory is less important than before to garnering wealth, the luring of people and capital by the most attractive state policies is absolutely crucial.... The real shift is simply from public purposes to private purposes, from a state that takes its legitimacy by assuring the common welfare to one that instead relies on providing the broadest possible opportunity for the satisfaction of individual interests.”
- 471-5 Bobbitt offers intriguing reflections on what’s wrong with the United Nations as we make the transition from nation-states to market-states: “Whether the basis for a world sovereign is the majoritarianism of states or of the peoples of the various nations, the current constitutional framework is either contradictory (because it retains a superstructure inherited from the concert of great powers) or fraught (because vast majorities can lay claim to its lawmaking power). When it is replaced by a constitution for a society of market-states, this problem will disappear because that constitution will resemble those of corporations, which allow for weighted voting based on wealth.”
- 476 “We must free ourselves from the assumption that international law is universal and that it must be the law of a society of nation-states. And we must see clearly what role violence and war have played, and will continue to play, in shaping that system.” [To which I would add that there’s more than a little of Michel Foucault (*Power and Knowledge*) in this postmodern argument.]

Book II, Part II: A Brief History of the Society of States and the International Order

- 479 Thesis: Much as Epochal wars have shaped the constitutional order of individual states, the great peace settlements of these wars have shaped the constitutional order of the society of states.

Chapter 17: Peace and the International Order

- 483 “It is my premise that there is a constitution of the society of states as a whole; that it is proposed and ratified by the peace conferences that settle the epochal wars previously described, and amended in various peace settlements of lesser scope; and that its function is to institutionalize an international order derived from the triumphant constitutional

order of the war-winning state. Thus while violence and war initiate the process of change in the constitutional order, peace and law ratify the ultimate result.”

- 484 “What are the characteristics of a constitution for the society of states? Like other constitutions, this one sets up a structure for rule following; allocates the jurisdiction, duties, and rights of the institutions it recognizes; determines a method for its own amendment and revision; specifies procedures for coping with disputes arising from its implementation; and above all, legitimates those acts appropriately taken under its authority. Like other constitutions, written and unwritten, the constitution of the society of states relies upon the interpretive means by which it is to be applied. By providing legitimating modalities of interpretation, history enables law to reproduce itself.” [So here we see the juncture of evolutionary theory and hermeneutics.]
- 485 “No constitution, least of all one that governs different states, can determine its own interpretive context any more than a law can provide its own legitimacy. The epochal peace conferences and treaties, like the epochal wars they terminated, existed within a complex history that gave them meaning.”

Chapter 18: The Treaty of Augsburg

- 486ff. Bobbitt shows the transition from [what I call] “The Religious Era” to “The Political Era” with the *cuius regio eius religio*, according to which, “he who rules, his is the religion.”
- 489ff. Bobbitt reviews the writings of Vitoria, Suarez, Ayala, and Gentili, not because they are the authors of the new order so much as that their writings reflect the new order.

Chapter 19: The Peace of Westphalia

- 508 “The idea of a juridical order without a higher political or ecclesiastical authority is so novel, and so far-reaching, that it has given immortality to the name with which it is mainly associated, that of the seventeenth century lawyer Hugo Grotius.”
- 509 “These ideas might be stated as an epigram: History is the bridge between strategy and law; law is the bridge between religion and politics.”
- 513 “Generally a ‘Grotian view’ is taken to mean the assertion of a duty on the part of the individual state to serve the interests of the society of states as a whole. . . . Although the Grotian society of states is perhaps anarchic, it does not exist in a naked state of nature. The rationale for the Grotian view is that there exists a great society of all mankind—*humani generis societas*—and all human institutions are governed by the rules of that society.”
- 518 Contrasts the Grotian view with that of Hobbes and Spinoza: “It is often said that Hobbes and later Spinoza extrapolated from the life of the individual human being to that of the State. If the natural condition of men was one of endless war, then the superimposition of

an absolute ruler, the sovereign State—Leviathan—did not terminate the state of nature, but merely transferred it to another plane. States are enemies by nature. Agreements to cooperate will be preserved only so long as fear of the consequences of breaking agreements binds the parties. Grotius, by contrast, extrapolated from the lives of persons in a society to that of states in a society. The natural condition of a society is one of potential cooperation—no man is an island sufficient unto himself. Not fear but aspiration binds states to their agreements.”

519 According to Pufendorf, “The law of gravity governed heavenly bodies; the law of states was to be derived by much the same rational means.”

“This is not the place to dwell on the shortcomings of Pufendorf; Leibniz has done this definitively. Nor is it necessary to complain about the habits of philosophers that addict them to imagining ‘states of nature’ from which to extrapolate, heedless of the one natural state they know something about, namely the one they are in at the moment, which must be presumed to govern to some degree their speculations about other such environments. Indeed I think it equally likely that both Hobbes and Spinoza found their inspiration for the natural state of man in what they observed in the behavior of kingly states—Hobbes focusing on the domestic scene, Spinoza on the international—and reasoned back from this paradoxical interface of absolute domestic authority and apparent international anarchy to the nature of man, rather than the other way around.”

