USING FORCE FIRST: MORAL TRADITION AND THE CASE FOR REVISION

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I. INTRODUCTION

The four years that have elapsed since the United States boldly claimed the right to use preemptive force absent an imminent threat have brought no calm to this roiled area of international law. "Preservationists" defend the standard recognized by states since at least the end of World War II, centered on the requirement of an imminent threat, and argue that relaxing this standard will yield more violence and less order. "Revisionists" counter that the threat of global terrorism renders this standard incapable of providing states with the security they require. Most scholarship in support of revision has focused on changed circumstances since 9/11: the threat of global terrorism and the failures of a standard that conditions preemptive force on the presence of an imminent threat. These arguments are crucial and, understandably, the focus of early efforts at fostering legitimacy. Equally important—and to this point in time overlooked—is a compelling argument that such a shift can


preserve underlying moral commitments that have shaped the contemporary standard in the past.

Making this argument is important for two reasons. First, the international processes that shape the customary law of force are more likely to validate a change that comes about through a process of adaptation, rather than invention. This observation is especially true where a challenged standard has achieved widespread recognition over a considerable length of time. Second, as this Article will suggest, a longstanding and evolving moral tradition has deeply shaped the contemporary standard governing the use of preemptive force. The use of lethal force always raises profound moral questions, and the imminence standard embodies a shared moral judgment about when circumstances justify the use of such force. Altering this standard demands a convincing case that revision can preserve these underlying moral commitments.4

This task requires what Revisionists have so far neglected: an account of the contemporary standard in its historical context, as the heir of a longstanding, carefully developed moral tradition on the use of preemptive force. This Article accepts the conclusion of the Revisionists and suggests that an understanding of this larger historical context can inform the current debate and strengthen the case for revision. In particular, examining the genesis of the contemporary standard offers three crucial insights. First, this account reveals that the singular importance attached to the imminence criterion in contemporary doctrine marks a notable departure from the tradition in which the criterion developed. Although widespread acceptance among states of a standard that gives near exclusive importance to the imminence criterion has contributed to global security over the past several decades, it is important to understand that granting imminence this role is an historic exception—yet an exception within a tradition that has sought to limit the use of force. Second, this account reveals a complex relationship between the principle of necessity and the imminence criterion, in which the former governs the latter. Understanding this point is critical, since the contemporary challenge is precisely the possibility of a fundamental clash between these two norms. That is to say, it is now plausible to imagine a situation where a state has exhausted all reasonable alternatives outside the use of force to secure the legitimate end of self-defense, but the threat is not imminent, as traditionally conceived. Third, and more broadly, this account illuminates the underlying moral commitments that have shaped the contemporary standard governing the use of preemption and shows how revision might preserve these commitments.

Part II, “The Contemporary Challenge of Preemption,” briefly examines the standard governing the use of preemptive force that held sway

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from at least the end of World War II to 9/11, paying special attention to its conceptual structure. Part III, “Preemption and Moral Tradition,” traces several key moments in the historical development of the contemporary standard. Although nearly all commentators point to the celebrated Caroline affair as the locus classicus of today’s standard, the principles that then-Secretary of State Daniel Webster announced drew on a longstanding moral tradition limiting the use of force. This tradition traces back to the writings of Augustine (354–430) and Aquinas (1225–74), early theologians in the Christian tradition, although sustained attention to the question of preemption did not appear until the early modern period. Vitoria, Grotius, Pufendorf, and other luminaries at the dawn of international law refined the standard. Webster employed the tradition but made the novel move to apply the imminence criterion to states—while previous writers in the tradition had consistently limited it to the context of individual self-defense. Finally, Part IV, “Moral Tradition and the Case for Revision,” applies this historical investigation to the contemporary challenge of preemption.

II. THE CONTEMPORARY CHALLENGE OF PREEMPTION

A. The Customary Right of Preemption

The majority of commentators and, arguably, most states recognize a limited right of states to use preemptive force as a matter of customary law.5 This recognition rests on two arguments. The first argument seeks to explain the incorporation of customary law into the Charter system. An important ground for incorporation is the text itself. The exception in Article 51 of the U.N. Charter to the general prohibition on the use of force refers to the “inherent” right of self-defense.6 While not ruling on the question of whether customary law includes a right of anticipatory self-defense,7 the International

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5 For a general overview of this debate, see THOMAS M. FRANCK, RECOURSE TO FORCE 97–108 (2002); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 111–15 (2000); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 165–69 (3d ed. 2001); Oscar Schachter, International Law: The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620 (1984). Critics of such a right usually make at least two arguments. The primary argument states that the U.N. Charter’s Article 51 exception for individual states to use force “if an armed attack occurs” exhausts the possible cases in which a state might act in self-defense. Since preemption comes prior to an armed attack, the Charter disallows it. DINSTEIN, supra at 166. A second argument concludes that customary law, even if it could support such a right, does not. Brownlie takes up this position and argues that the relevant time frame for discerning a customary right is the years since the ratification of the Charter. Reviewing state practice in these years, he concludes, “since 1945 the practice of States generally has been opposed to anticipatory self-defense.” See BROWNLIE, PRINCIPLES, supra note 2, at 701; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 251–80 (1963) [hereinafter BROWNLIE, INTERNATIONAL].

6 U.N. Charter art. 51.

7 “[R]eliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue.” Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27). In a later advisory opinion,
Court of Justice concluded in the *Nicaragua* case (1986) that customary law is an independent source of law within the Charter system.

[T]he United Nations Charter . . . by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" . . . of individual or collective self-defence . . . . The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature.  

The Court goes on to say that the Charter does not directly regulate all aspects of this customary law. Moreover, while the two sources may overlap, customary law retains a valid role independent of the Charter.  

A second argument finds that a limited right of preemption does in fact exist in customary law today. It seems clear that such a right survived developments limiting the recourse to force between the two world wars. One of the most important events interpreting customary law shortly after World War II was a 1946 decision handed down by the International Military Tribunal at Nuremberg. This judgment concerned the legality of Germany's invasion of Denmark and Norway. The Tribunal rejected Germany's argument that it acted in anticipatory self-defense, concluding: "preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation."  

Citing the important *Caroline* case, the Tribunal suggested that preemptive uses of force are lawful where the anticipated attack is
imminent. Several events since the signing of the Charter also confirm that states recognize a limited right to use preemptive force.

B. Necessity and Imminence

The twin norms of necessity and proportionality are central to the contemporary standard governing the decision to use preemptive force, although it is the former that is the focus of this inquiry. Scholars commonly trace these norms to the Caroline affair. During the Canadian Rebellion of 1837, a group of U.S. sympathizers agreed to support the rebels in their cause against the British government. Although the United States had signed a neutrality agreement with Britain, the city of Buffalo, New York was far from the arm of federal control. A U.S. militia seized Navy Island, a British possession in the Niagara River, either on or shortly after December 13, 1837. Over the next several days, a privately owned steamboat, the Caroline, made repeated trips from the U.S. side of the river to Navy Island, bringing more men and supplies. These supplies almost certainly included military equipment and ammunition. On the evening of December 29, a British force raided the Caroline where it was moored along the U.S. shore. After setting it on fire, they towed it into the current where it was swept over the falls.

In a series of diplomatic exchanges from January 1838 to August 1842, the U.S. government sought redress for a claimed violation of state sovereignty, while the British defended their actions as a necessary means of self-defense. Of this correspondence, most important was an April 24, 1841 letter sent by Secretary of State, Daniel Webster, to the British Minister at Washington, Henry Fox. In this letter, Webster outlined a standard to govern the conflict, which Fox accepted in subsequent correspondence: "It will be for that Government to show a necessity of self-defense, instant, overwhelming,

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11 "From all this it is clear than when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date." Id. at 206.


13 For a summary of the history and legal issues involved, see R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INT'L L. 82 (1938). See also Martin A. Rogoff & Edward Collins, Jr., The Caroline Incident and the Development of International Law, 16 BROOK. J. INT'L L. 493 (1990) (arguing that the Caroline incident was vital in the development of limitations on the use of force under customary international law).

