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Preventive War

by

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PREVENTIVE WAR

David Luban¹

The 2003 U.S.-led invasion of Iraq had three stated justifications: a *legalistic* argument that the war was necessary to enforce United Nations resolutions in the face of Iraqi defiance, a *humanitarian* argument that the war would remove a brutal dictator, and a *preventive war* argument that, in the words of President Bush's National Security Statement (NSS), the U.S. must "stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends," which requires acting "against such emerging threats before they are fully formed."² While the legalistic and humanitarian arguments are by no means unimportant or uncontroversial, the preventive war argument forms my topic in this paper. Not only was it the principal argument offered by the U.S. government, it represents an important revision in just war theory and the law of armed conflict.

In addition to the three stated justifications for the Iraq invasion, pundits, analysts, and critics offered a number of putative justifications beyond those the government was willing to acknowledge. The influential journalist Thomas Friedman, who supported the war, argued that creating a vibrant, successful democracy in Iraq would spur reform of the despotic and

¹ This paper was prepared for a roundtable discussion at the August 2003 American Political Science Association revisiting Michael Walzer's *Just and Unjust Wars*. I am grateful to my fellow panelists (Richard Arneson, David Estlund, and Jeremy Waldron), and to comments from members of the audience. I have also received helpful comments from Andrew Altman, Judith Lichtenberg, and Kit Wellman.

² National Security Strategy of the United States of America (2002), at <<http://www.whitehouse.gov/nsc/nss9.html>>.

demagogic regimes that now dominate the Middle East. This idea harmonized with the view, widely attributed to neoconservatives in the Bush administration such as Paul Wolfowitz, that the real war aim was a larger plan to modernize and democratize the Arab world. By contrast, the Internet intelligence-analysis service Strategic Forecasting (Stratfor) thought that the real purpose of the war lay in the fight against Al Qaeda. Al Qaeda operatives have assumed, and al Qaeda propagandists have insisted, that Americans are too soft and too skittish about casualties to fight. Furthermore, Middle East states like Saudi Arabia have proven unreliable allies in the fight against terror. According to Stratfor (which by and large supported the war), the Iraq invasion would conclusively prove to the Arab street that you don't mess with the United States. Even more importantly, it would position a large American army within ready striking distance of both Iran and Saudi Arabia, thereby forcing both of them to confront the new reality of American power and to control terrorist elements in their midst. Critics of the war asserted that the real reasons for the war were score-settling by Bush against his father's enemy; or a wag-the-dog effort to influence the mid-term and presidential elections; or an oil grab; or the first step in a plan to establish American control over the Middle East. Though some or all of these unofficial justifications may have figured in the thinking of some American planners, they are all speculations, and I will not consider any of them in this paper. However, versions of the first (the democracy argument) and last (the domination argument) will appear in the course of my discussion of preventive war.

The discussion is organized as follows. First, I lay out the prevailing doctrine of just war, as reflected in the United Nations Charter and what Michael Walzer calls the "legalist paradigm." The aim is to explain what preventive war is and why it does not fit comfortably

within the prevailing doctrine. I then discuss the justification of the legalist paradigm, first by examining Walzer's rights-based justification for it, which I reject, then by offering a broadly consequentialist justification, very close to the thinking of the U.N.'s founders, which I believe is more plausible. The most important point emerging from these arguments is that the real justification for the legalist paradigm lies in the importance of a no-first-use-of-force rule for war prevention, not in the importance of protecting state sovereignty (which, I argue, is valuable for contingent and, in fact, highly questionable reasons). Next I turn to preventive war. Again, the natural starting place is Walzer's analysis, which I recast in rule-consequentialist terms. The question is whether a general doctrine of preventive war to forestall relatively distant threats is morally defensible. My answer is no: following Walzer, I fear that giving a green light to preventive war would make wars too frequent and too routine. However, I believe that a more restricted form of the doctrine, which permits preventive war against serious threats posed by rogue states, is sound. There is a catch, however. I suggest that only the target of the threat, not third parties, may launch preventive war; and this may not cover the case of the Iraq war.

The next section considers in more detail the necessary restrictions on a defensible doctrine of preventive war. If preventive war can be justified against rogue states posing serious threats, it seems natural to extend the doctrine to rogue states involved with terrorist organizations – but only if the terrorist organizations pose very large-scale threats: thus the focus on weapons of mass destruction (WMD) in the National Security Statement provides a reasonable restriction on preventive war against states involved with terrorism. The permission to launch preventive war should also be restricted to situations in which the target poses physical threats to a state's people and homeland, not simply threats to economic interests in an elevated

standard of living; and the gravity of the threats must arise from the intentions of the target state. Otherwise, I suggest, the doctrine of preventive war justifies too many wars.

The final sections offer a very different perspective on the basic topic. They ask the question of whether, given the incredible disparity in power between the United States and other nations, it makes sense any longer to ask about appropriate “general doctrines.” To put it another way: should we continue to think of just war theory as a collection of rules or principles that apply to all states, or is this legalistic model of political morality inapplicable in the dramatically altered political constellation we inhabit? Some theorists – and, I suspect, many American policymakers – believe that in the current era a double standard is appropriate, in which the United States is simply not bound by rules of general applicability across all states. The U.S. gets to do things, like launch preventive wars or insist on its own military pre-eminence, that other states do not get to do.

The thought underlying this doctrine of American exceptionalism is that the magnitude of American dominance marks a dramatic change in the political organization of the earth, one in which a postulate of equal sovereign states no longer makes sense even as an idealized picture of world politics. This proposition in turn implies a radically historicist picture of political morality, according to which principles accommodate themselves to changed political realities.

I believe that this troubling idea cannot simply be rejected out of hand. The post-Westphalian organization of international society into sovereign states is a product of history, not moral necessity, and if the basic form of organization changes, insisting that moral principles internal to the Westphalian order should continue to apply seems unjustifiable. Nevertheless, those who assert the double standard argument have a high burden of proof to meet, because they

must show that the supposed new world order is morally acceptable; and, I suggest in the conclusion, proponents of the double standard have not come near to meeting the burden.

The Legalist Paradigm

The fundamental post-World-War-II doctrine of *jus ad bellum* is set out in the United Nations Charter. Article 2(4) of the Charter requires members to “refrain...from the threat or use of force against the territorial integrity or political independence of any state,” while Article 51 qualifies this prohibition by adding that the Charter does not “impair the inherent right of individual or collective self-defense” against armed attacks. Although Article 2(4) does not use the words “aggression” or “sovereignty,” the fundamental meaning of the ban on first uses of force has generally been taken as a ban on aggression against other states’ sovereignty, a ban justified, in the words of Article 2(1), by “the principle of the sovereign equality” of all U.N. members.

Michael Walzer labels the moral theory underlying the Charter system the “legalist paradigm.” As Walzer expounds it, the legalist paradigm consists of five main propositions:

- (1) There exists an international society of independent states.
- (2) This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political sovereignty.
- (3) Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.
- (4) Aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society.

(5) Nothing but aggression can justify war.³

The legalist paradigm forbids aggressive war but permits wars of self-defense, including law enforcement, that is, the defense against aggression waged by third parties. However, some wars fall under none of these categories, and at least three other categories have moral significance. First are preemptive wars. When an armed attack by another state is imminent, a state need not wait for the actual attack before using force. Most theorists and international lawyers regard preemption as a species of self-defense, provided that the enemy attack truly is imminent. In international law, the permissibility of preemptive war has not proven controversial, and I will assume here that preemption against imminent threats can be assimilated to self-defense.

A second problem-category is humanitarian intervention – war launched against a state in order to safeguard the human rights of its inhabitants or other people under its control. Defenders of state sovereignty typically frown on humanitarian interventions, and interventions fit awkwardly into the U.N. Charter framework and the legalist paradigm.⁴ But for those of us who believe that human rights impose moral limits on state sovereignty, humanitarian interventions will sometimes be permissible, and the real debate is not over whether humanitarian intervention can be justified, but only over what additional conditions besides the

³ Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (New York: Basic Books, 1977), pp. 61-62; Walzer's explanations of these propositions are omitted. A sixth proposition – “(6) once the aggressor state has been militarily repulsed, it can also be punished” – is of less interest to us, and does not form a part of the U.N. Charter system.

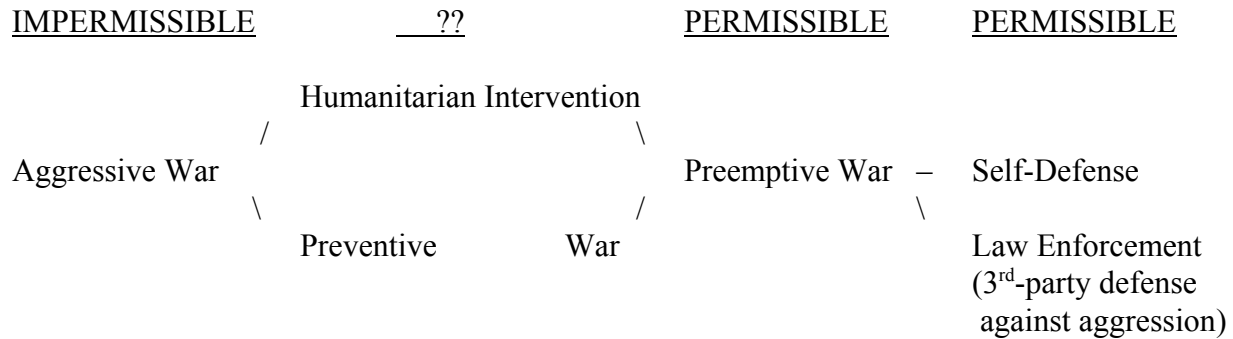
⁴ For an extended argument to this effect, see Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York: Palgrave, 2001).

presence of human rights violations must be satisfied to justify humanitarian interventions.⁵

The final problem-category is preventive war, which I will characterize as a preemptive war in which the imminence requirement is relaxed. A preventive war aims to forestall a military threat that is distant rather than imminent. Like humanitarian intervention, preventive war fits awkwardly into the U.N. Charter system, because both involve first strikes. Although proponents justify preventive war as a form of self-defense, it looks more like a war of aggression, for *posing a distant threat*, unlike *posing an imminent threat*, is hard to assimilate to the category of armed attack. Distant threats may never come to fruition, and actions that are ordinarily thought to lie unproblematically within a state's jurisdiction -- for example, increasing the size of its armies -- may pose distant threats of armed attack against other states.