Chapter 20: The Treaty of Utrecht

520 “The Westphalian Problem—that, absent an absolute and universal sovereign, every kingly state would attempt to aggrandize itself to the limit of its power—found its most threatening expression in the campaigns of Louis XIV that directly challenged the Westphalian settlement. The solution to this problem was ultimately expressed in a series of eight treaties known as the Peace of Utrecht, which resolved the epochal war composed of Louis’s campaigns.... The design flaw of Westphalia was that it invited this limitless aggrandizement on the part of the prevailing kingly state.”

522f. The language of this new consensus was reflected in four contrasts with the idiom it superseded:

1. The language of “interests” replaced that of “rights.”
2. Aggrandizement—so integral to the stature of the kingly state—was replaced by the goal of secure “barriers.”
3. The word *state* underwent a change. A “state” became the name of a territory, not a people, as would occur later when state-nations began to appear.
4. Whereas the kingly states had seen a balance of power as little more than a temptation for hegemonic ambition to upset, the territorial states viewed the balance of power as the fundamental structure of the constitutional system itself.

527 “The territorial state aggrandizes itself by means of peace because peace is the most propitious climate for the growth of commerce.”

528 “The Westphalian settlement, which affirmed the absolute and mutual independence of all the sovereigns, created an uncivilized system. It encouraged war because differences between princes must be resolved by the right of the strongest. Insecurity reigned.”

“In contrast, the settlement at Utrecht depended upon very different ideas about the nature of states, though these too were consistent with, perhaps even extrapolated from, assumptions about individuals. Leibniz held, for example, that the naturalistic view of human nature given by Hobbes was too fragmentary to be accurate. The key to human behavior was not compulsion and inevitability, but free will, and the society of free human beings was characterized not only by self-preservation, but by development. Leibniz opposed Hobbes’s view that absolute sovereignty was essential to justice because Leibniz saw in human nature a will to cooperate that had its basis in the need for individual development. Law was not founded on the exercise of raw power, but rather it reflected practical arrangements that enabled the pursuit of human happiness. Thus the operation of reason, which Grotius saw as the unifying element in international law, was for Leibniz the tangible expression of this inner human desire for pursuing and nurturing happiness.”

Chapter 21: The Congress of Vienna

544 “The mentality that arose with the state-nation could not passively accept an international system that seemed to depend upon etiquette for its operation. The state-nation was founded upon the claim (made notably by Hegel) that the State furnished the ideal vehicle for the realization of the nation; the nation could only be fulfilled through the self-conscious creation and enhancement of the State. During this period modern political parties came into being, as each offered to the nation a competing version of how best to fulfill the nation through the State.”

565ff. On John Austin’s contributions to constitutional interpretation (Austin’s approach is known as ‘positivism’): “Austin proceeded to define law as the commands of a sovereign addressed to political inferiors, backed by threats of harm in the event of disobedience.... [O]bedience is not a rational matter, as for Hobbes, nor a consensual one, as for Rousseau, but merely a fact.... *Positivism*, as Austin’s doctrines are known, does away with two of the core ideas that had shaped international law from its inception at the time of the birth of the modern state: natural law and the theory of the just war.”

566 “To the problem of whether more than one belligerent might prosecute a just war, the positivist would reply, ‘That’s not my department; consult the clergy or perhaps (today) the psychoanalyst,’ for positivists tended to treat moral judgments as projections of the emotions of the persons declaring moral rules.... This approach to law perfectly suited the Vienna system. That system was of course a product of its Age. A self-consciously designed constitutional system, it reflected the idealism of the late eighteenth century,

just as the system of Utrecht had reflected (and contributed to) the rationalism of the Enlightenment. Like the Vienna system itself, positivism reflects the self-consciousness, attention to public behavior, and sensitivity to the bases for legitimacy that characterized the state-nation.”

Chapter 22: The Versailles Treaty

570 “‘Ask not what your country can do for you, but what you can do for your country’ might well have been spoken by the leader of a state-nation. By contrast, the nation-state replies, ‘Go ahead: ask! Let’s see what we can do for you!’ And the market-state says: ‘Don’t bother asking. You’re on your own now.’”

571 “The nation-state sought its legitimacy in the betterment of the welfare of its people. This, however, brought forth a shadow for every variation of its constitutional form. The shadow of the nation-state is its ideology: By setting the standards by which well-being is judged, ideology explains how the State is to better the welfare of the nation. Whereas the state-nation had studiously contrived to legitimate itself through the creation of a certifying club of other state-nations, admission to which stamped the state as the representative of the nation in whose name it ruled, the nation-state could not resort to this method. . . . Until the debate among fascism, communism, and parliamentarianism could be settled, the nation-states could not form a legitimating society, because it was the legitimacy of their competitors that each ideology attacked.”