14 These letters, as far as the author is aware, are not available in one source. Collectively, almost all of this correspondence is in three sources: BRITISH AND FOREIGN STATE PAPERS, 1840-1841, at 1126-42 (1857); BRITISH AND FOREIGN STATE PAPERS, 1841-1842, at 193-202 (1858); and H. EXEC. DOC. 302, 25th Cong. (2d Sess. 1838).
leaving no choice of means, and no moment for deliberation," and "the act, justified, by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." The Caroline case became important for international law and the norms governing the use of preemptive force, not because states then recognized these norms as binding law in a broad context, but because they were appropriated in the last sixty years under the U.N. Charter.  

Most important for this inquiry is the norm of necessity. Scholars have given relatively little attention to the conceptual structure of this norm. As it appears in contemporary law prior to 9/11 and in the context of anticipatory self-defense, necessity bears on two issues: (1) the existence of reasonable alternatives to the use of force, and (2) the temporal proximity of the threat. Roberto Ago provides a clear statement of necessity understood as "last resort" in his Addendum to the Eighth Report on State Responsibility: "The reason for stressing that action taken in self-defense must be necessary is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force." Ago rightly understands necessity in terms of the legitimate end for using force ("halting the attack"), rather than as a requirement of exhausting even improbable alternatives.

The contemporary doctrine also understands necessity in terms of imminence, as a measure of the temporal proximity of the attack. It is primarily this requirement of an imminent threat that the Bush Administration rejected in the 2002 National Security Strategy, the primary statement on the government's new preemption doctrine. Although he does not use the word, Webster's statement is the classic expression of the imminence requirement. Scholars debate what counts as an imminent threat—and certainly Webster's

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16 It is clear from the comments legal scholars made over the next several decades that the case did not have the standing in the nineteenth and early twentieth centuries that it has today. Lawrence only mentions the Caroline episode in the context of the law of neutrality. T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 610 (4th ed. 1910). Hall and Oppenheim treat the case as an example of the limits on a nonetheless broadly construed right of self-preservation. W. E. HALL, A TREATISE ON INTERNATIONAL LAW 283–84 (4th ed. 1895); I L. OPPENHEIM, INTERNATIONAL LAW 183–81 (1905).
17 Perhaps the most important and comprehensive treatment of these norms is JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES (2004).
19 The document asserts that "we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), supra note 1, at 15. Although the document suggests a process of "adaptation," more accurate is the conclusion of then-Deputy Secretary of Defense, Paul Wolfowitz, who stated that the concept cannot be a necessary condition of preemptive action: "We must be prepared to act. We cannot wait to act until the threat is imminent. The notion that we can wait to prepare assumes that we will know when the threat is imminent." Paul Wolfowitz, Remarks before the International Institute for Strategic Studies (Dec. 2, 2002), available at http://www.defenselink.mil/speeches/2002/s20021202-depsedcdef.html.
strong language points to one extreme—yet this debate goes on within certain limits.\textsuperscript{20} Imminence rules out the first use of force against threats that are merely emerging, outside the heat of a crisis. Traditionally, it meant a visual mobilization of armed forces preparing for an attack.

The relationship between necessity and imminence is often overlooked or misconstrued. Some scholars have suggested that imminence is an altogether separate requirement from necessity. For example, Michael Schmitt concludes: "International law requires that any use of armed force in self-defense, preemptive or otherwise, comply with three basic criteria—necessity, proportionality, and imminency. These requirements derive historically from the Caroline case."\textsuperscript{21} Admittedly there is very little consensus on this issue, if only because few scholars have addressed it.

In the contemporary standard, the aspects of necessity as a measure of the exhaustion of reasonable alternatives and necessity as a measure of the temporal proximity of the threat adhere tightly together. The contemporary doctrine holds that a state has exhausted all reasonable alternatives against a coming threat of an armed attack only when that threat is imminent. Imminence and last resort are not simply two independent measures of necessity; rather, the former is a necessary and usually sufficient requirement of the latter. As Parts III and IV will suggest, however, this understanding marks a notable departure from the past.

III. PREEMPTION AND MORAL TRADITION

Nearly all accounts of the right of anticipatory self-defense begin with the celebrated Caroline affair but fail to locate the governing norms within a much older moral tradition, often referred to as the "just war tradition." Although scholars of international law sometimes make fleeting reference to the tradition, the story told is almost always one of gradual demise—a historical footnote with scant relevance today.\textsuperscript{22} The emergence of the Charter

\textsuperscript{20} Schachter represents the more limited version of this right. Drawing on the near-universal condemnation by states of Israel’s bombing of the Osirak reactor in 1981, he concludes: “We may infer from these official statements recognition of the continued validity of an ‘inherent’ right to use armed force in self-defense prior to an actual attack but only where such an attack is imminent ‘leaving no moment for deliberation.’” Schachter, \textit{supra} note 5, at 1635. McDougal holds that the Webster standard is too stringent, disallowing self-defense where it may otherwise be necessary. “[T]he understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists.” Myres McDougal, \textit{The Soviet-Cuban Quarantine}, 57 AM. J. INT’L L. 597, 598 (1963). Elsewhere, he notes: “[T]he standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the Caroline case.” FELICIANO & McDOUGAL, \textit{supra} note 8, at 217.


\textsuperscript{22} \textit{See}, e.g., D.W. BOWETT, \textit{SELF-DEFENCE IN INTERNATIONAL LAW} 4–8 (1958); DINSTEIN, \textit{supra} note 5, at 60–77; FELICIANO & McDOUGAL, \textit{supra} note 8, at 131–35. Some treatise writers,
system and its restraints on the use of force is often thought to owe little to this moral tradition. The attempt to articulate a secular and universal account of law, coupled with the rise of positivism, led many scholars to overlook the tradition as inescapably tied to religion and natural law theory. This widespread neglect, however, has obscured the more subtle ways in which the moral tradition has shaped the law of force today.

Part III has two aims: to show that the contemporary norms governing the use of preemptive force were shaped by the longstanding moral tradition on the just war, and to begin showing something about the conceptual structure of these norms, particularly the norm of necessity and the related requirement of imminence, which appear at the center of the preemption debate. Part IV will draw these strands together to show how an understanding of the tradition might inform contemporary discussion.

A. The Beginnings of a Moral Tradition: Augustine and Aquinas

Neither Augustine (354-430) nor Aquinas (1225–74) ever directly took up the issue of preemption, but together they constructed a theory of war and its limits, out of which a sustained discussion on the use of preemptive force would emerge in the sixteenth century. By all measures, Augustine is the most important figure at the beginning of this moral tradition.

The waning of the Roman Empire in the West was part of a larger shift from antiquity to the Middle Ages, and Augustine stood at its crux. His inner journey to Christianity, recounted in his Conferences, and his eventual appointment as a bishop in the North African town of Hippo, are well known. With the toleration of Christianity and its eventual elevation as the official religion of the Empire in the first half of the fourth century A.D., Augustine sought to reposition Christianity in this new context. Although recent scholars such as Brownlie, simply overlook the tradition altogether. Brownlie, Principles, supra note 2, at 697.

While some voices suggested at that time that the Charter marked a return to the just war idea, many scholars openly resisted the idea that this change had any connection to the moral tradition on the just war. See, e.g., Josef L. Kunz, Bellum Justum and Bellum Legale, 45 Am. J. Int’l L. 528 (1951); Arthur Nussbaum, Just War—A Legal Concept?, 42 Mich. L. Rev. 453 (1943).

The idea of a justum bellum appeared in classical sources well before Augustine. For a discussion of this idea in the context of the early Roman feticial practice, see John Rich, Declaring War in the Roman Republic in the Period of Transmarine Expansion (1976); Alan Watson, International Law in Archaic Rome: War and Religion (1993); Thomas Wiedemann, The Fetiales: A Reconsideration, 36 Classical Q. 478 (1986). Aristotle was one of the earliest writers to talk about a just war. See, e.g., Aristotle, Politics 1255a3–1255b. Among other writers, one of the most important to make mention of the just war during the Republican period of Rome was Cicero. See, Cicero, On Duties 14–17. Within Christianity, the idea of the just war developed in the writings of Eusebius, Chrysostom, and Jerome. Ambrose, Augustine’s senior contemporary, was especially influential on Augustine’s thought. Ambrose’s On the Duties of the Clergy borrowed from Cicero’s De Officiis, including his notion of the just war.