We can range these categories in a partial ordering, with Aggressive War at one end and Self-Defense Against Armed Attack -- "Self-Defense" for short -- at the other (along with Law Enforcement, in the sense of third-party defense against aggression). Preemptive War will be located one step over from Self-Defense, while Humanitarian Intervention and Preventive War will both be one step over from Aggressive War, with no ordering between the two:

⁵ I have discussed these issues in "Just War and Human Rights," *Philosophy & Public Affairs* 9 (1980): 160-81, revised and reprinted in *International Ethics: A Philosophy & Public Affairs Reader*, edited by Charles Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons (Princeton University Press, 1985), and more recently in "Intervention and Civilization: Some Unhappy Lessons of the Kosovo War," in Pablo de Greiff & Ciaran Cronin, eds., *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization*, (MIT Press, 2002), pp. 79-115.



During the prolonged debate before the U.S.-led invasion of Iraq in 2003, advocates of preventive war sometimes likened the attempt to disarm Iraq to Israel's 1981 bombing of Iraq's nuclear facility at Osirak, to prevent Iraq from acquiring nuclear weapons. But the analogy is misleading: Osirak was a quick in-and-out aerial attack leaving the reactor in ruins, but Iraq's territory and government intact. The 2003 Iraq invasion was a war of conquest, with the stated aim of regime change, that is, the destruction and replacement of Iraq's government. One was a preventive *attack* while the other was a preventive *war*. I wish to restrict my discussion to the more extreme case: a full-fledged war of conquest justified by the claim that the conquered country poses a long-term threat to the invader.

The Justification of the Legalist Paradigm

What is the argument for the legalist paradigm, with its commitment to the moral primacy of state sovereignty and to the sovereign equality of states? Sovereignty, after all, can be abused, and much of the debate about humanitarian intervention and human rights has emphasized that states should have no sovereign right to tyrannize their own people. Sovereign equality is even more puzzling. Why should Liechtenstein, with a population of 32,000, be regarded as the equal of China? If anything, this seems to diminish the relative importance of the billion Chinese – in this sense, the sovereign equality of states seems facially inconsistent

with cosmopolitan ideals of human political equality – and anyone for whom the numbers count should find the postulate of sovereign equality puzzling.

Walzer offers a non-consequentialist, rights-based justification of sovereignty that, if it is successful, helps dissolve the puzzle. On Walzer's theory, the moral basis of state sovereignty lies in the right of self-determination, or as he describes it, "communal autonomy."⁶ This is the right of peoples to work out their own fate, independent of "foreign control and coercion."⁷ Walzer often speaks of this as a right of communities, but he also makes it clear that ultimately all rights of communities must derive from individual rights.⁸ Thus, on his view individuals have a right to live in self-determining communities of their own, and the Liechtensteinians have just as much a right as the Chinese. In this respect, the numbers don't count: otherwise, a Liechtensteinian's right will be diminished solely because she was born in a smaller state.⁹

On Walzer's theory, then, the crime of aggressive war lies in its breach of sovereignty, because breaching sovereignty violates individual human rights to participate in the process of political self-determination. Attractive as it is on its face, however, I believe this theory fails.¹⁰ To see why, we must understand that in Walzer's view "self-determination" is a term of art. It does not refer to democratic freedom, or indeed to any specific institutional arrangement. It

⁶ Walzer, *Just and Unjust Wars*, p. 90.

⁷ Ibid., p. 89.

⁸ Ibid., pp. 53-54.

⁹ This argument bears close resemblance to the approach in John Taurek, "Should the Numbers Count?", *Philosophy & Public Affairs* 6 (1977), especially pp. 313-15.

¹⁰ Here I am elaborating on arguments I originally made in "The Romance of the Nation-State," *Philosophy & Public Affairs* 9 (1980): 392-97, reprinted in Beitz et al., *International Ethics*.

refers only to the absence of foreign control and coercion, that is, to the protection of sovereignty.¹¹ A sovereign state is self-determining in Walzer's sense regardless of whether it is democratic, or even whether it is oppressive and tyrannical. Self-determination, he emphasizes, is a broader notion than political freedom: "it describes not only a particular institutional arrangement but also the process by which a community arrives at that arrangement -- or not."¹² If a democratic or liberal revolution gets crushed, with its leaders executed, its supporters jailed or murdered, and thousands of people expelled, that still counts as self-determination in Walzer's sense provided that the political struggle remains internal to the community. Perhaps this is what we mean by self-determination when we think of societies from a suitably detached and Olympian point of view. Self-determination becomes something like national destiny. But if so, the question arises why anyone should regard self-determination as an important value, something to which people have a right that it is a crime to violate. Why, that is, should individuals value self-determination in Walzer's sense: a right to their freedom if they are brave enough and lucky enough to win it without getting killed? For those too old or too young for the barricades (or too feeble or mild-mannered or busy caring for their children), this will be an unrecognizable right, that is, unrecognizable as a right to something presumptively valuable. It is like the right to health care provided you can win it in a karate tournament.

Walzer would presumably reply that the analogy is false, for freedom is unlike health care. Health care is a worthwhile good regardless of how we obtain it; but freedom is not

¹¹ In this sense, Walzer argues in a circle: violations of sovereignty are "the crime of war" because they violate the right to self-determination, that is, the right to sovereignty.

¹² Ibid., p. 87.

freedom unless people win it themselves: “No one can, and no one should, do it for them.”¹³

Here Walzer cites John Stuart Mill: unless people win their liberty for themselves, through their own courage and persistence, it is cheap liberty and they will never be “fit for popular institutions.”¹⁴ Their democracy will fail. Thus, although self-determination need not itself form the substance of a right men and women value, such as actual institutions of self-governance, it is a necessary condition for more substantial rights.

However, Walzer seems here to overlook that democratic institutions handed to people on a platter and democratic institutions won solely through their own heroic efforts are not the only alternatives. An outside intervener might successfully depose an undemocratic government, then provide technical and financial assistance as the newly-liberated people create democratic institutions with their own sweat equity. That was the case in postwar Germany and Japan, and it is strange that Walzer ignores these important counter-examples to Mill’s thesis. And those of us born into stable democratic systems can certainly enjoy the freedom they afford even if we are lucky enough never to have to risk our necks for it, a possibility that Mill and Walzer appear to deny.

The conclusion, then, is that self-determination in Mill’s rather abstract and chilly sense of an internal mortal struggle for political control of a society does not form the substance of an individual right; and so state sovereignty, described by Walzer as “an arena within which freedom can be fought for and (sometimes) won”¹⁵ is not a collective right grounded in

¹³ Ibid.

¹⁴ Ibid., p. 88, quoting Mill in *On Liberty*.

¹⁵ Ibid., p. 89.

individual rights to self-determination. That does not, of course, imply that states should simply be open for conquest. Free, democratic institutions may well be a fundamental human right, and conquerors have seldom aimed to establish free, democratic institutions in the nations they vanquished.

Yet the identification of sovereignty with political freedom dies hard, and theorists should never ignore the fact that many people are willing to die and to kill for sovereignty. As Paul Kahn reminds us, during the Cold War both the United States and the USSR were prepared to annihilate the planet rather than lose their sovereignty.¹⁶ Faced with this passion for sovereignty, it is important, therefore, to understand that sovereign states are neither sufficient nor necessary for free, democratic institutions. Not sufficient, of course, because some sovereign states are tyrannies; and not necessary, because democratic institutions can thrive in political environments far removed from sovereignty. The state of Maryland has free, democratic institutions but lacks most of the powers associated with sovereignty. Similarly, the member states of the European Union seem to believe that their freedom will be enhanced, not diminished, by ceding part of their sovereignty to the EU. To be sure, Walzer's right to self-determination conceptually requires a world of sovereign states protected against military attack, because self-determination is defined as a state's freedom from external coercion. But the more important and substantial human rights – the rights to free, democratic institutions, to basic security and subsistence, and to human dignity – can be realized in many alternative political arrangements, and sovereign nation-states are neither the only such arrangement nor the best.

¹⁶ See Paul W. Kahn, "Nuclear Weapons and the Rule of Law," *NYU Journal of International Law and Politics* 31 (1999): 349-415.