Constitutional Interpretation: The Legal Philosophers

584ff. [The next several pages of notes may be more detailed than some readers would prefer. In chapters 22 and 23, Bobbitt summarizes the views of several legal philosophers and schools of jurisprudence. This appeals to *me*, but if *you* are in a big hurry, skip to the notes on Chapter 24. Why am I so interested in these subtleties? Not simply because I have a taste for philosophy. What is at stake here, ultimately, is the very old struggle between brute force and the power of persuasion. Is there ever any justification for violence that transcends the sense of justice of a particular nation? Current events, talk of the “clash of civilizations,” and the uneasy balance of powers in a pluralistic world require us to plumb these subtleties if we are to act with both understanding and conviction.]

In this intellectually rich section of the book, Bobbitt shows how Kelsen, Schmitt, and Kirckheimer expressed, respectively, the liberal, fascist, and communist ideologies underlying the various philosophies of law that competed with one another in Weimar Germany. But prior to those three...

Jellinek: “The State, Jellinek held, is a psychological mass-function. [Could this be a typo for ‘fiction’?] It has no reality apart from its human constituents, who associate in order to form a community of purpose. This emphasis on the nation’s role in endowing the State with meaning is the nation-state’s reversal of the ideology of the state-nation,

which held that it was the State that endowed the nation with meaning.... Jellinek's characterization is refreshingly non-foundational, in contrast to the legal philosophers of earlier periods who sought an external validation, e.g., the command of the sovereign (Austin) or natural law (Pufendorf). [For Jellinek,] a valid law is simply one that is accepted as valid."

- 587 **Kelsen:** "Jellinek conceded that law asserts norms, and he acknowledged that juristic concepts do not decide natural facts, but he made law depend upon the psychological fact of acceptance. For Jellinek, the normative power of a legal rule depends upon its motivating power; its validity is a matter of its effectiveness. This introduces the world of causality, which is a feature peculiar to the world of natural reality. This move, in Kelsen's words, overlooks the fundamental characteristic of any norm: 'that it is a rule not of but for human behavior.'"...

"Consider the neo-Kantian distinction between a practical and a theoretical science. A practical science tries to bring about factual conditions in accordance with some desired standard; this standard is the normative....

"Jellinek too had distinguished between theoretical and practical science by claiming that a theory is explanatory while a practice is applied. Kelsen, however, contended that the distinction between theory and practice is a relative one, and that it depends upon the further distinction between fact and norm. The relevant facts for a theoretical science are different from those of a practical science, though both must deal with facts. The real difference between theory and practice is that each deals with different facts and has a different role for norms."

- 588 "Kelsen's first postulate then was that law has a Janus face; to ignore either of its visages is to assimilate it into a different discipline and thereby distort its true subject . . . Kelsen disagrees with Oliver Wendell Holmes, Jr.: Jurisprudence is not a prediction of what courts will in fact do, as Holmes concluded, but an assertion of what they ought to do."

- 589 "According to Kelsen's views, law takes place precisely when its exhortations are not wholly effective, i.e., when it has failed to be followed.... Notice that Kelsen's formulation directs the rule to an organ of the State and not to the subject of the rule. This has the effect of doing away with fictions like *the will of the people* or the *intention of the legislature* and other metaphysical entities like *the sovereign*. All the elements of Kelsen's formula are observable statements of fact.... There is no need for Austin's fictional *command*."

- 590 "But if we give up Austin's sovereign, what legitimates a legal rule?" Here Kelsen sends us on a hierarchical regress from act to law, and from law to norm (a judicial decision); and from there to "conformity with a criminal statute," and from there to the constitution: "What then legitimates the constitution? It is its correspondence with what Kelsen chooses to call 'the basic norm' (*Grundnorm*). The basic norm 'may state that the will of the king shall constitute law because he holds his authority by the grace of God, or it may say that what the medicine man declares taboo ought to be avoided because he has

communion with the spirits.” [So the regress ends with an acknowledgement of a certain arbitrariness or cultural relativism.]

“Of this basic norm many things can be said; indeed Book I of the present work is in part a history of the morphogenesis of such norms.”

591 “Because the validity of a legal order is a matter of its correspondence with a norm, it follows that a state can be legitimated by its correspondence to those rules that are the product of interstate norms. In other words, the state is legitimated by the norms of international law, not constitutional law.... Kelsen’s argument for the primacy of international law can be summarized as follows: Only one normative system can be valid at the same time.” [And here is where we see Kelsen’s neo-Kantianism.]

“A number of interesting conclusions may be drawn from Kelsen’s views. First, the State simply drops out as a real entity. In Kelsen’s words, the State ‘plays the same role as that of God in metaphysics and gave rise to the same problem, the reconciliation of sovereignty and legal limitation.’... The State is a kind of ghost in the machinery of official acts, which correct analysis can eliminate the way analytical psychology eliminates the soul.”

592ff. **Schmitt:** “Whereas the neo-Kantians, of whom Kelsen was the most prominent, held that the test of legality lay in the correspondence between the legal rule and the formal requirements of a legal proposition, these neo-Hegelians believed that legality was derived from a correspondence between the legal rule and the cultural needs and identity of the society.”

593 “The State is not driven by law: rather law is that State’s creature, to be used as the State determines.”