For general biographical accounts, see Peter Brown, Augustine of Hippo (2d ed. 2000); Gary Wills, Saint Augustine (2000). For works on Augustine’s historical context, see Averil Cameron, The Late Roman Empire AD 284–430 (1993); Hugh Elton, Warfare in Roman Europe (1996); Peter Brown, Religion and Society in the Age of St. Augustine (1972).
have challenged the generalization of Christianity as a purely pacifist religion in its first few centuries, the move from persecuted sect to ascendant imperial religion nonetheless challenged many traditional Christian norms, especially those regarding the use of force. Augustine’s writings provide a limited case for war, rejecting early pacifism, while at the same time providing a fundamentally different account of the use of force than the raison d’État notions of the Greeks and Romans.

Augustine identified several criteria for deciding whether or not to use force. Although he does not enumerate them as such, his writings suggest that a just war will always carry three marks: legitimate authority, just cause, and right intention. The first criterion firmly rules out wars among private individuals, who can resolve their disputes through the appropriate government channels. Moreover, the political community must only go to war for just cause. He describes just cause in two ways: as that which precipitates the use of force and as the aim, or end in using force. The event precipitating the use of force is limited to some injury. The political community must have incurred some wrong, otherwise using force is unjust. "To wage war against neighbours, and to go on from there against others, crushing and subjugating peoples who have done no harm, out of the mere desire to rule: what else is this to be called than great robbery?"

Of course, the effect of this requirement in limiting the use of force will depend largely on what counts as an injury, and Augustine’s understanding is quite broad. Later theorists would narrow the types of injury that give rise to just cause. Augustine also employs the concept of just cause to identify the proper end in the use of force. From this aspect, just cause includes three ends, mentioned throughout his


27 Augustine’s extended discussions of war as a moral issue are scattered. The primary writings include: On Free Will (Book I); Reply to Faustus, the Manichaeans, XXII; Sermon 302; Letter 138, to Marcellinus; City of God; Letter 189, to Boniface; Questions on the Heptateuch, VI.10; and Letter 229, to Darius.

28 This requirement of legitimate authority exists in any act of killing. For a person to kill a man already condemned to die would be an act of murder, if the assailant were not the person appointed to perform the execution. AUGUSTINE, Letter 229, to Darius, in 4 SAINT AUGUSTINE: LETTERS (Wilfrid Parsons trans., Fathers of the Church 1956). Likewise, suicide is murder precisely because the person who kills himself lacks the authority to do so. AUGUSTINE, CITY OF GOD 26–33 (R.W. Dyson trans., Cambridge Univ. Press 1998).

29 "Just wars are those which have as their object vengeance for injuries received." Augustine, Augustine and Just War, 19 AUGUSTINIAN STUD. 37, 66 n.41 (1988) (quoting Questions on the Heptateuch). The Roman law concept of iniuria has both a broad and narrow meaning. Broadly construed, it means unlawfulness or the absence of a right. Narrowly construed, it is the name of a particular delict. Iniuria "embraced any contumelious disregard of another’s rights or personality. It thus included not merely physical assaults and oral or written insults and abuse, but any affront to another’s dignity or reputation... provided always that the act was done willfully and with contumelious intent." BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 216 (1962).

30 AUGUSTINE, CITY OF GOD, supra note 28, at 150.

31 For example, he finds unjust the Roman war against the Sabines, when the latter sought to rescue their stolen women. However, "the Romans might with some justice have waged war against that people when they refused a request to give their daughters in marriage," on account of the "injury... by the refusal of marriage." Id. at 70.
writings: self-defense, punishment, and the restitution of goods taken.\(^{32}\)
Lastly, Augustine believes that the morality of killing depends in part on the intention of the agent. Killing to gain another’s possessions is on the other side of a moral divide from killing to rescue a third person whose life is threatened with no other means of escape.\(^{33}\)

While the tradition continued to develop over the next several centuries, the most important figure after Augustine is Thomas Aquinas (1225–74) in the thirteenth century.\(^{34}\) Aquinas’s central intellectual achievement was his *Summa Theologica*. Although his systematic treatment of war is limited to a few paragraphs, it became the benchmark for later theorists who would give sustained attention to the issue of preemption. In response to the question of “whether it is always sinful to wage war,” Aquinas writes:

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. . . . Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault. . . . Thirdly, it is necessary that the belligerents should have a right intention, so that they intend the advancement of good, or the avoidance of evil.\(^{35}\)

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\(^{32}\) Augustine does not explicitly treat the subject of communal self-defense, though clearly he thinks that the use of force to defend the political community is just. His understanding of the role that the political community plays in securing a minimal level of order requires that he accept this use of force as just. While concluding that most wars are waged out of a lust for domination, Augustine (reminding us that his loyalties were not only to Christ, but also to Rome) suggests that the Romans built much of the empire through just wars of self-defense. Speaking of wars that expanded the empire, he remarks: “Clearly . . . the Romans did have a just defence for undertaking and waging such great wars. They were compelled to resist the savage incursions of their enemies; and they were compelled to do this not by greed for human praise, but by the necessity of defending life and liberty.” *Id.* at 104. See also *id.* at 161–62. The use of force is not limited to stopping an incursion. In his *Commentary on the Sermon on the Mount*, Augustine develops a framework for using force in individual cases where an injury has already occurred and toward the end of deterrence. See *Augustine, Commentary on the Lord’s Sermon on the Mount 62–66* (Denis J. Kavanagh trans., Catholic Univ. of America Press 1951); *Augustine, Letter 138, to Marcellinus, in 3 Saint Augustine: Letters* (Wilfrid Parsons trans., Fathers of the Church 1953).


\(^{34}\) All medieval theories of the just war, including Aquinas’s, depended on Gratian’s *Decretum*, a compilation of canon law completed around 1140. The most important section concerning warfare in the *Decretum* is Causa 23, which includes a broad selection of Augustinian texts and solidified the stamp of Augustine on the tradition. The later Decretists, Decretalists, and theologians, including Aquinas, all drew on Gratian’s text to develop their just war ideas. The most thorough overview of these developments between Augustine and Aquinas is *Frederick Russell, The Just War in the Middle Ages* (1975).

\(^{35}\) *Aquinas, Summa Theologica* 1359–60 (Fathers of the English Dominican Province trans., Benziger Bros. 1948).
Outside of this framework Aquinas also discussed other principles guiding the decision to use force, including a principle of necessity that would play a central role in later accounts of preemption.  

B. The Question of Preemption: Vitoria and the Salamanca School

Although Augustine and Aquinas formed the basic framework of this moral tradition in the Middle Ages, it was not until the early modern period that proponents of the tradition gave sustained attention to the issue of preemption. In so doing, these proponents extended the tradition in two ways. First, they developed various tests to determine when just cause, understood as an injury, arises absent an actual attack. Second, they refined the principle of necessity, a separate and subsequent requirement of exhausting reasonable alternatives that took on special importance in this context. Together, these norms carved out a limited space for the use of preemptive force. Although profound changes in the underlying theory of law accompanied these developments, this account will focus on the transmission of the tradition as a set of practical norms.

The most important proponents of the tradition in the early modern period were the neo-Thomists of sixteenth-century Spain. The revival of Aquinas's thought that they led ensured the transmission of the tradition. Among the Spanish neo-Thomists, Francisco de Vitoria (ca. 1485-1546) was the earliest and perhaps most important figure. Vitoria studied Aquinas's *Summa* at the University of Paris and returned to Spain in 1523 where he eventually taught Theology at the University of Salamanca. His most important writings include his commentary on the *Summa* and several

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36 This principle appears in his discussion of individual self-defense. *Id.* at 1471–72. The historical antecedents of necessity and proportionality lie at least as far back as the Roman law concepts of *incontinenti* and *modernamen inculpatae tutelage* in the context of individual self-defense. The former relates to the norm of necessity and concerns the time in which a person can respond to a violent attack upon her person. *The Digest of Justinian* 43.16.3.9 (Alan Watson ed., Univ. of Penn. Press 1985). The latter relates to the principle of proportionality and requires moderation in a forceful response relative to the circumstances. Both norms appear in this passage from the *Digest:* “Those who do damage because they cannot otherwise defend themselves are blameless. . . . [I]t is permitted only to use force against an attacker and even then only so far as is necessary for self-defense.” *The Digest of Justinian*, supra, at 291. These ideas appear throughout the writings of the canonists.