Maryland became freer and more prosperous as part of a federal system than she would have as a sovereign state; and the Europeans are betting that the same is true for them.¹⁷

Thus, I am skeptical of Walzer's defense of the legalist paradigm. I do think that the legalist paradigm has an important rationale, however. But unlike Walzer's it is a largely consequentialist rationale, an extraordinarily simple and familiar one encapsulated in the opening words of the United Nations Charter: "We the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...have resolved to combine our efforts to accomplish these aims." The decision to ban the use of force except in self-defense represented a judgment, emerging from the smoldering ruins of Europe and Japan, that treating war as an instrument of policy poses an intolerable threat to "fundamental human rights" and "the dignity and worth of the human person." Estimates range from 50 million to almost 100 million dead in the two world wars. The modern technology of killing has no relevant historical parallel. Hence the decision to make war-launching into a moral and legal crime, a taboo set off from the game of policy.

In a Westphalian world organized into sovereign nation-states, the ban on first use of force implies a ban on aggression against other states' sovereignty, and so the no-aggression rule will be the same that Walzer proposes. But it would be a mistake to suppose, as Walzer does, that the real evil of war is the assault on sovereignty rather than the untold sorrow of modern war. For, if the world were organized on non-Westphalian lines – as some think it already is – the ban on first use of force would have the same consequentialist rationale (averting the "untold

¹⁷ For an important philosophical discussion of the infirmities of traditional sovereignty, see Thomas W. Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103 (1992): 48-75.

sorrow” of war) but would imply nothing about state sovereignty or its protection.

Although humanitarian intervention is not my topic in this paper, I should emphasize that the Untold Sorrow rationale for the legalist paradigm by no means rules out humanitarian intervention. On the contrary: we should recognize that Untold Sorrow can result from other humanitarian catastrophes beside war, and an exception to the general no-first-use rule when the basic rights of human beings are at stake harmonizes with rather than contradicts the rationale.¹⁸

The Argument for Preventive War

According to Walzer, the argument on behalf of preventive war is largely consequentialist (Walzer says “utilitarian”). In line with his overall method in *Just and Unjust Wars*, Walzer presents the argument in a historically specific form, but it is not hard to generalize. The specific context is European balance-of-power politics in the 17th through 19th centuries, where the preventive-war doctrine articulated by such notables as Bacon, Burke, and Vattel permitted war to prevent states from power-accretions that threatened to destabilize the balance of power. In Burke’s formulation, which Walzer chooses as his illustration, the consequentialist argument holds

¹⁸ Throughout this paper, I use the term “basic rights” in the sense defined by Henry Shue in *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980): basic rights are those the enjoyment of which is necessary to the enjoyment of any other rights, basic or non-basic. They include, on Shue’s argument, rights to security, subsistence, and, arguably, democratic participation. Thus, my current defense of the legalist paradigm remains consistent with the view I defended in “Just War and Human Rights” that a just war is a war in defense of basic human rights and an unjust war is a war that attacks such rights. In “Intervention and Civilization,” I added other conditions to the permissibility of humanitarian intervention: that it not predictably lead to more violations of basic rights than it forestalls, that the losses it inflicts on the enemy not be disproportionate to the benefit, that the decision to go to war result from an internally legitimate political process, and – very important in the contemporary situation in international politics – that the war be followed by state building sufficient to establish peaceful and stable government.

- (1) that the balance of power preserves European liberties, and
- (2) that fighting early, before the balance has become unstable, is less costly than waiting until the threat becomes imminent.¹⁹

In its current American form, the argument runs pretty much along the same lines, with the one glaring exception that American doctrine holds that it's the *imbalance* of power that protects American liberty. According to the NSS, "Our forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of...equaling the power of the United States."²⁰ To be sure, this doctrine does not explicitly threaten that America will use military force to prevent potential adversaries from challenging American dominance. It might mean only that the U.S. intends to maintain forces so powerful that potential adversaries will abandon hope of trying to rival them. Indeed, the NSS explicitly discusses preemption (in the sense of prevention, that is, anticipatory action even when attack is not imminent) only against rogue states and terrorists. But the document also articulates a more general doctrine:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if

¹⁹ Walzer, *Just and Unjust Wars*, pp. 76-77.

²⁰ NSS, at <<http://www.whitehouse.gov/nsc/nss9.html>>. For emphasis, I have omitted the words "...surpassing or...": the original phrasing is "...in hope of surpassing or equaling the power of the United States."

necessary, act preemptively.²¹

Because the United States believes that national security requires military dominance, this doctrine clearly implies that Washington regards preventive war as a justifiable response to rivals' efforts to reach military parity with the U.S.

The consequentialist argument for preventive war can be spelled out more generally than either Burke's balance-of-power argument or the American-dominance variant. Tracking Walzer's phrasing, the general argument combines two propositions:

- (1) that some state of affairs X (balance of power, American dominance, whatever) preserves some important value V (European liberty, American liberty, whatever) and is therefore worth defending even at some cost; and
- (2) that to fight early, before X begins to unravel, greatly reduces the cost of the defense, while waiting doesn't mean avoiding war (unless one gives up V) but only fighting on a larger scale and at worse odds.²²

President George W. Bush articulated just such an argument in his case for the Iraq invasion: "If we know Saddam Hussein has dangerous weapons today – and we do – does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?"²³

Of course, a vital distinction exists between versions of the argument where X and V are allegedly desirable for the entire society of states, and versions where they are desirable only for

²¹ Ibid., at <<http://www.whitehouse.gov/nsc/nss5.html>>.

²² Here I'm copying Walzer's words with slight changes.

²³ President George W. Bush, Cincinnati speech, October 7, 2002.

the single state launching the preventive war (and its allies). Burke's argument claimed that the balance of power (X) preserved European liberty (V), so that all European states had a stake in maintaining the balance of power through preventive war. While some contemporary Americans may believe that American dominance is also in the general interest – perhaps because they believe a Pax Americana offers the world's best realistic chance of Pax Simpliciter – the NSS's argument for dominance makes no claim to be spelling out anything more than what America takes to be in her own interest. Arguments grounded in a single state's self-interest should not properly be regarded as consequentialist moral arguments. They are egoistic, prudential arguments.

However, that does not mean they lack moral force. Wars of self-defense are fought in the interest of the state under attack, and in that sense they too are special-interest rather than general-interest wars; but self-defense is universally regarded as a legitimate moral justification for war. Arguments holding that a state can wage preventive war against merely potential threats in effect assimilate preventive war to the paradigm of self-defense and preemptive war. Whatever moral force the argument possesses derives from the inherent right of self-defense – provided, of course, that the case for prevention as a legitimate form of self-defense can be sustained.

Preventive War and Collective Self-Defense

The assimilation of prevention to self-defense brings up a second distinction that will prove important subsequently. Article 51 of the U.N. Charter speaks of the inherent right of individual *and collective* self-defense, and Walzer's legalist paradigm likewise holds that aggression justifies war against the aggressor by third-party states, that is, states that are neither

the aggressor nor the victim. Such was the justification for the first Persian Gulf war: the international community was engaged in the collective self-defense of Kuwait.

However, this raises a puzzle. Even though preemptive war and preventive war are often described as extensions of self-defense, existing doctrine does not permit preemptive or preventive wars launched by third parties. Even if Egypt's military build-up in 1967 was so ominous that Israel was justified in launching a preemptive strike, as Walzer maintains, existing doctrine does not hold that any state other than Israel would have been justified in obliterating Nasser's air force to prevent an attack against Israel.

The seeming inconsistency between (i) assimilating preemption and prevention to self-defense, (ii) granting a right to collective self-defense, but (iii) denying a right to collective preemption and prevention should not be troubling. "Collective self-defense" is actually a misnomer, and it covers two distinct situations. One is the right of third party states to enforce the legalist paradigm, and it should not properly be regarded as self-defense at all. It is law enforcement, not self-defense, and we ordinarily do not regard preventive violence as a legitimate form of law enforcement. To be sure, Article 2(4) of the Charter bans not just the use of force but also the threat of force; but it seems clear that this refers only to explicit, imminent threats, not distant, immature, or unarticulated threats. To launch war against a state because its policies appear to be leading it in the direction of committing crimes against peace some time in the future does not fit into a recognizable model of law enforcement.

Collective self-defense can also refer to members of a treaty-based defensive alliance (such as NATO) coming to the aid of a member that comes under attack. It is the only true case of collective self-defense, in the sense of vicarious self-defense. A direct attack on one member

of the alliance poses a threat to all, because to fail to come to the defense of the attacked state defaults on the duty of mutual aid established through the alliance, and defaulting costs all the states whatever measure of protection and deterrence the alliance creates. But a distant, immature threat against one state (as opposed to an actual attack on the state) does not trigger any conventional obligation on the part of others, and hence their failure to engage in a preventive attack does not undermine the alliance. Under such circumstances a third-party preventive war cannot be assimilated to vicarious self-defense.

Theoretically, of course, a treaty could require its parties to launch preventive wars against threats to any member. No existing treaties do that, and as international law currently stands no treaty *can* do it.²⁴ For good reason: any such treaty would multiply the provocations to preventive war and open the way to politically-motivated, or otherwise opportunistic, first strikes on grounds of protecting victims of potential aggression. Thus, preventive war simply does not count as a form of collective self-defense.