594 “Schmitt’s jurisprudence reflects four notable ideas: (1) that the crisis in Weimar Germany can be traced to its constitutional order—liberal parliamentarianism—and that this order was imposed on Germany ... (2) that the State defines itself by the distinction it draws between friend and enemy ... (3) that sovereignty is the power to determine when an emergency situation exists and thus when the legal rules that ordinarily govern should be suspended; (4) that the relationship Schmitt draws between rule, order, and decision is sometimes labeled ‘decisionism.’”

595 “Every legal order, according to Schmitt, is the reflection of a concrete social and political order in which some individuals or groups rule over others; the unusual thing about liberal parliamentarianism is that it seeks to conceal the dominance of the bourgeoisie behind a façade of legal procedures.”

596 “Kelsen and Schmitt agree that we live in an age of relativity, that is, an age without a single overarching, governing norm.... By making civil society the field of competition for numberless private myths, the State sows the seeds of its own destruction because it has become marginal to the production of meaning, while private interest groups, each

organized around its own myth, try to capture the machine of government. Meanwhile the lives of its citizens dissolve into consumerism, hedonism, and an attraction to cults.” Schmitt pines for noble goals [somewhat like Fukuyama lamenting “the last man”] and claims: “The value of life stems not from reasoning. . . . It emerges in a state of war where men inspired by myths do battle.”

- 598f. “‘The normal,’ Schmitt wrote, ‘proves nothing, the exception proves everything; not only does it validate the rule, the rule above all lives off the exception. In virtue of the exception, the force of actual life breaks through the crust of a mechanics grown listless by repetition.’ The resolution of fundamental clashes of values, which underlie conflicts in law, cannot come by negotiation or procrastinating compromises and half measures. . . . Schmitt sees that the death of an external sovereign, like the death of God, does not lead to the triumph of science—even legal science—but to the war of gods, the conflict of interest groups each animated by its own myth. . . . Recognizing politics’ need for a myth, Schmitt wishes to replace the procedural myth of Kelsen with a myth of substantive content. . . . Indeed he holds that one’s life is worthless unless one has a purpose for which one is prepared to die.” [Which reminds me why I wrote *Living Without a Goal: We’re better off without a dependency on such political passions to give meaning to life.*]
- 600 “Schmitt argued that all legal orders are founded on an existential decision, and not on a norm. . . . In summary, ‘decisionism’ did not merely exalt the role of the decision. Where Kelsen, beginning with the logical form of the legal proposition, looked behind each legal act for the norm validating it and attempted to show that the basis for establishing the legality of a decision stood prior even to the constituent authority, Schmitt saw each legal act as a decision. Like his opponents in the Frankfurt School, he saw law as indeterminate, requiring fresh decisions inevitably and ubiquitously. He therefore substituted a hierarchy of men for the hierarchy of norms, finding the basis for legal validity in the correspondence between law and the actual social and political situation.”
- 601 The Frankfurt School and Otto Kirchheimer
- 602 “The verifiable theories of positivism would only confirm the surface phenomena of society; what was needed was critical insight to expose the façade that mesmerized the positivist.”
- 603 “The Institute sought to account for the failure of the communist revolution . . . attempted a kind of Reformation of Marxist theology.”
- 606 “Far from pluralism, Kirchheimer yearns for a purifying solidarity that has found expression in our own times in the Khmer Rouge campaigns in Cambodia and the Cultural Revolution in China.”
- 607 “We are inclined to forget that, until the mid-1930s, liberal parliamentarianism, not fascism, was the principal target of communists.”

608 “The Weimar experience thus provides a national microcosm of an international phenomenon, the unstable competition among ideological forms of the nation-state that occurred in the aftermath of Versailles.”

Chapter 23: The Peace of Paris

This chapter begins with a description of the end of the Long War, showing its significance for the decline of the nation-state. I’m skipping over about 30 pages, mostly on the breakup of the Soviet Union, in order to concentrate on, and put in close proximity to the previous section, another section entitled, “Constitutional Interpretation: The Legal Schools” (pp. 639-663), which is, to me, both more interesting and more obscure.

The issue is the relevance, nature, and importance of international law. Acheson wrote that “those who devote themselves to international relations ... are understandably reticent about the role of law.” (p. 640) Acheson’s successor, John Foster Dulles, declared, “I confess to being one of those lawyers who do not regard international law as law at all.” (p. 641n.) So Bobbitt adds: “If law was only what the powerful said it was, how could international law compel a state to do anything that was not in that state’s interest? ... Out of this intellectual and moral abyss, a half dozen schools of thought emerged, each trying to establish a justifiable yet realistic basis for international law.” (p. 641) The next 20 pages review the core ideas of those schools.