38 Following Vitoria were several influential theologians who ensured the influence of Thomistic thought in the modern age. These included Dominican theologians such as Domingo de Soto (1494–1560) and Fernando Vazquez (1509–66) and later also included Jesuits such as Luis de Molina (1535–1600) and Francisco Suarez (1548–1617).
discourses on the nature of civil power and the Spanish conquest in the New World.\textsuperscript{39} Vitoria’s primary statement on the issue appears in his commentary on the \textit{Summa}. Responding to Aquinas’s classic statement on individual self-defense in II.II.64.7, Vitoria asks: “If the Doctor’s conclusion is true, i.e., that it is lawful to kill an attacking enemy, would it be lawful to anticipate him and seek to intercept and kill him?”\textsuperscript{40} He also asks:

[I]f I were a poor man, and did not have the wherewithal to hire guards and allies, and my enemy were a noble or rich man, and I know that he is recruiting guards and allies to kill me, then the question is whether it is lawful for me to preemptively kill him, “to kill him before he kills me.”\textsuperscript{41}

The hypothetical raises a primary moral question: Can a person use force first, in self-defense, if the circumstances are such that failure to do so would deny the individual an effective defense?

Vitoria responds by carving out a limited space for the use of preemptive force. His first move is to nuance the concept of just cause in two ways: by rethinking the concept of injury and by developing a standard for determining when an injury might occur prior to an actual attack. Recall that the tradition described just cause in two ways: as \textit{that which precipitates the use of force} and \textit{the aim or end in using force}. Vitoria draws on the latter understanding of just cause to shape his understanding of an injury. In the tradition, this concept of injury appeared in its most tangible sense in the case of physical attack as an actual harm—a wound inflicted or a blow struck. Vitoria concludes that if a person possesses no effective means to defend himself, then the concept of injury must be nuanced. Against the charge that the person acting in anticipation of an act is the attacker, Vitoria states: “this is not to attack, but rather it is to defend oneself. Indeed, the other is attacking when he is preparing himself to kill him,” assuming that there is “no other means to defend oneself...except preempting the enemy.”\textsuperscript{42} Later writers will refer to an “incomplete injury,” but Vitoria implies as much in his response. While the precipitating event is conceptually prior to the legitimate end insofar as the injury gives rise to the end, here the end of self-defense shapes the concept of injury.

\textsuperscript{39} The two most important writings are FRANCISCO DE VITORIA, \textit{On the American Indians}, in VITORIA: POLITICAL WRITINGS 154 (1991) and FRANCISCO DE VITORIA, \textit{On the Law of War}, in VITORIA: POLITICAL WRITINGS 299 (1991), both delivered as lectures in 1539.

\textsuperscript{40} FRANCISCO DE VITORIA, \textit{Reflection on Homicide & Commentary on Summa Theologiae} IIa-IIae Q. 64, 201 (John P. Doyle trans., Marquette Univ. Press 1997) (translator’s notes omitted).

\textsuperscript{41} \textit{Id.} at 201–03.

\textsuperscript{42} \textit{Id.} at 203
Vitoria also nuances the concept of just cause by providing a standard for determining when this injury arises prior to an actual attack. In other words, if the concept of injury in some limited cases extends beyond the actual infliction of the harm, what is the standard for determining when this situation arises? Extending the example he mentions earlier, Vitoria says that a person would be justified in using force if, "supposing that he has journeyed to another city, he knows with scientific certitude that his enemy will seek him and kill him." Although Vitoria's standard is vague, later writers in the tradition provide a concrete list of tests that the potential victim must satisfy before using preemptive force.

In addition to nuancing the concept of just cause in these two ways, Vitoria's second move is to employ a separate but related principle of necessity. He conceives of necessity in terms of "last resort," a requirement that the potential victim exhaust all reasonable alternatives prior to using force. The man Vitoria describes has "no other way" to defend himself. In developing his answer, he explains:

If the man has some [other] means to defend his life . . . he should do that and not preemptively strike his enemy. For so to strike him would not be a means necessary to defend himself "within the bounds of blameless defense," since he could defend his life in another way.

While Vitoria develops this account of preemption in terms of individual self-defense, it seems that he meant it to apply to the commonwealth, as well.

Vitoria's account of preemption is a careful extension of the just war tradition. Specifically, Vitoria nuances the concept of just cause and posits the principle of necessity as a requirement that the potential victim exhaust all reasonable alternatives prior to using preemptive force. Although later proponents in the tradition rework the moral theory lying behind it and nuance the standard that Vitoria develops, his account becomes the starting point for the moral tradition on preemption.

C. The Imminence Standard: Grotius and Pufendorf

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43 Id.

44 Id. (emphasis added). This principle does not require that the person relinquish a significant amount of his property to avoid using force. Elsewhere Vitoria states: "It is lawful to make armed resistance for the defence of property, as admitted in the decreet Olim causam quae (X.2.13.12) adduced by Nicolaus de Tudeschis." FRANCISCO DE VITORIA, On the Law of War, in VITORIA: POLITICAL WRITINGS 299 (1991).

45 In his commentary on the Summa, II.64.8, a marginal gloss on the discussion of the preemptive use of force states: "It is lawful for the emperor for the defense of the republic to get a start on war, if he knows that another hostile king is conspiring against his kingdom. Therefore, in the same way, it is lawful for me to get a start on my enemy." VITORIA, supra note 40, at 234–35 n.246.
In the modern period, Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–94) were the most important theorists in this evolving moral tradition on war and preemption. Grotius was a native of the Netherlands, where he lived until 1594. His major work, *On the Law of War and Peace*, was published in 1625. In the final decade of his life he served as the Swedish ambassador to France, where he negotiated an agreement by which France entered the final stage of the Thirty Years War as an ally of Sweden. He held this position until his death in 1645, only a few years prior to the signing of the Treaty of Westphalia.

Grotius’s account of preemption is a clear extension of the project Vitoria began. He was well-versed in the writings of the neo-Thomists, especially Vitoria, whom he references extensively. Like many modern theorists in the tradition, he begins by considering preemption in the context of individual self-defense.

V.—War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed. 1. The danger, again, must be immediate and imminent in point of time . . . . 2. Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambuscade, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences.

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46 Richard Tuck places Grotius wholly on the side of those espousing a permissive account of war. "[T]he view taken of Grotius in the conventional histories of international law badly misrepresents his real position. Far from being an heir to the tradition of Vitoria and Suarez ... he was in fact an heir to the tradition Vitoria most mistrusted, that of humanist jurisprudence." RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 108 (1999). Tuck bases this conclusion almost entirely on an interpretation of Grotius’s view of international punishment and the implications this view has for the treatment of native peoples. On this count Grotius and the Salamancan school are on opposite sides, and Grotius explicitly rejects their position. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 506 (photo. reprint 1995) (Francis W. Kelsey trans., 1925). However, Tuck strangely gives no attention to Grotius’s view of preemption, an issue Tuck mentions in regard to other figures he considers and a place where Grotius is clearly extending the thought of the neo-Thomists.

47 Grotius cites Vitoria in *On the Indies* and *On the Law of War and Peace* 126 times. PETER BORSCHBERG & HUGO GROTIUS "COMMENTARIUS IN THESES XI" 48 n.145. (Peter Lang trans., 1994). In his early and short *Commentarius in Theses XI*, Grotius cites Vitoria twelve times, more than he cites any other person. *Id.* at 48. Borschberg concludes that Vitoria is the single most important influence on Grotius. *Id.* at 47–49.

Like Vitoria, Grotius thinks of an injury as beginning earlier than the actual blow. When he extends this discussion to public wars, he refers to "a wrong action commenced but not yet carried through."

Grotius moves beyond Vitoria in identifying several criteria for determining when someone has the requisite certainty that an enemy will attack. Implied in the passage above, and stated directly in his discussion of public war, is a requirement that the person considering the use of force discern the certain intent of the enemy to attack. By itself, intent is never a sufficient ground for the use of preemptive force, but it is a necessary ground. The aggressor must also possess sufficient means to attack. The enemy is one who has weapons. In addition, the potential aggressor must manifest some kind of active preparation. The aggressor not only chooses an end and has the means to reach that end, but also has done something active toward that end: "he has formed a plot, or is preparing an ambuscade, or . . . is putting poison in our way, or . . . is making ready a false accusation and false evidence." Finally, the attack must also be imminent. Grotius is the first major theorist in the tradition to mention this criterion in his discussion of preemption. In the example provided, the enemy "seizes weapons in such a way that his intent to kill is manifest." There is some outward act that initiates the attempt to harm such that the actual harm is close at hand. While the requirements are distinct, an imminent attack almost always entails the two other requirements, as well.