Evaluating the Argument for Preventive War

The argument for preventive war is simply that (1) it defends a state of affairs worth defending (such as one's own security), and (2) fighting the war now is a better bet than fighting it later. How good is this argument? Not very, according to Walzer, and here I agree with his analysis. He suggests a consequentialist rejoinder to this argument, namely (3) that even if (1) and (2) are true, it might be better on consequentialist grounds if states did not accept them,

²⁴ Any such treaty would violate the U.N. Charter, and Article 103 of the Charter states that when a treaty conflicts with Charter obligations, the Charter prevails. Similarly, Article 53 of the Vienna Convention on the Law of Treaties invalidates any treaty that conflicts with a "peremptory norm of general international law," such as the use-of-force provisions of the Charter.

because doing so would lead to “innumerable and fruitless wars”: (1) and (2) lower the threshold of war and are likely to make wars too frequent. But Walzer tells us that his most fundamental objection to the argument for preventive war is not consequentialist at all. He thinks that the consequentialist calculations needed to confirm propositions (1) and (2) – or, for that matter, to confirm the consequentialist counter-argument (3) – are likely to be impossible. “Think of what one would have to know to perform the calculations, of the experiments one would have to conduct, the wars one would have to fight – and leave unfought!”²⁵

Walzer’s basic objection to preventive war is not only, he tells us, that preventive war would make war-fighting too frequent, but that it would make it too ordinary. One Achilles’ heel of consequentialism has always been its creepy willingness to treat loss of human life as simply another cost of doing business, life being merely one good among others, to be taken or sacrificed with no more reluctance than any other good whenever the calculus comes out that way. In Walzer’s terms, utilitarian arguments make war too ordinary because “[l]ike Clausewitz’s description of war as the continuation of policy by other means, they radically underestimate the importance of the shift from diplomacy to force. They don’t recognize the problem that killing and being killed poses.”²⁶

As stated, this argument is puzzling and prove too much. Nothing about it is unique to preventive war. All wars are fought to advance or defend some policy or other; all wars by definition substitute force for diplomacy, and all involve killing and being killed. Thus, as stated, Walzer’s argument is equally an objection to preemptive war or even to wars of self-

²⁵ Walzer, *Just and Unjust Wars*, p. 77.

²⁶ *Ibid.*, p. 79.

defense.

I nevertheless think that Walzer is on to something crucial when he says that the doctrine of preventive war makes war too ordinary – that is, too much part of politics as usual. Fleshing out the reasoning, we might say the following. Under the doctrine of preventive war, every state is permitted -- and in life-and-death games, the gap between “permitted” and “prudentially required” thins to the vanishing point -- to base the decision to go to war on its estimation of the threat another state might pose in the future to its vital interests. That depends on what policies the other state adopts and what military preparations it makes. Basing the war decision on a rival’s policy choices one or more steps removed from an imminent attack subsumes the decision to the ordinary chess-game of *Machtpolitik*. Instead of making the trigger for war the threat of imminent attack – the adversary’s unmistakable signal that he has crossed the line from diplomacy to force – preventive war doctrines make the trigger a set of policy-choices not much different in kind from those that states always make – for example, decisions about what weapons programs to pursue, what alliances to form, where to station troops. Preventive war doctrines re-incorporate war-launching into the repertoire of ordinary politics – precisely what the U.N. regime, born of the carnage of World War II, was intended to prevent.

This line of thought again makes the argument seem consequentialist, a ban on preventive war because it looks too much like aggressive war, and experience has taught that routinizing aggression costs too much blood and too much suffering. More specifically, it is rule-consequentialist: a moral or legal rule permitting preventive war legitimizes wars under conditions too close to the routinization of aggression. The reason that Walzer nonetheless regards this as a non-consequentialist argument seems to me that, as we have seen, he defends

the legalist paradigm on a priori grounds rather than on the ghastly experience of European warfare that motivated the founders of the United Nations. On his view, aggression interfering with another state's sovereignty would be wrong regardless of its consequences. On this analysis, preventive war commits the crime of aggression because the *casus belli* consists of internal policy choices by a rival sovereign state that do not (yet) amount to an attack or imminent attack on any other state – in other words, a facially legitimate exercise of self-determination.

Given my earlier criticism of Walzer's emphasis on self-determination, it should come as no surprise that I reject this non-consequentialist version of the argument, which begs the question of what sovereign powers states rightfully possess. But the consequentialist argument seems quite sufficient to justify the ban on aggressive war. Walzer's objection that consequentialist calculation in messy human affairs is impossible, a kind of wonk hubris, is well-taken. But it hardly requires sophisticated calculation to observe that states for which aggressive war represented policy by other means butchered scores of millions of people in the twentieth century.²⁷ If Walzer means that no evidence can show that a ban on preventive war would save lives, the reply is that no evidence can show that *any* doctrine of just war saves lives, simply because states so frequently disregard moral and legal norms. The right test for a moral norm should not be whether the norm will be efficacious, but rather whether it would be efficacious if states generally complied with it. The legalist paradigm, even modified to permit humanitarian interventions, seems likely to pass that test.

²⁷ These are just the death-tolls for the two world wars. Estimates for the total number of war dead in the twentieth century range as high as 175 million.

Along the same lines, I believe that Walzer's consequentialist argument against preventive war, which he states but then sets aside, is a strong one. The argument, recall is that even if (1) and (2) are sometimes correct, it would be better if states abjured preventive war, because doing the calculations required to verify (1) and (2) sets the threshold too low and would make wars too frequent among states that accepted the norm. To see why, let us suppose that the current U.N. framework were to be replaced by a doctrine of preventive war.²⁸ In its simplest form, the doctrine of preventive war holds that wars (including wars of conquest) are permissible against emerging threats, if striking first and fighting early is more advantageous than waiting until an enemy attack is imminent. The doctrine is far too permissive. During the run-up to the latest Iraq war, even Henry Kissinger, not exactly a dove, cautioned against making prevention "a universal principle available to every nation."²⁹ Kissinger noted that a permission to launch preventive war would license India and Pakistan to attack each other. But they aren't the only ones. During the Cold War it would have justified both a U.S. and a USSR first strike against the other given a favorable window of military opportunity. Today, given a similar window, it would justify first strikes by both North Korea and Japan, both Ethiopia and Eritrea, both Congo and Rwanda, both Israel and Syria, both Serbia and Macedonia -- in short, by both states in any of the world's hot spots.

The problem is not just that a doctrine permitting preventive war broadens the category of permissible wars. It is that it broadens the category to include situations in which the burdens

²⁸ Here and elsewhere in this paper, I am leaving the question of humanitarian intervention to one side.

²⁹ Kissinger, "Our Intervention in Iraq," Wash. Post, Aug. 12, 2002 (op-ed).

of judgment and the infirmities of judgment play an ineradicable role. I use the term “burdens of judgment” in roughly the same way as Rawls, to refer to the inevitability that different (reasonable) people’s judgment will disagree.³⁰ By the infirmities of judgment I refer to the fact that people’s judgment about matters of great moment and high risk is seldom rational. Recall Walzer’s argument: given the impossibility of experimentation and the difficulty of predicting consequences, everyone might be better off on consequentialist grounds if no one undertook the calculation. There is simply no way for decision makers, even supposing they mean to act in good faith, to gauge the likelihood of a potential threat with any accuracy (and once they launch a preventive war, no one will ever know if they were right about the threat); even the leaders of the threatening nation may not know their own medium-term intentions. Add the inevitable squishiness of determining how much risk states should tolerate (an issue in which the burdens and infirmities of judgment loom large), and the problem becomes clearer still: a doctrine of preventive war simply makes it far too likely that “innumerable and fruitless” wars will be launched.

Indeed, the doctrine actually *makes* rival states into potential threats to each other by permitting preventive invasion of potential adversaries based on risk calculations whose indeterminacy makes them inherently unpredictable by the adversary -- and then it licenses attacks by both of them, because now they are potential threats to each other. In Thomas Schelling’s imagery, it is always possible that I will have to shoot my rival in self-defense to stop

³⁰ John Rawls, “The Domain of the Political and Overlapping Consensus,” in *Collected Papers*, edited by Samuel Freeman (Cambridge: Harvard University Press, 1999), pp. 476-78.

him from shooting me in self-defense.³¹ The doctrine of preventive war makes the shooting a legitimate option for both of us, and by legitimizing it unravels whatever precarious equilibrium a broadly-asserted norm against first use of force establishes.

The Appeasement Argument and the Case of Rogue States

Advocates of preventive war draw a different lesson from World War II than that of the U.N.'s founders. Had Great Britain and France been willing to launch a preventive war against Hitler before he completed his rearmament, there would have been no World War II.³² The lesson of Munich is that squeamishness over preventive war inevitably leads to appeasement, and appeasement leads to war. It teaches that the real problem may not be too many preventive wars, but too few. This conclusion, indeed, is built into clause (2) of the argument given earlier for preventive war: "waiting doesn't mean avoiding war but only fighting on a larger scale and at worse odds."

As we shall see, this argument is not without merit, but in the rather journalistic way I've stated it (which I think is faithful to the style of its proponents), the argument substitutes abuse for analysis. The A-word is loaded: everyone knows that appeasement is feckless and spineless

³¹ Thomas C. Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1980), p. 232. Schelling's analysis in Chapter 9 – the paper "The Reciprocal Fear of Surprise Attack" – is highly relevant to our problem, the reciprocal fear of preventive attack.