“The fundamental approaches that divided thinkers about international law before the twentieth century can be roughly characterized as formalism and naturalism... The formalist in international law, like Suarez or Austin (or Leibniz), derives the truth or falsity of a legal proposition ... if the test of general recognition is met. By contrast, the naturalist ... like Grotius or Bluntschli (or Hume), holds that the relationship between the content of legal rules and the world accounts for their truth or falsity. Legal rules must be in accord with the nature of man, which is part of the nature of the universe.” (p. 641)

“Formalism and Naturalism ... played out in various different attempts to meet the challenge of Legal Realism. Formalism became the source of three schools of thought: Legal Process, Nominalism, and Consensualism. Naturalism served as the source of the New Haven School, Neo-Realism, and what might be called *Perspectivism*.” (p. 642)

LEGAL PROCESS

Henry Hart “sought to change the focus of jurisprudence from the substantive rule finding so much in evidence in the nineteenth century treatises on law to the process of creating precedent.” (p. 642) “Fairness will result if methods of legal decision-making that all parties concede to be fair are scrupulously adhered to. That adherence, not the substantive fairness of the rules, will in turn deliver legitimacy, and legitimacy will bring about compliance” [i.e., whatever the rules of the game may be, if all players adhere to them equally scrupulously, then it will be a fair game, whoever wins].

CONSENSUALISM

This is so dominant outside the U.S. that the term “school” “seems inappropriately sectarian.” (p. 644)

“Consensualists share a fundamental premise: Because international law is made and implemented by states, the consent of states, as manifested in their original intentions memorialized in explicit or implicit agreements, is the only basis on which rules may legitimately be said to govern state behavior.” (p. 645)

“One reason why the consensualist position appears so unrealistic is that it treats the consent of all states equally, ignoring their relative positions of influence.” (p. 646) [This is the jurisprudence of the UN General Assembly, not the Security Council.]

NOMINALISM

“The creed of the Nominalist might be put this way: Statecraft, long before there were written constitutions, found a role for written agreements. Texts do not replace the networks of norms, conventions, and institutions that help to manage international relations and are so prized by legal process theorists, but formal writing in the diplomatic idiom does provide an economical and relatively unambiguous way for political leaders to commit themselves and their posterity, a necessity precisely because intentions may change.” (p. 647) “Thus Oscar Schachter, a leading Nominalist ... rejects the Legal Realists’ conclusion that international law is simply what states do.” (p. 647) “The Nominalist ... locates this normative element in texts, and supports his position by pointing to the empirical fact that states are indeed most likely to restrain themselves when bound by specific treaty language” [i.e., the law is the law because *so it is written*].

THE NEW HAVEN SCHOOL

The key figures are Myres McDougal and Harold Lasswell. “Richard Falk, the Absalom figure in this drama and another second-generation spokesman for the New Haven School, noted: ‘The McDougal and Lasswell undertaking can be regarded as converting the core insight of legal realism into a comprehensive framework of inquiry, including the provision of a normative rudder ... dedicated to the promotion of human dignity—by which to assess the relative merits of opposing lines of argument.’ But of course Legal Realism did not simply fail to provide ‘a normative rudder’—it denied the very possibility of one, apart from one arbitrarily chosen (or unconsciously adopted). As a result, the New Haven School’s helpful proposal of a golden rule by which to assess all other rules has proved to be the most controversial part of its program.” (p. 650)

“Louis Henkin has criticize the School’s view of law as a policy process by noting that it is a view of law ‘not as is but always as becoming.... The law is what God, or the United Nations, or History ... will say—later—in judging what nations had done in the light of context and consequences’” [i.e., What is legal? *We’ll see*.]. (p. 652)

NEOREALISM

This is embraced by “virtually all senior officials working in the U.S. national security establishment,” esp. Acheson, who brought Paul Nitze to the State Department. Appointed by Truman to serve as Secretary of State, Acheson faced the task of bringing post-war Germany and Japan into the society of states: “He was apparently heedless of the arguments from international law that these states had the right to develop their own security structures as they saw fit by virtue of their sovereignty, arguing instead that ‘world structure and order’ demanded these invasive restraints. Because it was a matter of the stakes at risk in the Long War, which went to the heart of the constitutional existence of the parliamentary nation-state, Acheson believed American action on these questions could not be governed by any international legal rule. After all, the society of states that created such rules takes its legitimacy from its constituent states; how, therefore, could that society insist on the application of rules that might be fatal to its leading members?” (p. 653)

“The Legal Realist’s dilemma. That dilemma may be expressed thus: How do we restore legitimacy to law when it is subject to everyone’s interpretation, and especially that of the deciders who create it and demand that the rest of us obey? The hard-working practitioners of American diplomacy, like their counterparts in law firms, may have an answer to this dilemma: They embrace it, and relish the fact they happen to be the deciders, but this is not a welcome solution to everyone else, and certainly not to Perspectivists.” (p. 657)

[What is legal? *Whatever the strong, the deciders, the elite say is legal.*]

PERSPECTIVISM

“Perspectivists attempt to overcome what they believe to be the inherent cultural, class, and other biases in such overriding approaches, whether they are McDougal’s or Acheson’s, noting that these biases are especially evident in international law when the higher goals are determined by the particular policies of a national state.... That [national elites] tend to regard their national state’s conduct and policies as more conducive to achieving universal ideals is understandable. Sentiments, education, information sources and deeply rooted affinities are likely to prevail over the claims of distant, uncongenial societies. One might argue that the post-Versailles order is actually designed to give expression to such biases.” (pp. 657-8) Bobbitt gives as examples of different perspectives feminism, Islamic fundamentalism, and the “critical analysis” school of jurisprudence.