In addition to considering the concept of just cause in the context of a coming harm, Grotius also articulates the independent principle of necessity: A person cannot use force to stop a coming danger that gives rise to just cause if some reasonable alternative to the use of force exists. Grotius states the principle often as a general limitation on the use of force, and it is evident in this passage as well. The examples he mentions—someone who has "formed a plot" or is "putting poison in our way"—are all examples where the potential attack falls short of being imminent. In these situations Grotius generally rules out the use of preemptive force, with the important exception that a person can act where she is certain that she cannot avoid the danger in any other way. The operative principle here is necessity: "Generally, in fact, the delay that will intervene affords opportunity to apply many remedies." The idea is that where the threat is not imminent, it is almost always the case that there is some other reasonable alternative for neutralizing the threat. Imminence, it seems, serves as a proxy for necessity.

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49 Id. at 184.
50 Id. at 174.
51 Id. at 173.
52 For example, speaking of private wars of self-defense, Grotius writes: "If an attack by violence is made on one's person, endangering life, and no other way of escape is open, under such circumstances war is permissible, even though it involve the slaying of the assailant." Id. at 172–73.
53 Id. at 174.
54 Id. at 175.
Grotius next considers preemption in the context of the state. "What has been said by us up to this point, concerning the right to defend oneself and one's possessions, applies chiefly, of course, to private war; yet it may be made applicable also to public war, if the differences in conditions be taken into account." He mentions several differences. The individual right of self-defense remains only as long as the individual lacks effective protection from the public powers. Where this protection is available and effective, the right lapses. Grotius goes on to say that the requirement of an imminent threat does not apply in the context of state self-defense. "[F]or [states] it is permissible to forestall an act of violence which is not immediate, but which is seen to be threatening from a distance... by inflicting punishment for a wrong action commenced but not yet carried through." Grotius does not explain why the standard for states is more lenient, though one reason is likely the need to create a credible deterrent. Deterrence is one of the primary goals of punishment for Grotius and it is the exclusive task of the state.

In his primary section on the state's use of preemptive force, Grotius again makes the point that certainty of the aggressor's intent alone is never sufficient. The intent must be "revealed by some fact," some action that is meant "to bring this about." The act must be "planned and initiated." It seems that the other criteria are all relevant: certain intent; sufficient means; and active preparation. In addition to these requirements and absent an imminent threat, Grotius adds the additional requirement of magnitude of harm.

Crimes that have only been begun are therefore not to be punished by armed force, unless the matter is serious, and has reached a point where certain damage has already followed from such action, even if it is not yet that which was aimed at; or at least great danger has ensued.

In sum, Grotius significantly advances the tradition's account of preemption, providing a set of criteria for determining when just cause arises absent an actual attack, as well as introducing the requirement of imminence into the tradition as a limitation on individual self-defense.

After Grotius, Samuel Pufendorf (1632–94) was the most important theorist in the tradition to develop these norms governing the use of

55 Id. at 184.
56 Id.
57 Id. (emphasis added).
58 Id. at 8–9, 472–78.
59 Id. at 503.
60 Id.
61 Id.
62 Id. at 504.
preemptive force. Pufendorf’s career included both government service and teaching law and philosophy. Westphalia was perhaps the single most important event shaping the political context in which he wrote. His primary work was *On the Law of Nature and Nations*, published in 1672. His account follows the analysis first laid down by Vitoria and refined by Grotius, which provided several measures for when just cause arises absent an actual attack and developed a separate principle of necessity understood as last resort. Like Grotius, Pufendorf analogizes individual to state self-defense.

Pufendorf’s standard is more stringent for an individual in civil society:

> It seems possible to lay down the general rule that the beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the space being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him.

He provides as an example an assailant wielding a sword and charging another person, intending to kill in a matter of seconds. As for Grotius, the individual under the protections of the social contract and considering the use of preemptive force must look to the temporal proximity of the attack, as measured by its imminence.

Pufendorf takes up the issue of preemption in the context of rejecting the fear of a powerful neighbor as a just cause for war, which other proponents of a more permissive account of preemption, such as Gentili and Bacon, had defended.

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65 PUFENDORF, LAW OF NATURE, *supra* note 63, at 276.

66 *Id.* at 277.

67 Strongly influenced by the humanist tradition, Gentili (1552–1608) granted a broad allowance for the use of preemptive force.

> I call it a defence dictated by expediency, when we make war through fear that we may ourselves be attacked. No one is more quickly laid low than one who has no fear, and a sense of security is the most common cause of disaster .... Therefore ... those who desire to live without danger ought to meet impending evils and anticipate them.
Fear alone does not suffice as a just cause for war, unless it is established with moral and evident certitude that there is an intent to injure us. For an uncertain suspicion of peril can, of course, persuade you to surround yourself in advance with defences, but it cannot give you a right to be the first to force the other by violence to give a real guarantee, as it is called, not to offend. . . . For so long as a man has not injured me, and is not caught in open preparation to do so . . . it should be presumed that he will perform his duty in the future. 68

Certain intent and active preparation are explicit requirements, and presumably the latter also includes sufficient means. Again, even if just cause arises, the state considering the use of preemptive force must also satisfy the requirement of last resort. 69 At no point, however, does Pufendorf predicate the permissibility of preemption in this context on the presence of an imminent threat.

D. The Moral Tradition in Eclipse: Vattel, Kant, and Hall

During the eighteenth and nineteenth centuries, a permissive tradition on the use of force gained ascendancy, mirroring geo-political developments that followed in the hundred years after Westphalia, particularly the coming of age of strong, sovereign states. The early modern origins of this rival tradition trace most immediately to Machiavelli’s Prince. On the issue of preemption, Machiavelli (1469–1527) is predictably blunt:

Wise rulers . . . have to deal not only with existing troubles, but with troubles that are likely to develop, and have to use every means to overcome them. For if the first signs of troubles are perceived, it is easy to find a solution; but if one lets trouble develop, the medicine will be too late. 70

ALBERICO GENTILI, DE JURE BELLE LIBRI TRES [ON THE LAW OF WAR] 61 (John C. Rolfe trans., William S. Hein & Co. 1995) (1925). Gentili’s ideas on preemption were almost certainly passed to Francis Bacon (1561–1626), his contemporary and friend. In Bacon’s 1624 discourse, Considerations Touching a War with Spain, Bacon urged England to make war with Spain, which was growing in power. He invoked the same standard—“wars preventive upon just fears are true defensives”—and urged such a war, in order to maintain a balance of power in Europe. FRANCIS BACON, CONSIDERATIONS TOUCHING A WAR WITH SPAIN, IN THE WORKS OF FRANCIS BACON, VOL. II, at 202 (Basil Montagu ed., A. Hart 1852).

68 PUFENDORF, LAW OF NATURE, supra note 63 at 1296.
69 Id. at 1295.
He praises the Romans who knew that “wars cannot really be avoided but are merely postponed,” and therefore chose to start them at a time and place of their choosing. These ideas were continued in the writings of Thomas Hobbes (1588–1679), who provides an enduring theoretical foundation for this rival tradition. For Hobbes, preemption is the practical and inevitable outcome of the “state of nature,” a condition where individuals or states exist outside the social contract and without any higher governing authority. Describing this condition as a state of war, Hobbes concludes:

[In the state of nature], there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is, by forces, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him: And this is no more than his own conservation requireth, and is generally allowed.

As this permissive account gained increasing intellectual acceptance, the moral tradition on the just war was gradually eclipsed. Emmerich de Vattel (1714–67) reflects this shift among writers who take up the tradition. Vattel was born in Prussia, though he spent most of his career in diplomatic service as an adviser to the Elector of Saxony. His most important work was The Law of Nations (1758), which was widely influential, especially in the United States. In a chapter entitled “The Just Causes of War,” Vattel repeats the general lines of the just war tradition regarding the decision to use force. Nonetheless, he describes a standard that considerably weakens the norms espoused by Grotius and Pufendorf. For example, where a state anticipates a future harm that meets all of the criteria seen earlier, Vattel says that the state should look for the “smallest wrong” as an occasion to use force. He later concludes: “There is perhaps no case in which a State has received a notable increase of power

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71 Id. at 11.
72 THOMAS HOBBES, LEVIATHAN 88 (Richard Tuck ed., 1996). “Feare of oppression, disposeth a man to anticipate, or to seek ayd by society: for there is no other way by which a man can secure his life and liberty.” Id. at 71–72.
73 Vattel claims:

The right to use force, or to make war, is given to Nations only for their defense and for the maintenance of their rights.... We may say, therefore, in general, that the foundation or the cause of every just war is an injury, either already received or threatened.