³² At any rate, that is what critics of Chamberlain's and Daladier's appeasement believe. The two leaders' own military judgment, which may well have been correct, was that in 1938 they were many months from having the military capacity to defeat Hitler. I am grateful to Jeremy Waldron for calling my attention to this frequently-forgotten piece of the history. To make the argument work, we should then have to imagine the preventive attack against Hitler taking place earlier – perhaps as early as 1934, when the Enabling Act, the Night of the Long Knives, and the beginning of German rearmament made the extraordinary nature of his regime clear.

and bad. That, after all, is precisely why advocates of preventive war hurl the A-word at their adversaries to tar policies they dislike, in this case the policy of letting your rivals arm themselves without attacking them. But they need to show that the A-word applies to such policies, not simply say that it does. This is particularly important given that the contrary policy of attacking rising rivals the moment they attempt to augment their power commits strong states to a program of violently repressing weaker rivals in perpetuity. (To avoid begging the question the other way, I will refrain from describing this program either with the other A-word – aggression – or with the even nastier I-word, imperialism.)

The appeasement analogy makes historical sense only when we focus on specific characteristics of the Hitler regime. From the beginning of his political career, Hitler advocated aggression, glorified violence, and practiced what he preached. *Mein Kampf* and the Storm Troopers were not exactly German state secrets.³³ Germany's rearmament, and its annexation of the Sudetenland, violated treaty law. The appeasers nevertheless chose to believe Hitler's lies about his peaceable overall intentions.³⁴ Had they been right, appeasement may well have been the policy that kept the peace, in which case realists would today be using the A-word as a synonym for prudence.³⁵ But the appeasers had ample basis for disbelieving Hitler's lies, and that is why appeasement was wrong. Chamberlain's sin was gullibility, not spinelessness. The

³³ As Walzer emphasizes in his critique of appeasement. *Just and Unjust Wars*, p. 68.

³⁴ Again, this may not do them justice. They may have disbelieved Hitler but not had the military capacity to launch a war against him. But for purposes of the present argument, let us suppose that the critics of appeasement are right that an early attack could have beaten Hitler, and that Chamberlain and Daladier were taken in by Hitler's lies.

³⁵ I leave to one side the question of whether Britain and France should have attacked Hitler anyway on humanitarian grounds if they were militarily in a position to do so.

moral to draw, then, is that preventive war can be justified, if at all, only against rogue states like Hitler's Germany, that is, states that exhibit clear evidence of a military build-up with aggressive intentions. One can put the point in terms of the legalist paradigm. With a rogue state, the distinction between preventive war and preemptive war thins to the vanishing point, because the trajectory of the rogue state makes it an "imminent" attacker in the relevant sense of imminence, which is probabilistic rather than temporal. The future attack is close to a sure thing.

What criteria define a rogue state? For purposes of preventive war doctrine, the most important characteristics are militarism, an ideology favoring violence, a track-record of violence to back it up, and a build-up in capacity to pose a genuine threat.

Under these criteria, Iraq under Saddam Hussein seems like a clear example of a rogue state, having launched aggressive wars against Iran and Kuwait, gassed thousands of its own citizens, and maintained active programs to develop chemical, biological, and nuclear weapons. This does not imply that the US was justified in launching a preventive war against Iraq, however.³⁶ The overwhelming evidence is that Iraq's weapons were to be used against Iran -- or, conceivably, Israel -- but not the United States. As we saw earlier, that might justify preventive wars launched by Iran or Israel, but not by the U.S. or the U.K.

The general argument runs independent of the Iraq example, however. So far, I have

³⁶ I leave to one side the question of whether the U.S. was entitled to launch a humanitarian war against Iraq. I think the answer is yes, with the important caveat that humanitarian wars can be justified only if they are followed by sufficient investment of energy and resources to reconstruct the invaded nation. However, the most salient moment to launch a humanitarian war against Iraq would have been in 1988, during the Anfal campaign of crimes against humanity against the Kurds -- a period when the United States was backing Iraq, not opposing it. See the discussion of U.S. policy toward Iraq in the 1980s in Samantha Power, *"A Problem From Hell": America and the Age of Genocide* (New York: Basic Books, 2002), pp. 171-245.

argued two points. First, I criticized an unrestricted doctrine of preventive war. The unrestricted doctrine holds that preventive wars (including wars of conquest) are permissible against potential adversaries, if striking first and fighting early is more advantageous than waiting until an enemy attack is imminent. Second, I defended a restricted doctrine of preventive war. The restricted doctrine holds that preventive wars are permissible against rogue states, where a rogue state is one whose policies and past track-record make it overwhelmingly likely that it is arming with belligerent intentions. The restricted doctrine permits preventive war launched by potential victims of a rogue state's aggressive attack, but not by third parties.

Extensions and Restrictions on Preventive War: Terrorists, Low-Level Long Term Threats, and Threats to Economic Interests

The U.S. offered a somewhat different argument for preventive war against Iraq, namely that the evil to be prevented was not an Iraqi attack against the U.S. homeland, but rather Iraqi-developed WMD falling into the hands of terrorists. A similar argument about the connection between the target state of preventive war and terrorism supposedly justified the U.S. war against Afghanistan. And insofar as the American doctrine of preventive war constitutes part of the War on Terror, it focuses not only on rogue states, but on any states that sponsor, tolerate, or even negligently fail to repress terrorists. Because the U.S. is a principal target of terrorism, it holds that preventive war against terrorism-connected states falls under the extended principle of self-defense.

It is unclear whether the focus of the argument is, as in the Afghan case, a connection with terrorism in general, or whether, as in the Iraqi case, it is the connection with terrorism and WMD. The latter case seems relatively clear. If a state seems likely to develop WMD and give

them to terrorists, the case readily assimilates to the restricted doctrine of preventive war defended previously. Here, the state itself may not meet the criteria for roguishness, but it proposes to arm groups that do, and so a potential victim of these groups is entitled to wage preventive war in order to prevent terrorist attacks. Given the remorselessness that international terrorists have exhibited, there is little question that once terrorists have fearsome weapons at their disposal, attacks using those weapons are imminent in the probabilistic sense. (Even opponents of the Iraq War seldom maintained otherwise. Rather, they questioned the factual judgments about Iraqi intentions and terrorist connections. A number of fairly hawkish analysts were skeptical that Saddam Hussein would give WMD to terrorists rather than hoarding them. Others, supporting the war, believed that Saddam could not be counted on to act in his own rational self-interest, or argued that even if he withheld WMD from terrorists, no one could predict what his successors would do. I express no opinion on these factual matters here. No one really knew then, and obviously we will never know now.)

Thorny questions remain, of course. I rather cavalierly lumped together states that sponsor terrorists, states that tolerate terrorists, and states that negligently fail to repress terrorists. But of course these are very different, and a fully worked out version of the restricted doctrine would have to settle on whether states that merely tolerate or fail to repress terrorists on their territory are legitimate targets of preventive war. If so, the permission to launch preventive war becomes startlingly broad. The U.S. would be entitled to conquer Russia, with its uncontrolled black market in uranium and nuclear know-how, as well as Saudi Arabia, with a reigning religious tradition hospitable to terrorism, which the royal family can repress only at its peril. These startling results need not mean that the theory is wrong, of course. But, in line with

the legalist paradigm and Walzer's criticisms of preventive war doctrines, I believe that the overall strategy in formulating a restricted doctrine should be to draw the permission as narrowly as possible, to avoid giving a green light to "innumerable and fruitless wars."

For the same reason, a general permission to launch preventive wars against states involved with terrorist organizations, regardless of the threat of WMD, seems far too broad. It would make dozens of states legitimate targets of preventive wars by dozens of other states. Moreover, the doctrine should, on pain of incoherence, also permit wars against states that harbor or sponsor any activity posing dangers comparable to those posed by terrorists -- for example, organized crime, or even the release of toxic wastes across borders. A non-arbitrary formulation of the doctrine would have to formulate the conditions permitting preventive war in terms of the probability of a threat materializing and the harmfulness of the threat, without particularizing the source of the injuries. After all, death is death, whether it results from a terrorist attack or an environmental toxin. That broadens the permission to launch preventive war even further, and leads to counter-intuitive results, for example that states willfully emitting high levels of greenhouse gases become legitimate targets of preventive war.

The need to formulate the doctrine of preventive war as narrowly as possible yields other restrictions as well. For example, I have suggested that preventive war against a rogue state is morally similar to preemptive war against imminent attacks, once we think of imminence in probabilistic rather than temporal terms. To think probabilistically rather than temporally about the imminence of an attack means regarding the attack as imminent once its likelihood surpasses some imminence threshold (say, a probability of 80%), rather than regarding it as imminent if it is going to happen tomorrow or next week. However, we must be careful in analyzing the notion

of a likelihood that surpasses some imminence threshold. It would be a mistake to calculate the likelihood by computing the cumulative likelihood over time, for even relatively improbable attacks can attain a high cumulative likelihood within a few years. A back-of-the-napkin calculation illustrates the problem. After how many years N will the likelihood that an attack occurs sometime during those N years exceed the imminence threshold? Say that the annual likelihood of attack is 10%, and the imminence threshold is 80%. In that case, N is a bit more than fifteen years.³⁷ That is, at an annual probability of 10%, the likelihood is more than 80% that an attack will occur within fifteen years and a few months. Although fifteen years is a time period beyond the horizon of most practical politicians, it surely lies within the purview of rational strategic planners, and might well provoke a preventive war. Yet to regard an attack with an annual probability of 10% as “imminent” stretches the concept of imminence beyond recognition. During the Cold War it would have made it morally legitimate for the USSR to launch preventive war against the U.S. The U.S. had thousands of thermonuclear warheads targeted against tens of millions of Soviet civilians. The number of expected deaths was high, because even though the probability of a U.S. first strike was low, it was hardly negligible. The U.S. refused to embrace a no-first-use principle, formulated contingency plans for nuclear first strikes, and was the only country in the world that had unapologetically used nuclear weapons against civilians.