“Whether or not such a program rests on inquiries in which one can have supreme confidence, one can hardly be insensitive to the hunger for an external standard by which to assess the justice of our acts.” (p. 660)

[What is legal? *Whatever laws will help defend the marginal against oppression by the elite.*]

“The ‘modalities’ of American constitutional law are the ways in which we characterize a proposition of that law as true or false. The six modalities of constitutional interpretation in the U.S. are: (1) historical (relying on the intentions of the ratifiers of the Constitution); (2) textual

(looking to the meaning of the actual terms of the constitutional text as these would be understood by the contemporary ‘man in the street’); (3) structural (inferring rules from the relationships that the Constitution mandates among its structures—federalism, the three branches of the federal government, etc.); (4) doctrinal (applying rules generated by precedent); (5) ethical (deriving rules from the ethos of the Constitution, described in the Declaration of Independence and elsewhere); (6) prudential (seeking to balance the costs and benefits of a particular rule according to a parameter—economic, political, or otherwise—extrinsic to the Constitution).” (p. 660)

“It will be easily seen that each of the schools of international law discussed can be paired with its constitutional modality: consensual/historical; nominalist/textual; Neo-Realist/structural; Legal Process/doctrinal; New Haven School/ethical; Perspectivist/prudential.” (p. 661)

“Does this matter? We are in a time of crisis, and must turn our attention to international terrorism. Why should we pursue thought when action is required? Colonel House had to have answers before his war ended; he didn’t know it would continue for 70 more years. Now that the Long War is over, and the Peace of Paris signed, and the possibility of a new war looming, why must we urgently undertake a New Inquiry [named for ‘a secret group, code-named The Inquiry, set up on Wilson’s orders to bypass the State Department and formulate America’s plans for the postwar world’]? Because we are daily making decisions that will structure the kinds of opportunities available to us in the future. ‘Once in a while a door opens,’ wrote Graham Greene, ‘and lets the future in.’ This is such a moment.”(p. 663)

Book II, Part III: The Society of Market-States

Chapter 24: Challenges to the New International Order

669 Granted that the market-state is about increasing the opportunities for its individual members, different cultures with different values may have different approaches to what counts as a real increase of opportunity. “For example, consider these contrasts between the Tokyo and Berlin models: education financed privately vs. public education; high savings rates vs. low savings; low currency values vs. high currency values; low interest rates vs. high interest rates on corporate borrowing; high interest rates vs. low interest rates on consumer loans; personal sacrifice vs. a higher quality of life; long working hours vs. leisure consumption. Either set of choices can plausibly be said to maximize opportunity.”

670-4 A review of the descriptions of the entrepreneurial, mercantile, and managerial market-state models.

676 “How will developments in weapons technology, the globalization of culture, and the liberalization of trade and finance challenge the society of market states?” The following pages answer these questions, beginning with weapons of mass destruction.

689 After a lengthy and very well-informed discussion of the issues, Bobbitt observes: “No set of legal rules can help much here: It is a matter of prudence and wisdom in the formation and execution of policy. Nor can the international society of states do much as a group because so much turns on the policies of one state, the United States, which, after all, committed the first act of nuclear proliferation at Alamogordo.... *Indeed, the provision of information by the United States in order to enable missile defense may play as large a role in the twenty-first century as the provision of extended deterrence did in the twentieth.*”

690 “Ultimately only a global coalition that shares intelligence and information can hope to forestall terrorist attacks using nuclear weapons. We are in a race against time: Can the new society of market-states develop technologies of information collection—like nanosensors, for example, that detect nuclear traces—and habits of cooperation before terrorists deploy nuclear devices in an attack?”

695ff. Immigration and Human Rights: The Globalization of Culture

698ff. The Liberalization of Trade and Finance: Economic Development and the Environment

701 “Wriston asked, ‘What becomes of the great mission of modern governments?’ The reply must be: The mission changes. The market-state ceases to base its legitimacy on improving the welfare of its people, and begins instead to attempt to enable individuals to maximize the value of their talents by providing them with the most opportunity to do so. ‘Be everything you can be’ replaces ‘A chicken in every pot.’”

713 A critical summary of the argument:

“The Long War was won by strategic innovations that we might nowadays call the development of weapons of mass destruction, the globalization of communications, and the international integration of finance and trade. These strategic innovations have brought with them new challenges [reviewed on pp. 677-713] that now face the society of states that the end of the Long War is bringing into being. Three fundamental choices confront the society of market-states with respect to each of these challenges. Until they have been made, we will live in a period of transition.