Even where a state has just cause for war because of some actual injury that has occurred, the natural law forbids a state to resort to armed force before it has exhausted other reasonable alternatives. Id. at 245–48. Later Vattel says that, in an offensive war (war toward the ends of reparation and punishment), the use of force is only just if it is marked by an “inability to obtain the thing otherwise than by force of arms. Necessity is the sole warrant for the use of force,” Id. at 246. Elsewhere he explicitly adopts the language of “last resort.” Id. at 243.
74 Id. at 250.
without giving other States just grounds of complaint. Let all Nations be on
their guard to check such a State, and they will have nothing to fear from it."
Furthermore, Vattel also places limits on the tradition's scope of applicability.
While its restraints on the use of force apply "to the conscience of sovereigns,"
they are not meant to structure actual relations between states. Vattel gives several
reasons for this confinement of the moral norms, the most important of which
is an outworking of the Hobbesian idea that states are free moral persons living
in a state of nature:

It belongs to every free and sovereign State to decide in its
own conscience what its duties require of it, and what it may
or may not do with justice. If others undertake to judge of its
conduct, they encroach upon its liberty and infringe upon its
most valuable rights.

In surprising ways, Immanuel Kant (1724–1804) affirms Hobbes's
account of preemption. For Kant, war is an instrument Nature employs to
drive humanity toward perfection and a more just order. The condition of fear
and actual hostilities between states will eventually lead them to enter a
voluntary federation, governed by law and supported by a credible sanction.
Even wars of aggrandizement are a part of this movement. The changes,
however, are gradual and Kant is clear that war plays an indispensably positive
role in the present. "So long as human culture remains at its present stage, war
is therefore an indispensable means of advancing it further; and only when
culture has reached its full development—and only God knows when that will
be—will perpetual peace become possible and of benefit to us."
The result is a complex normative account of war in the present. While Kant obliges states
finally to leave this state of war, he sanctions a permissive account of the use
of preemptive force under the present conditions and into the foreseeable
future.

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75 Id. Vattel's position is complicated, and both T.J. Hochstrasser, Natural Law Theories
in the Early Enlightenment 181 (2000) and Tuck, supra note 46, at 193–95 err in simply
identifying Vattel with a raison d'etat tradition on the use of force. Vattel is moving in this direction,
but he is better interpreted as a transitional figure.
76 VATTEL, supra note 73, at 188–89, 304.
77 "[R]egular war, as regards its effects, must be accounted just on both sides." Id. at 305.
78 Id. at 304. Vattel first makes this claim in the preface to his work. He concludes that the
voluntary law of nations can be derived simply from the concept of states as free moral persons in a
state of nature. Id. at 9a–10a.
79 IMMANUEL KANT, Idea for a Universal History, in KANT: POLITICAL WRITINGS 47 (Hans
80 Id. at 51.
81 IMMANUEL KANT, Conjectures on the Beginning of Human History, in KANT: POLITICAL
WRITINGS, supra note 79, at 232.
By failing to exit the state of nature, each state commits a wrong against another and thereby gives occasion for war. This constant wrong that states commit against each other merely by refusing to leave the state of nature is sufficient grounds to use force. Kant explains, "it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion." Furthermore:

In addition to active violations . . . [the state] may be threatened. This includes another state’s being the first to undertake preparations, upon which is based the right of prevention (ius praeventionis), or even just the menacing increase in another state’s power (by its acquisition of territory) . . . . This is a wrong to the lesser power merely by the condition of the superior power, before any deed on its part, and in the state of nature an attack by the lesser power is indeed legitimate. Accordingly, this is also the basis of the right to a balance of power among all states that are contiguous and could act on one another.

Despite Kant’s optimism for a just international order among states, he largely accepts Hobbes’s description of the present as a state of war in which states can rightfully use preemptive force against each other on the mere basis of fear. Kant’s account of preemptive force represents the triumph of the Hobbesian tradition at the close of the eighteenth century, a tradition that would inform the jus ad bellum for international law as it blossomed into a distinct discipline in the nineteenth century.

Perhaps the best example of this development is Edward Hall’s popular Treatise on International Law (1880). Hall posits that states have at least two basic rights: the right of independence, and the right of self-preservation. He defines the former as “a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community.” Likened to the individual moral agent in the state of nature, states have a right to conduct their own internal affairs as they see fit without intervention from other states.

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82 IMMANUEL KANT, Toward Perpetual Peace, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 322 (note) (Mary J. Gregor trans., 1996).
83 IMMANUEL KANT, Metaphysics of Morals, in IMMANUEL KANT: PRACTICAL PHILOSOPHY, supra note 82, at 452.
84 Id. at 484.
85 HALL, supra note 16.
86 Id. at 50. See also HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 82–83 (photo. reprint 2002) (1836).
88 HALL, supra note 16, at 50. See also WHEATON, supra note 86, at 82–83.
In tension with this right of independence, however, is the related right of self-preservation.\(^8^9\) "[S]ince states exist, and are independent beings... they have the right to do whatever is necessary for the purpose of continuing and developing their existence, of giving effect to and preserving their independence."\(^9^0\) Where the right of independence clashes with the right of self-preservation, Hall is clear that the latter prevails. "In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation. Where law affords inadequate protection to the individual he must be permitted, if his existence is in question, to protect himself by whatever means necessary."\(^9^1\)

Hall describes a sweepingly broad account of self-preservation, which justifies the use of force not only in the case of an actual or imminent attack, but also in the case of a mere threat.

If a country offers an indirect menace through a threatening disposition of its military force... [and] if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defense, so that it would be in a position to give effect to its intentions... the state or states which find themselves threatened may demand securities... and if reasonable satisfaction be not given they may protect themselves by force of arms.\(^9^2\)

Hall agrees that states may use preventive force early on to avoid going to war later.\(^9^3\) An attempt to upset the balance of power between the major powers may provide legitimate grounds for a preemptive attack. By the nineteenth century, Hobbes's account of states existing in an international state of nature and bound by few or no restrictions in deciding to use force had triumphed.

E. Webster and the Caroline Case in Context

Although the just war norms governing the use of preemptive force were largely eclipsed in international law during the nineteenth century, it was

\(^{89}\) Other scholars use different terms for the latter right, including expansive notions of self-defense, self-help, and necessity. For a more extended account of the different terms scholars use for this right, see BROWNLIE, INTERNATIONAL, supra note 5, at 41.

\(^{90}\) HALL, supra note 16, at 45. See also OPPENHEIM, supra note 16, at 177–79; WHEATON, supra note 86, at 81, 209; WOOLSEY, supra note 86, at 6–18, 43–45.

\(^{91}\) HALL, supra note 16, at 281. "The same right to continued existence which confers the right of self-development confers also the right of self-preservation, and a point exists at which the latter of the two derivative rights takes precedence of the duty to respect the exercise of the former by another state." Id. at 46.

\(^{92}\) Id. at 46–47.

\(^{93}\) Id. at 297–99.
this tradition that Secretary of State Daniel Webster drew upon in his 1842 letter to Fox. Recall the standard announced by Webster and accepted by the British: “It will be for that Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

Webster’s correspondence relating to the Caroline episode and other contemporary sources give no indication as to how Webster arrived at this standard. Earlier sources, however, indicate that he was directly acquainted with the writings of several theorists already examined. In an early autobiographical fragment, Webster mentions reading Vattel and Pufendorf while practicing law in Boston. More importantly, Webster’s 1826 argument before the Supreme Court in the case of the Marianna Flora, an otherwise obscure case, shows Webster addressing some of the same issues that arose in the diplomatic flurry that surrounded the sinking of the Caroline more than a decade later. It also shows Webster drawing on some of the key figures in the developing moral tradition on preemption.