³⁷ Let the annual probability of an attack by a potential adversary be p , and label the imminence threshold T . The general answer is given by the formula $N = \log(1 - T) / \log(1 - p)$. The probability of no attack within N years is $(1 - p)^N$, because $1 - p$ is the probability of no attack in each of the N years and the N events are independent. Thus, the probability of an attack within N years is $1 - (1 - p)^N$. It reaches the threshold when $1 - (1 - p)^N = T$. Solving for N yields $\log(1 - T) / \log(1 - p)$.

Intuitively, the difficulty is this: the 10% annual probability of attack suggests that the adversary probably has no active intention to attack; hence, no attack is imminent. The fact that the cumulative probability grows past the threshold in fifteen years reflects the possibility that things might change, or that unforeseen happenstance might trigger an attack. A judgment of imminence should not rest on the bare possibility of accident or changed intentions. We should therefore look beyond numerical probabilities to the underlying realities that justify the numbers: the adversary's history, policies, and likely intentions. In the Iraq case, for example, an appropriate preventive rationale would be a credible argument that once Saddam Hussein acquired nuclear weapons, he would either give them to terrorists or (a more likely scenario) launch conventional wars against his neighbors using the nuclear weapons as a deterrent against outside efforts to stop him. An inappropriate preventive rationale would be an argument that Saddam's successors, whomever they might be, might someday give WMD to terrorists.

Similarly, the need to formulate the doctrine of preventive war narrowly suggests that the only threat justifying a preventive war is that of an armed attack against the basic rights of a state's people, not its economic interest in maintaining a level substantially beyond the fulfillment of basic rights. Broadening the doctrine to include economic interests in sustaining a high level of economic prosperity would justify, to take one conspicuous example, Japan's attack on Pearl Harbor. Japan was (and remains) an industrial economy in a land desperately short of natural resources. Her economy depends on imported raw material -- the real motive for the conquest of China. From the Japanese point of view, the American naval presence in the Pacific -- especially the Philippines -- posed an intolerable threat to Japanese economic well-being. It meant that Japan's major rival for Pacific trade was in a position to cut off Japanese access to

imports from Australia and Southeast Asia at will.³⁸ Japan's war aim was a limited one: to drive the U.S. Navy out of the Pacific west of Hawaii. If the doctrine of preventive war includes a permission to launch preventive wars against potential economic threats, the attack on Pearl Harbor was an act of just war.

All these limitations on the doctrine of preventive war flow from the requirement to frame the permission narrowly, in order to avoid principles that justify too many wars. Against this, a critic might object that it simply begs the question to speak of too many wars. The question it begs, of course, is "how many are too many?" The argument on behalf of preventive war, remember, stipulated that the war would have to be fought later, at higher cost and greater risk. So perhaps a broad permission to fight preventive wars would actually decrease the amount of violence.

Here, I believe, Walzer's argument displays its real force. How would one ever know, without an experiment in fighting or failing to fight preventive wars in similar circumstances? The situation simply does not lend itself to experiments. It lends itself only to an examination of history. For the most part, the historical record shows that states fight wars regardless of reigning doctrines of just war, because they regard those wars to be in their interest. This is very close to the situation that would prevail under an expanded doctrine of preventive war; and the result has been the gruesome devastation of the twentieth century. Furthermore, it seems to me

³⁸ I draw this analysis from George Friedman and Meredith Lebard, *The Coming U.S. War With Japan* (New York: St. Martin's, 1991), pp. 56-85, which, notwithstanding its sensationalistic title, offers an incisive and convincing analysis of Japan's chronic geopolitical dilemma. Friedman and Lebard observe that the post-war friendship between Japan and the U.S. did not mean that the geopolitical rivalry over Pacific trade was an illusion. It meant only that during the Cold War, Japan needed the U.S. for defense, and the U.S. needed Japan because of her strategic location controlling Soviet naval access to the Pacific.

that when a doctrine of just war justifies a great many wars that seem intuitively unjust – the attack on Pearl Harbor is only one example – we are entitled to skepticism about the doctrine. Perhaps, as Walzer suggests, there are good consequentialist reasons for abandoning the consequentialist argument for a broad doctrine of preventive war.

The Argument for a Double Standard

I now wish to shift the argument dramatically. So far, I have followed Walzer and the United Nations Charter, formulating doctrines of preventive war in terms of the legalist paradigm. Specifically, I have assumed a world of sovereign states, legally and morally equal to one another, obligated to respect each other's sovereignty and territorial integrity, but permitted to defend themselves against armed attack. The argument has accepted the legalist view that a first-strike attack against another state is *prima facie* wrong – it is the crime of aggression – and then examined the cases of preemption and prevention. The argument has been a validation of the legalist paradigm's rejection of preventive war on Walzer's ground that permitting preventive war makes war too easy and too ordinary; but with a narrow exception arguing that in the face of nearly-certain danger posed by rogue states, whether or not the danger is temporally imminent, a first strike is more like self-defense than aggression.

Above all, I have assumed that we seek a *universal* doctrine of preventive war, one that would apply to all states, in line with Article 2(1)'s postulate of the sovereign equality of states. Kissinger, in the article from which I quoted earlier, insisted that American policy-makers preoccupied with on Iraq “translate intervention in Iraq into terms of general applicability for an international system.”³⁹ This advice represents the rock-bottom requirement of anything that can

³⁹ Kissinger, “Our Intervention in Iraq.”

sensibly be called a “legalist paradigm,” because rules of law – as opposed to managerial decisions – must be rules of general applicability.

That is not how American hard-liners see the world. A recently fashionable view in Washington holds that a frank double standard is appropriate in a world dominated by a single “hyper-power.” To put it bluntly, the U.S. gets to do things that other states do not. In particular, the US gets to launch preventive wars against potential threats, but India and Pakistan, Ethiopia and Eritrea, Serbia and Macedonia do not. Before investigating the legitimacy of this view, a few examples illustrating it might be in order. Let me mention three examples.

1. An early example of the argument is a deliberately provocative, shrewdly argued article by Jack Goldsmith – then a law professor, now an official in the White House Office of Legal Counsel – entitled “International Human Rights Law and the United States Double Standard.”⁴⁰ Goldsmith observes that the U.S. has one of the world’s worst records for ratifying human rights treaties, but that the U.S. nevertheless strongly favors other nations ratifying them. He defends the double standard, in part by the stark claim that, quite frankly, the US *can* maintain the double standard.⁴¹

2. The US has based its fierce resistance to the International Criminal Court on the ground that the ICC refused to create a special immunity from prosecution for Americans. American resistance has taken three dramatic forms. First, Congress enacted a law (nicknamed

⁴⁰ Jack Goldsmith, “International Human Rights Law and the United States Double Standard,” *The Green Bag* 1 (1998): 365-73.

⁴¹ *Ibid.*, p. 371. As a constitutional matter, even though the U.S. Constitution incorporates international treaties into federal law, any subsequent federal statute on the same subject supersedes the treaty just as it would a prior federal statute.

the “Hague Invasion Act”) authorizing the President to use any available means, including military force, to rescue Americans from the custody of the ICC. The President signed it into law. Second, the U.S. has undertaken a world-wide effort to sign bilateral treaties (so-called “Article 98 agreements”) with ICC members in which both sides agree not to turn each other’s nationals over to the ICC – despite the fact that such a refusal by a state-party to the ICC would violate its obligations under the Rome Treaty. Third, the U.S. has lobbied states to de-sign the Rome Treaty and has cut off military aid to those that refuse to sign Article 98 agreements. American officials have made it clear that had the ICC granted a blanket immunity to Americans, America would not oppose the Court. The U.S. wanted an explicit double standard - immunity for Americans, the ICC for everyone else -- enshrined in international law.

3. Robert Kagan’s recent book *Of Power and Paradise* – nowadays a “must-read” among Beltway insiders – argues that American and European interests are in the process of diverging irreconcilably. The Europeans favor international rules and institutions over military muscle, whereas the Americans take the opposite approach. Americans, on Kagan’s diagnosis, are nationalists who jealously guard their own sovereignty, whereas the Europeans are willing to subordinate their own sovereignty to secure a “Kantian paradise” of perpetual peace and dispute-resolution through legal rules. Kagan does not overtly take sides – his basic argument is that both approaches flow naturally from the historical experience of the two protagonists. But precisely because of his historicist (Nietzsche would have said “genealogical”) analysis of American and European approaches, Kagan urges everyone to “get used to the idea of double standards,” with Americans using “force, preemptive attack, deception, whatever is necessary”

while Europeans maintain a “rule-based Kantian world.”⁴² Far from decrying the double standard, it becomes increasingly clear as Kagan’s argument proceeds that his sympathies lie with the American side, that is, the side that favors a double standard.