These choices are:

(1) Regarding weapons of mass destruction:

- (a) Whether to attempt affirmatively to check the proliferation of such weapons, through extended deterrence, and to suppress proliferation through ad hoc interventions
- (b) Whether to rely on multilateral arms-control agreements, accepting as inevitable that some proliferation will occur outside these agreements
- (c) Whether to rely on the wholesome effects of internal liberalization through economic growth and mutual deterrence to contain this proliferation

(2) With respect to the globalization of communications:

- (a) Whether to address the linked issues of immigration and human rights by encouraging a global network of economic growth premised on the transparency of sovereignty
- (b) Whether to cultivate the fragmentation of states within ‘umbrella’ megastates
- (c) Whether to strengthen the protection of national cultures and the regionalization of international law

(3) With regard to the international integration of finance and trade:

- (a) Whether to increase the absolute wealth of the society of market-states, taken as a whole, without regard for distributional effects
- (b) Whether to manage growth with an eye to short and medium-term distributional effects
- (c) Whether to encourage economic stability through growth tempered by a regard for long-term balance

Some market-states will doubtless attempt to mix and match these alternative policies but as a general matter one or another set of mutually supporting policies—(a/a/a) or (b/b/b) or (c/c/c)—will rise to dominance in each state because these options reflect different views of state sovereignty. A state that relies on pre-emption to thwart nuclear proliferation is all the more likely to support transparency in sovereignty when it comes to human-rights violations. A state that is anxious to preserve the cultural integrity of its minority groups is unlikely to pursue economic strategies that shred the social contract. Inevitably, one of these sets of approaches—entrepreneurial, managerial, or mercantile—will dominate the constitution of the society of market-states, because a society of states that pursued policies that were inconsistent with respect to state sovereignty would produce an incoherent and unstable constitution.”

Chapter 25: Possible Worlds

The epigram reads: *By considering alternative futures, we begin to see that the future is shaped not only by the past but by what we think is possible and by the choices we make.*

–Shell International Petroleum Company, 1992

715 “I will now take up the question of how the society of market-states might respond to the challenges just surveyed. But rather than prescribe a single set of solutions to these challenges, I will describe alternative approaches, whole worldviews that, if they govern action, will bring into being radically different worlds. I choose this approach for four reasons”:

- (1) Forecasting doesn’t work.
- (2) The reader can do this at home.

- (3) “This sort of presentation can clarify the moral choices we must make in the coming decades—having to do with what kind of world we want to live in and what we are willing to do to achieve it—rather than submerge those choices in the seductive calculus of efficiency.”
- (4) “The implementation of the choices that are ultimately made will have less to do, in a market-state environment, with codified proscriptions and more to do with shared understandings, goals, and expectations.”

716 “Before the sea change from nation-state to market-state, ‘vision’ was simply a matter of looking ahead, extrapolating from the present.... Suddenly in the 1990s, no one really had a ‘vision’ of the future because the future was going to be so unlike the past. What was required was not lacerating self-criticism over our failures to foresee the collapse of the Soviet Union, the Gulf War, the disintegration of Yugoslavia, and the mass migrations in East Africa. Rather we needed to approach the future with an acceptance that simple forecasting was not going to be useful to us for a while, that no one had any clear view of what was coming and therefore no one could be confident that he or she was offering a realistic vision of the future. *Instead we had to sharpen our skills at imagining different futures*” [emphasis added for the benefit of the GBN audience].

717ff A spirited defense of scenario planning.

721 “The following pages offer three general scenarios, constructed by assembling the elements of possible worlds that are brought into being by crucial, fundamentally moral choices that might face states.... The world of *The Meadow* is that of a society of states in which the entrepreneurial market-state has become predominant. In this world, success comes to those who nimbly exploit the fast-moving, evanescent opportunities.... The world view portrayed in *The Park* ... reflects a society in which the values and attitudes of the managerial market-state have prevailed. Governments play a far larger role.... Finally, *The Garden* describes an approach associated with the mercantile market-state.... Unlike the regional groupings fostered by *The Park*, the states of *The Garden* have become more and more ethnocentric, and more and more protective of their respective cultures.”

“In a meadow all is profusion, randomness, variety. A park is for the most part publicly maintained, highly regulated with different sectors for different uses. A garden is smaller, more inwardly turned—it aims for the sublime, not the efficient or the just.”

The following pages (pp. 729-771) lay out a range of drivers and trends, possible events, and challenging decisions prior to the articulation of three scenarios in which all of these elements play out in different ways. As is often the case with narrative scenarios, they do not admit of summaries any more succinct than those just given.

773-5 Bobbitt’s own reflections on the challenges posed by these scenarios. *The truly remarkable climax of the book* is the elegant construction of what I’ve called (borrowing from Bateson and Warren McCulloch) a *heterarchy* of choices (think of the game of

paper, rock, and scissors, or the system of checks and balances between executive, legislative, and judicial branches):