The facts in this earlier case were relatively undisputed. In 1819 Congress passed an act creating enforcement powers against piracy and slave-trafficking. A year later the USS Alligator was launched to patrol the high seas, under the command of Lieutenant Robert F. Stockton. In 1821, on its second voyage, the Alligator came upon a ship bearing no flag and seemingly signaling distress. As the U.S. vessel approached the unidentified ship, however, the latter began firing. The volleys continued even after the Alligator raised the U.S. flag. Suspecting that pirates were attacking his ship, Stockton continued to approach the other vessel and returned fire. Only after a near miss did the other ship hastily raise a Portuguese flag. Although neither vessel had struck the other, the Alligator gained the upper hand and seized the Portuguese ship. Lieutenant Stockton bound the crew and sent the ship to Boston for trial in a U.S. court.

The case eventually arrived at the U.S. Supreme Court. In the interim, the U.S. government had requested that the crew, the vessel, and its cargo be released and sent back to Portugal. At issue before the Court was only the question of whether Lieutenant Stockton was liable for damages in sending the Marianna Flora to Boston rather than releasing the ship, as the District Court judge had ruled. Arguing on behalf of Stockton, Webster took up the same question that would arise a little more than a decade later in the case of the

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96 The Marianna Flora (D. Mass Feb. 9, 1822), microformed on U.S. Supreme Court Appellate Case Files (No. 150–62, micro-copy no. 214), rev’d, 16 F. Cas. 736 (Cir. Ct., D. Mass. 1822) (No. 9,080), aff’d, 24 U.S. 1 (11 Wheat. 1) (1826). See also HENRY WHEATON, WHEATON’S NOTES REGARDING THE MARIANNA FLORA (1826) (on file with The Pierpont Morgan Library, New York).
Caroline: when can a party justifiably use force in self-defense against an approaching threat?

In arguing for a standard, Webster and his co-counsel George Blake borrowed from the rules governing individual self-defense, which they found in both the common law and the natural law. Henry Wheaton, the Court reporter at that time, summarizes their arguments before the Supreme Court:

Still less can it be maintained that the Portuguese had reasonable grounds to suspect that the Alligator was a pirate, and had hostile designs upon his ship, and, therefore, he had a right to attack and destroy her. The analogies of the municipal law may assist to illustrate this branch of the inquiry. What degree, or what grounds of fear of bodily harm, will justify an act that may result in the destruction of human life, is, in some cases, a question of great delicacy and difficulty. By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending, and almost unavoidable.

Arguing also from the natural law, Wheaton recounts that Blake and Webster go on to quote Pufendorf at length in support of the same conclusion:

But the writers on natural law may, perhaps, on this occasion, be more properly cited; and the following passage from Puffendorf affords the fullest illustration of the principles applicable to this subject . . . . "[B]efore I can actually assault another under colour of my own defence, I must have tokens and arguments amounting to a moral certainty that he entertains a grudge against me, and has a full design of doing me a mischief, so that, unless I prevent him, I shall immediately feel his stroke. Among these tokens and signs giving me a right to make a violent assault upon another man, I must by no means reckon his bare superiority to me in strength and power."

97 Webster's interest in the undertakings of the Alligator began with the vessel's maiden voyage in April 1821. Supported in part by the American Colonization Society, of which Webster was a member, the Alligator sailed to the west coast of Africa where Stockton among others negotiated the purchase of present day Liberia as a place to return U.S. slaves.

98 The Marianna Flora, 24 U.S at 16-17. Webster and Blake's brief for the Court no longer exists. According to early practice, however, the Supreme Court reporter included a summary and, in some cases, a partial transcript of the oral arguments presented by both sides. In this case, Wheaton's notes are quite extensive.

99 Id. at 17-18.
Webster invokes the very tradition on the use of force that developed from Vitoria through Pufendorf. As Part IV will discuss, however, he does so by invoking the standard for individuals and applying it to states acting preemptively in their own defense. The standard includes clear intent, sufficient means, and, although he does not use the language, a measure of temporal proximity that is best described as a requirement of imminence. As Secretary of State fifteen years later, Webster again drew on the tradition to determine when a state can use preemptive force in the Caroline case. For nearly one-hundred years, scholars gave this episode only passing attention. Although nearly all accounts of the contemporary norms governing the use of preemptive force start with Webster, this account shows Webster reaching back much further and enlisting the longstanding moral tradition on the just war.

IV. MORAL TRADITION AND THE CASE FOR REVISION

Beginning with Vitoria in the sixteenth century and continuing through Webster, a distinct moral tradition on the use of preemptive force emerged. The purposes of this narrative were to identify this tradition, to begin understanding its conceptual structure, and to reveal its contribution to the international norms governing the use of preemptive force today. As suggested earlier, an understanding of these norms as they developed within the moral tradition is important for understanding the role played by the imminence criterion in the tradition and the relationship of imminence to other norms governing the use of force, in particular the requirement of necessity. This account is also important for making the case that a careful expansion of the right to use preemptive force can preserve the underlying moral commitments that have shaped these norms in the past. As this concluding Part will suggest, the moral tradition has much to say about why the contemporary tradition, which requires foremost that the threat be imminent, might evolve under the new threat of global terrorism.

A. The Rejection of Imminence in the Context of State Self-Defense

Revising the law of anticipatory self-defense requires a careful rethinking of the concept of imminence. The narrative sketched earlier suggests two reasons for revising the law of preemptive force in a way that does not give the requirement of imminence near exclusive importance, but at

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100 From 1841 to 1914, the Caroline Case received passing reference primarily in the limited context of justifiable violations of neutrality for the sake of "self-preservation." See DANIEL GARDNER, A TREATISE ON INTERNATIONAL LAW 205 (1844); H.W. HALLECK, INTERNATIONAL LAW 555–56 (1861); LAWRENCE, supra note 16, at 521–22; OPPENHEIM, supra note 16, at 187; ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 184–85 (1854–61); WOOLSEY, supra note 87, at 269.
the same time preserves underlying moral commitments that have shaped the evolving standard governing the use of preemptive force in the past. First, this narrative suggests that, prior to Webster, the tradition rejected the requirement that states can resort to preemptive force only in the face of an imminent threat. This conclusion is not to say that the tradition was silent on the issue of preemption; as Part III examined, the tradition developed a standard for the use of preemptive force that looked to multiple points of assessment. Rather, the criterion of imminence applied exclusively to the case of individual self-defense in the context of a functioning government. Recall that Vitoria, the most important early theorist in the tradition to extend the just war norms to the question of preemption, never mentioned this criterion concerning the temporal proximity of the attack.

With Grotius came a discussion of imminence in the context of individual self-defense.

War in defence of life is permissible only when the danger is immediate and certain, and not when it is merely assumed. The danger, again, must be immediate and imminent in point of time. . . . If the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled . . . .

The mere drawing up of plans and other preparations for an attack are insufficient; the attacker must initiate the actual movement that will result in the victim's harm. Turning to the use of preemptive force by the state, however, Grotius makes this qualification: "What has been said by us up to this point . . . applies chiefly, of course, to private war; yet it may be made applicable also to public war, if the differences in conditions be taken into account." He is explicit that a state need not wait until the threat is imminent, in the stringent sense described in the case of individual self-defense. Rather, a state can "forestall an act of violence which is not immediate . . . ."

Pufendorf also requires that individuals under a functioning government only use preemptive force against a threat that is imminent. He emphasizes that this criterion requires that, in addition to the clear intent to harm and means to do so, the aggressor must also be near in space and time, and must have begun the action that will result in the victim's harm. The example he provides is of an attacker charging with weapon drawn, though still

\[101\] GROTIUS, supra note 46, at 173.
\[102\] Id. at 184 (emphasis added).
\[103\] Id. He explains this difference in terms of punishment. While individuals have a right to use force for self-defense, only states have a right to use force toward the two additional ends of restoring goods taken and punishing wrongdoers. Although later theorists in the tradition place preemption in the category of self-defense, for Grotius it is a form of punishment.
at some distance. For states, the criteria of certain intent, sufficient means, and active preparation all apply, but imminence is noticeably absent. For Grotius, Pufendorf, and other early sources of international law, imminence is a requirement for the use of preemptive force by individuals under the protections of a functioning government, but not a requirement for states or individuals absent such protections. Although these theorists analogized the state to the individual, they consistently refused to condition the use of preemptive force by states on the presence of an imminent threat.