Committed internationalists react with dismay to the American nationalists’ “rules for everyone but us” approach. But they would be fools to ignore the incredible dimensions of American superiority, the state of affairs that the NSS regards as a legitimate goal of American foreign and military policy. The U.S. annual military budget is as large as the next twenty-one nations’ military budgets combined; the projected 2004 budget of about \$400 billion is about six times the size of Russia’s, the next largest military budget.⁴³ And the U.S. economy – a quarter of the total world GDP, and nearly as large as the next three economies combined – supports this gigantic military investment with virtually no strain.⁴⁴ The \$400 billion defense budget represents about 4% of America’s GDP. The annual expenditures alone actually understate the true dimensions of American technological superiority, which represents the culmination of decades of effort and expenditure. To call America a superpower, even the sole superpower, likewise understates the magnitude of disparity, because it implies continuity with the Cold-War

⁴² Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Knopf, 2003), pp. 74-75. Some of this language is not Kagan’s own, but rather is quoted approvingly from the British journalist Robert Cooper. The term “Kantian paradise” appears on page 75, and Kagan earlier made the reference clear: “Europe...is entering a post-historical paradise of peace and relative prosperity, the realization of Immanuel Kant’s ‘perpetual peace.’” Ibid., p. 3.

⁴³ Based on figures from the Center for Defense Information, <<http://www.cdi.org/budget/2004/world-military-spending.cfm>>.

⁴⁴ These figures for 2001, in 1995 dollars, may be found at the website of the U.S. Energy Information Administration, Table B2, World Gross Domestic Product at Market Exchange Rates, 1992-2001, <<http://www.eia.doe.gov/emeu/iea/tableb2.html>>.

era of superpower politics; perhaps the French neologism “hyper-power” (*hyper-puissance*) better indicates the unparalleled situation in which we find ourselves, precisely because it is an unfamiliar word. The appropriate imagery is the opening scene of Book 8 of the *Iliad*, where Zeus, furious at the other Olympians’ meddling in the Trojan War, assembles the gods and threatens to hurl them into Tartarus if their interference continues:

“You may learn then how far my power
puts all gods to shame.
Or prove it this way:
out of the zenith hang a golden line
and put your weight on it, all gods and goddesses.
You will not budge me earthward out of heaven,
cannot budge the all-highest, mighty Zeus,
no matter how you try.

But let my hand
once close to pull that cable – up you come,
and with you earth itself comes, and the sea.
By one end tied around Olympos’ top
I could let all the world swing in mid-heaven!
That is how far I overwhelm you all,
both gods and men.”

They were all awed and silent.⁴⁵

Or awed and shocked. The Mother Of All Bombs creates a passable facsimile of the Father Of All Gods, and the ultimate guarantor of American superiority is the arsenal of thousands of nuclear weapons, which make Zeus’ threat – “up you come, and with you earth itself comes, and the sea” – no mere poetic hyperbole. Obviously, America remains vulnerable to terrorist attacks, but threats from other states are for all practical purposes non-existent.

The implication for preventive war seems straightforward. The arguments we have reviewed both for and against preventive war have all assumed that a doctrine of preventive war

⁴⁵ Homer, *The Iliad*, trans. Robert Fitzgerald (New York: Anchor, 1974), p. 182 (Book 8, lines 18-30).

would apply equally to geese and ganders, and the debate revolves around the question of whether a generalized permission to wage preventive war sets the threshold for warfare too low. The American nationalist argument rejects the assumption that a doctrine of preventive war needs to be general. It is, in the eyes of American nationalists, a doctrine that the U.S. is entitled to wage preventive war, not that every state is.

At first blush, of course, the idea of a double standard will no doubt repel anyone with egalitarian instincts. But that is because we are used to thinking in terms of the domestic analogy, according to which states are to international society as individual persons are to domestic society. That is an error. States are unlike people in virtually every way. The disparity in size between Liechtenstein and China has no parallel in the case of individual persons, and – as we saw earlier – to treat the billion Chinese on a par with the 32,000 inhabitants of Liechtenstein seems very hard to justify on egalitarian grounds (because by giving each state equal political clout it discounts the interests of each Chinese compared with each Liechtensteinian by a ratio of almost three million to one). Once we stop thinking in terms of the domestic analogy, the postulate of sovereign equality of states stands revealed as what it really is: a conventional political arrangement that is useful for many purposes but less so for others.⁴⁶ Indeed, the U.N. Charter already recognizes that fact by creating a two-tier system, in which sovereign equality prevails except that the permanent members of the Security Council are more equal than others. And, as historical circumstances transmute, the moral principles appropriate

⁴⁶ Here I disagree with Judith Lichtenberg, who criticizes American exceptionalism as exemplified in the double standard argument on egalitarian grounds. “Pre-emption and Exceptionalism in U.S. Foreign Policy: Precedent and Example in the International Arena,” *Wars on Terrorism and Iraq: Human Rights, Unilateralism, and U.S. Foreign Policy*, edited by Thomas G. Weiss and Marvin Crahan (London: Routledge Press, forthcoming).

to one system of political organization may turn out to be senseless or even destructive applied in another system. A clear example is the way European colonial powers abused the doctrine of sovereignty in nineteenth century Africa – imputing sovereignty to pre-literate tribal monarchs who then “signed” written treaties turning over all their land and people to the colonial powers in return for small gifts of cloth.⁴⁷

The American nationalists’ argument is simply that the world has changed again. Just as the postulate of sovereign equality of states would have made no sense within the Roman empire, it makes no sense in the world of American hyper-puissance. At this point, the rule-of-law model, based on the domestic analogy, may no longer be the best way to organize the world peacefully and harmoniously. For better or for worse, America has become the military, economic, diplomatic, and in many ways cultural leader of the world, and the moral principles governing any regime of international security must acknowledge this asymmetry.

I believe that there is no quick or simple egalitarian argument against the double-standard position, because the connection between moral egalitarianism among individuals in domestic society cannot simply be assumed to transfer to states in international society. At the same time, however, the claim that the double standard represents a *moral* theory of international politics requires some defense beyond the assertion that America has the power to act as she sees fit. Otherwise, the argument represents nothing more than realist amoralism, the latest incarnation of the brutal dictum of Athens’ generals to the Melians, reported by Thucydides: the strong take

⁴⁷ See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), pp. 136-43, as well as the depressing discussion of the use of native treaties in Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton Mifflin, 1998).

what they can, and weak suffer what they must.⁴⁸ Melian amorality represents not a moral theory of politics, but the denial that morality has a place in politics.

In some hands, to be sure, the nationalist argument assumes a realist, amoralist form: the U.S. does what is in its interests, and try and stop us. We see this, for example, when Goldsmith writes:

We can now better understand how and why the United States perpetuates the double standard. The explanation is not subtle. The United States declines to embrace international human rights law because it can. Like other nations, the United States wants the benefits from an international human rights regime with as little disruption as possible to its domestic political order. Unlike most other nations, the United States' paramount economic and military power, combined with its dominance of international institutions, means that it is largely immune from both formal international sanctions and the variety of less formal, lower-level sanctions.⁴⁹

But the double standard argument can also assume the moralized form that has become familiar in the writings of American neoconservatives, holding that American hegemony promotes world-wide democracy, prosperity, and human rights, so that those against whom America finds herself compelled to wage preventive war are enemies of values that even cosmopolitans embrace. If the argument claims to represent a moral position, and not simply an assertion that the United States can get away with the double standard, the moralized forms of the argument

⁴⁸ Walzer begins *Just and Unjust Wars* with a powerful critique of realism, focusing on the Melian dialogue. Pp. 3-20. See also Marshall Cohen, "Moral Skepticism and International Relations," in Beitz et al., *International Ethics*, pp. 3-50.

⁴⁹ Goldsmith, p. 371.

are clearly the ones to take seriously. For want of a more convenient label, I will call the moralized form of the double standard argument, the *moral-hegemony* argument (because it defends American hegemony on moral grounds). One example of the moral-hegemony argument appears in the National Security Statement, which asserts that American dominance will be coupled with a program to “champion the aspirations of human dignity,...ignite a new era of global economic growth through free markets and free trade,...[and] expand the circle of development by opening societies and building the infrastructure of democracy.”⁵⁰

The fact that the American government incorporates these cosmopolitan values in its national security policy is surely noteworthy; it is a far cry from the brutality of the Melian dialogue. The utopianism of the argument may give us pause, however. The argument claims that a new system of international organization, building American dominance into the norms of international political morality, furthers the interests of humanity, and not simply those of the United States. This is fundamentally a factual claim, in the admittedly attenuated sense in which prophecies about the political destiny of the world are factual. I will not attempt to adjudicate the factual claim here; doing so far exceeds my competence. (For that matter, it may exceed anyone’s competence: the line between responsible trend-projection and quack futurology is a thin one, and the only real test – hindsight – offers no comfort when the question concerns what to do now.⁵¹) My aim here is more modest than adjudicating the argument: it is simply to inquire

⁵⁰ NSS, Table of Contents.

⁵¹ “And you should ask yourselves, ‘How can we know that the oracle was not spoken by the Lord?’ – if the prophet speaks in the name of the Lord and the oracle does not come true, that oracle was not spoken by the Lord; the prophet has uttered it presumptuously; do not stand in dread of him.” Deuteronomy 18:21-22. Unless the prophet pins himself down to concrete, short-term predictions, this test will not help much.

into what factual demonstrations it would take to make the moral-hegemony claim plausible.