“Think of The Meadow as ‘A,’ The Park as ‘B,’ and The Garden as ‘C.’ If we rank these approaches with respect to the security decisions taken in each scenario, A is preferred to B, which is preferred to C. That is, peace with some justice (the protection of nonaggressors, for example) is to be preferred to simple peace (bought at the price of sacrificing innocent peoples), which is still preferable to a cataclysm that would destroy the innocent and guilty alike. Or perhaps we get B/A/C—no conflict is preferred to frustrating low-intensity conflict, which is still preferable to a high risk of cataclysm. In any case, we can agree that C (The Garden) presents the worst option for satisfying the world’s security needs. But if we do the same sort of exercise with respect to the issues raised by the ‘culture’ scenarios, preferring genuine pluralism to mere cultural protectionism, and yet preferring the protection of minorities to their marginalization, we get B/C/A. Or at least we get C/B/A, for some will feel that the protection of sanctified ways of life trumps pluralism. In any case, we can agree that A—The Meadow—is an inhospitable place for the serenity, continuity, and community that protect cultures. And if we conduct this same exercise with respect to the scenarios devoted to economic issues, ranking sustainable growth ahead of recovery, which is still preferable to stagnation, we get C/A/B. Or, if growth alone is our objective, we get A/C/B: The insatiable but impressive engine of dynamic, innovative risk-taking is preferred to the methods of mercantilist competition. In any case we must concede that regional protectionism—the world created in The Park—is a sure route to high unemployment, slow growth, and the costliness (and uneven diffusion) of new technology.”

In short, as some sage once put it, *not all good things go together*. So there are hard choices to be made.

- 774f “We do scenarios to help us define what kind of world we really want, among many possible worlds, to clarify how decisions taken today will effect large-scale results later, and to make us more alert to the meaning of unfolding events. Thus scenario-based planning is not about solving the hypothetical problems of some distant tomorrow, but about making decisions wisely today.... Business leaders are wholly unprepared to take up the moral and political responsibilities that governments are busily casting off, and the politicians and bureaucrats are seldom well situated to make the long-term investments in infrastructure that create opportunity.”

Chapter 26: The Coming Age of War and Peace

- 777 “Before we can create such a new order ... we must establish a consensus; that is to say, before we can have a new constitution for the society of states, we must have a constitutional convention.”
- 778 “This sense of peace ‘as far as the eye can see’ is widely shared. Yet there is also a sense in the QDR [Quadrennial Defense Review] and elsewhere of uneasiness, a sense that the

future is likely to be dangerous in new ways—even a sense that we will look back on the Cold War as a golden age. For the reasons given in the preceding chapters, I think this sense of foreboding is justified.”

781 “A weak and unstable China is far more dangerous than a strong China.”

782 “We shall have to reorient our concerns to cope with the changes brought about by the emergence of the market-states. Let me give seven examples of this reorientation.”

783 The media

785f The environment

786 Interstate trade and technology transfers
Crime and corruption

787ff. Critical infrastructure—“international superinfrastructure”

795 Public health

796 The Revolution in military affairs

Chapter 27: Peace in the Society of Market-States: Conclusion to Book II

800 “What a pluralist society of states needs are practical means of cooperation—alternatives to the nation-state institutions that span the different forms of the market-state.”

803 “By pluralism is meant the view that some values are to be preferred to others, and that these preferred values are those democratic and peaceful institutions that permit individuated and diverse cultural development in the context of nonaggressive relations. The reason why the political system of the West is preferred is that it is the only system that allows *all* states, Western or not, to develop their own cultures. In a society of states committed to pluralism there are preferred values (as opposed to relativism) but no preferred states (as opposed to exceptionalism).”

804 “International law has developed in a turbulent periodicity, changing its most basic precepts as its constituent parties, states, underwent dramatic and fundamental constitutional change. One consequence of this different understanding is that universalism no longer seems inevitable, and we can entertain the idea that the reversibility of this universalism does not mean the retrenchment or death of international law itself.... The Long War of the nation-state is over, having destroyed every empire that participated in it, every political aristocracy, every general staff, as well as much of the beauty of European and Asian life.... Two tasks lie before us: to decide, as states, when it is appropriate to use force in this new world; and to determine, as a society of states, when to collectively sanction the use of that force in this world. This is a matter of creating precedents and case law. It amounts to deploying the habits of law on behalf of

strategy, and of course vice versa.... I believe that the combination of improvised constitutional instruments with increasingly settled case law is the appropriate method for the society of market-states. This combination is a reversal of the method of the nation-state (and to that extent may take place outside the UN).”

Epilogue

- 814 “In 2001 ... the U.S. underwent a long-overdue defense review under the direction of Andrew Marshall. Its recommendations ... were the focus of intense scrutiny and, like the proposals in the present work, many of which they resemble, were controversial. But virtually no one in that debate observed that the profound changes urged in the Marshall Report will have equally profound consequences for the constitutional make-up of the country.”
- 815 “The parliamentary nation-state has emerged from the Long War as triumphant. Nevertheless, we should not expect that either this form of the constitutional order or the peace that recorded its ascendancy will be eternal. Mindful of the past, we can expect a new epochal war in which a new form of the State—the market-state—asserts its primacy as the most effective constitutional means to deal with the consequences of the strategic innovations that won the Long War. To shape, if not permanently forestall, this war to come, the society of states must organize in ways that enable it to prevent the proliferation of weapons of mass destruction, to treat expeditionary interventions as opportunities for consensus-creating coalitions, and to share information as a means of defense against disguised attacks. By these means, the next epochal war can be converted into a series of interventions and crises, instead of a world-shattering cataclysm or a stultifying and repressive world order.”