In the first place, it is important to understand that the burden of proof lies with the proponents of the argument. The baseline hypothesis must be that an American claim to exemption from principles of genuine applicability is a self-interested policy. To suppose otherwise would be wildly ahistorical. Second, the burden of proof is a high one, for the proposal is drastic and grandiose: to bypass or even replace the postwar international order, based on the construction of international institutions such as the United Nations, with an alternative based on official American leadership. Proponents offer two grounds for their claim that American dominance serves wider ends than America's.

The first, which I have already mentioned, holds that American hegemony promotes cosmopolitan values: democracy, economic development, and human rights. The causal mechanism is globalization -- in the words of the NSS, "free markets and free trade," coupled with American aid targeted at "opening societies and building the infrastructure of democracy." Presumably, American military supremacy holds the enemies of globalization at bay -- at the moment, these are Islamic fundamentalists and international terrorists, but they may also include radical nationalists, traditionalists, or anti-capitalists -- and globalization plus targeted aid does the rest. Implicit in this analysis is an argument for the U.S. double standard, including the unilateral permission to launch preventive wars. By virtue of its leadership position in the cosmopolitan evolution of world society, the U.S. must be free to act anywhere against the enemies of cosmopolitan values, unfettered by rules that should rightly bind non-leader nations.

Here, the sources of skepticism should be familiar and obvious. First, it is highly controversial whether free markets and free trade enhance human rights, or even whether the

development they foster improves the well-being of the least well-off members of burdened societies.⁵² Second, it is the prerogative of genuine democracies to elect anti-American or anti-modern regimes, or regimes hostile to globalization or in favor of nationalizing foreign property. Thus the compatibility of American leadership and promotion of democracy remains an open question. Finally, there is little or no evidence that American governments will ever be willing to spend foreign aid at levels that actually fulfil anything like the ambitious program outlined in the NSS.⁵³

Let me emphasize that my purpose is not to endorse any of these criticisms, although I find all of them substantial and plausible; the third is nearly indisputable. The point is rather to sketch some of the hurdles proponents of the moral-hegemony argument must overcome to meet their burden of persuasion.

⁵² It is hardly necessary, and scarcely possible, to reference the voluminous literature on globalization. Important recent critiques of globalization include Amy Chua's argument in *World on Fire* that rapid development in ethnically-divided societies, where the richest benefits flow to an economically-dominant minority, stimulates ethnic war and genocide; and economist Joseph Stiglitz's critique of the needless suffering imposed by International Monetary Fund development policies. Amy Chua, *World on Fire: How Exporting Free Market Democracy Increases Ethnic Hatred and Global Instability* (New York: Doubleday, 2002); Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W. W. Norton, 2002). Within recent years, highly-publicized lawsuits have alleged that multinational corporations have allied themselves with human rights violators in developing countries. See, for example, *John Doe I v. Unocal*, 2002 U.S. App. LEXIS 19263 (2002)(alleging corporate collaboration with slave labor in Myanmar); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2nd Cir. 2000)(alleging that defendant instigated Nigerian government to execute land-rights activists who were obstructing oil drilling). If these allegations are true, it suggests that whatever the long-term effects of globalization, the short-term effects may not prove compatible with protection of human rights.

⁵³ This program, detailed in the National Security Statement, includes providing resources to countries that engage in reform, securing public health, education, and agricultural development. Around the same time the NSS appeared, the U.S. conquered Afghanistan, one of the world's poorest countries. A year later, the Bush administration attempted to zero Afghanistan out of the aid budget (an effort rebuffed by the U.S. Congress).

A second version of the argument is what I shall call the *sheriff theory*. I take the term from an analogy of Robert Kagan, who offers an interesting version of the theory:

The United States does act as an international sheriff, self-appointed perhaps but widely welcomed nevertheless, trying to enforce some peace and justice in what Americans see as a lawless world where outlaws need to be deterred or destroyed, often through the muzzle of a gun. Europe, by this Wild West analogy, is more like the saloonkeeper. Outlaws shoot sheriffs, not saloonkeepers. In fact, from the saloonkeeper's point of view, the sheriff trying to impose order by force can sometimes be more threatening than the outlaws, who, at least for the time being, may just want a drink.⁵⁴

Two points emerge from this passage. First, Kagan is in effect proposing that the United States has become a weak form of a Hobbesian sovereign. ("Weak" in two ways: first, because the U.S. does not hold a monopoly on violence even though it aims to stamp out the possibility of certain extreme forms of violence; second, because the arrangement is only semi-consensual – the U.S. is self-appointed but "widely welcomed.") Second, Kagan offers a rationale for the unilateral U.S. permission to launch preventive war: outlaws shoot sheriffs, not saloonkeepers, so preventive war against the outlaws is more readily assimilated to self-defense when the sheriff launches it. Kagan also offers an argument against those who prefer a full-fledged rule of law model of world affairs to the American double standard:

Most Europeans do not see or do not wish to see the great paradox: that their passage into post-history has depended on the United States not making the same passage. Because Europe has neither the will nor the ability to guard its own paradise and keep it from

⁵⁴ Kagan, pp. 36-37.

being overrun, spiritually as well as physically, by a world that has yet to accept the rule of “moral consciousness,” it has become dependent on America’s willingness to use its military might to deter or defeat those around the world who still believe in power politics.⁵⁵

In an anarchic “Hobbesian” world, not everyone can be a saloonkeeper. Someone has to play sheriff, and the sheriff cannot be bound by the same pacific rules he is trying to enforce.

Kagan’s book contains a great deal of acute analysis of post-war European and American history, as well as a shrewd understanding of the interplay between that history and political psychology. But the grounds for doubt of his thesis should be apparent. First, and most important, Kagan does not explain why holding America accountable to general principles of political morality would defeat the American ability to confront forces that would destroy the “Kantian paradise.” He does say that “great powers...often fear rules that may constrain them more than they do anarchy,” whereas weak powers prefer rules just because the rules constrain great powers.⁵⁶ But of course the fact that great powers fear rules that may constrain them does not make the rules a bad idea.

Second, Kagan exaggerates, almost caricatures, European wimpiness in the face of devastating threats. He does not show that Europe is in danger of being overrun – by whom? – and his mysterious reference to being overrun “spiritually as well as physically” seems like Spenglerian bombast (unless it is something worse, an oblique reference to the growing influence of Islamic immigrants in European societies). Nor does he show that Europe’s military

⁵⁵ Ibid., pp. 73-74.

⁵⁶ Ibid., p. 38.

forces, including two nuclear powers, would be incapable of defending Europe from threats in the foreseeable future without an American military umbrella. The U.K., Germany, France, and Italy are all among the world's top ten military spenders, and the EU states' collective military budgets exceed \$130 billion for fiscal year 2004 (as compared with \$80 billion for China, Saudi Arabia, Iran, Pakistan, North Korea, Libya, and Syria combined).⁵⁷

Finally, Kagan attributes a kind of altruism to American foreign policy that is hard to square with the historical record. His picture of America as the guardian of European freedom seems most accurate in the Cold War context, but even there it seems more likely that America defended Europe in order to contain its geopolitical rival, the Soviet Union, rather than the other way around.⁵⁸ And when it comes to tasks such as preventing or combating genocide, the U.S. has proven to be no sheriff: Samantha Power has extensively documented the policy deliberations in which American leaders have avoided interventions against any twentieth century genocide.⁵⁹ At one point Kagan writes that

although the United States has played the critical role in bringing Europe into this Kantian paradise, and still plays a key role in making that paradise possible, it cannot enter the paradise itself. It mans the walls but cannot walk through the gate. The United States, with all its vast power, remains stuck in history, left to deal with the Saddams and the ayatollahs, the Kim Jong IIs and the Jiang Zemins, leaving most of the benefits to

⁵⁷ "CDI Fiscal Year 2004 Budget," Center for Defense Information
<<http://www.cdi.org/budget/2004/world-military-spending.cfm>>.

⁵⁸ Kagan thinks it is the other way around: see, e.g., p. 75.

⁵⁹ Power, *"A Problem From Hell"*. Power's conclusion is that the consistent U.S. policy in the face of genocide has been trying hard to do nothing while taking no political heat for doing nothing – a policy she describes rather bitterly as largely a success. *Ibid.*, p. 508.

others.⁶⁰

In an otherwise unsentimental book, this is a moment of pure bathos. The claim that American foreign policy has left “most of the benefits to others” seems incomprehensibly out of touch with reality. It is a kind of historical sleight of hand to meet the burden of proving that the double standard serves interests more general than those of the U.S. itself.

I do not assert that proponents of the moral-hegemony argument cannot meet their burdens of proof. It is possible that an international order reconstructed under American leadership, where America enjoys unrestrained freedom to act – including the freedom to launch preventive wars against distant threats – offers the world’s best chance of fulfilling cosmopolitan values. There may be credible evidence to back these claims. But mere assertions, free-market ideology, and wishful thinking are not good enough. Those are all the double-standard proponents have offered to date. Absent a compelling argument for the double standard, the test of principles of political morality – including principles of *jus ad bellum* – should remain, in Kissinger’s words, whether a policy can be translated into terms of general applicability for an international system. If that remains the test, the general doctrine of preventive war fails it.

⁶⁰ Kagan, pp. 75-76.