Without any explanation for his departure from the tradition to which he appealed, Webster applied the standard for individuals within a political community to states. In his 1826 oral argument to the Supreme Court in the case of the *Marianna Flora*, Webster references both Grotius and Pufendorf in describing the standard that states must meet for preemptive action.

By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending, and almost unavoidable. . . . "[B]efore I can actually assault another under colour of my own defence, I must have tokens and arguments amounting to a moral certainty . . . so that, unless I prevent him, I shall immediately feel his stroke." 104

Webster's description of imminence is even more stringent in his letter to the British: "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation." 105

In his argument before the Court in *The Marianna Flora*, Webster makes explicit reference to "the rules of the common law." 106 The standard he articulates is similar to that found in Blackstone, whose *Commentaries on the Laws of England* was enormously influential in the new republic. Blackstone treats the subject of anticipatory self-defense in his chapter, "Of Homicide." He distinguishes three common law categories of homicide: justifiable, excusable, and felonious. Anticipatory self-defense falls within the second category. His account expresses a stringent understanding of imminence.

[T]he self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault . . . . This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise

this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.  

Although Blackstone does not use the term imminence, his standard is the same.

Blackstone’s rationale for this stringent standard is the same found in Grotius and Pufendorf: individuals within a state and faced with a threat usually “have recourse to the proper tribunals of justice.” Therefore, a “preventive” attack against an “impending” threat is typically ruled out; in these cases a civil remedy is available. Rather, the threat must be “certain and immediate” to justify attack. Although Blackstone’s subject is English common law, he mentions in the next paragraph that the same standard does not govern relations between independent nations. Webster and Blake, however, obscure this distinction. They acknowledge that the Marianna Flora and the Alligator were in a “state of nature” when they confronted each other on the ocean. However, the imminence standard they defend before the Court—and in support of which they quote Pufendorf—is the standard that both Pufendorf and the larger tradition of which he was a part had limited to individuals exercising self-defense under the protections of a functioning government. This easy transference of the standard for preemptive action in the case of individual self-defense to the same in the case of state self-defense might not be nearly as questionable if, in fact, the tradition up to that time and the very writers Webster cites had not made such a clear distinction between the governing standards in these two different contexts.

Why did Webster substitute one standard for the other? It is important to remember that Webster is not making any sweeping generalizations about when states can use preemptive force. States recognized few restraints on the use of force during the nineteenth century. Webster’s cases were quite particular: in the first, a case of perceived piracy; and in the second, a case of the use of force by one state against another under a bilateral neutrality agreement. It was only later as scholars and statesmen appropriated Webster’s language in the mid-twentieth century that the standard applied more broadly. Moreover, Webster was a lawyer trying to make the strongest case he could on behalf of his clients, even if it required a creative departure from his sources. In the cases of both the Marianna Flora and the Caroline, Webster’s purpose was well-served by an especially stringent standard for preemptive action, a standard requiring an imminent threat. In the twentieth century, and especially

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107 4 WILLIAM BLACKSTONE, COMMENTARIES 183.
108 Id. at 185.
109 24 U.S. at 12.
after World War II, Webster’s standard was appropriated in part to provide historical legitimacy for the widespread effort to limit the use of force.

In sum, until Webster and the retrieval of Webster’s standard in the twentieth century, the evolving tradition on the use of preemptive force nearly universally rejected the requirement that states can resort to preemptive action only in the face of an imminent threat. While the Webster standard as appropriated under the Charter system was an attempt to limit the overall use of force, it was from its inception a notable departure from the tradition. Of course, Webster’s move to apply the imminence criterion to states did not take place in the absence of any restraints. The tradition had developed a nuanced account, taking into consideration the differences between states and individuals and developing several factors to decide when a state could take preemptive action. While the requirement of an imminent attack as applied to states has served the international system well in the past several decades, the new threat of global terrorism has altered the circumstances in such a way that this standard can no longer provide states with the security they require. As this narrative suggests, an evolving standard that no longer gives singular importance to the requirement of an imminent threat is not the departure from tradition that preservationists and even revisionists often describe.

B. The Priority of Necessity

Most important, the narrative also suggests that the principle of necessity governs the criterion of imminence. Recall that the tradition consistently required that even where an individual or a state has just cause for preemptive action, the same must also meet the independent requirement of necessity. In other words, the individual or state must exhaust all reasonable alternatives short of using force, which is always a last resort. The narrative points to a special relationship between the requirement of imminence, where it applies, and the principle of necessity, an independent criterion that applies in all cases of preemptive action. In short, the requirement of an imminent threat served as a proxy for the more fundamental requirement that the use of preemptive force be necessary.

Although Grotius requires an imminent threat as a general constraint on individuals using preemptive force under the protection of a political community, recall that he does so with a qualification.

[If a man is not planning an immediate attack . . . I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply
many remedies, to take advantage of many accidental occurrences . . . .

Read closely, this passage allows an individual to use preemptive force where the threat is something less than imminent if there is no other way to avoid certain harm.

The justification for this broader allowance rests on the relationship between *imminence* and *necessity*: namely, that necessity is the underlying moral requirement, requiring that the potential victim have no other means to avoid what is otherwise certain to happen. The requirement of imminence, then, functions as a useful proxy for necessity: the use of preemptive force is necessary if the coming threat of harm is so near in space and time that the potential victim lacks any other means to escape receiving the first blow except by using force first. In the context of a functioning government, this proxy makes sense, since generally individuals can appeal to the state for protection. Grotius makes an exception, however, in some cases where the threat is not imminent but the person subject to attack lacks any other effective means to defend against a harm that is certain to come. This exception is not problematic, however, insofar as imminence is only a proxy for *necessity*, and does not require anything finally independent of it. Grotius recognizes that making such a judgment is difficult, especially since the time between the present and when the attack is imminent can give rise to "many accidental occurrences" that might allow a person to protect herself without using preemptive force. Nonetheless, he recognizes that in a very limited set of cases waiting for the threat to be imminent will effectively preclude a sufficient defense. Although Grotius, like everyone else in the tradition after him, requires that states only use force as a last resort—when the use of such force is necessary—he does not limit such uses of force to imminent threats. Lacking the protections of a higher authority, states may, in some limited cases, need to use preemptive force. A general requirement of imminence would fail to capture the differences in this context.

Pufendorf’s writings reflect the same close relationship between the requirements of imminence and necessity. He explicitly defines imminence in terms of necessity. Addressing the standard for preemptive action by an individual in civil society, Pufendorf writes:

[I]t seems possible to lay down the general rule that the beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose,

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110 GROTIUS, supra note 46, at 174–75 (emphasis added).
111 Id. at 175.
has gotten into the position where he can in fact hurt me, the space being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him.\(^{112}\)

In other words, an imminent attack is an attack so near in space and time that the potential victim has no alternative but to attack first, if she is to avoid taking the first blow. In the case of individual self-defense in civil society, imminence functions as a proxy for necessity. By not requiring an imminent threat for states or individuals outside civil society, Pufendorf implicitly acknowledges that there are some situations in which a state, lacking recourse to a higher authority, may have no reasonable alternative but to use force to defend itself against a threat that, at the time, is less than imminent. Again, necessity is the fundamental moral measure.

Webster’s standard, although applying the imminence standard to states as well as to individuals, follows along the same lines. As in Grotius and Pufendorf’s writings, imminence and necessity bear a close relationship to each other. The first half of Webster’s standard—"a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation"—explicitly defines necessity in terms of imminence. Using force is necessary because the threat is "instant," so near in time that the victim has "no choice of means" to defend herself; she can only strike first with force.

Yet when Webster’s standard is interpreted outside of the larger tradition of which it is a part, it is hard to discern the nuanced relationship between these two requirements as they developed in the tradition. Webster’s language suggests a near identity between the two requirements, with no clear reason to think that necessity is more fundamental. Moreover, since Webster applies the requirement of an imminent threat in both the individual and state contexts, there is less of a vantage point from which to discern the relationship between the principle of necessity and the imminence criterion. Commentators and states routinely cite Webster for the contemporary standard and the same confusion appears today.

As suggested earlier, it is now plausible to think that the requirements of imminence and necessity might in some cases clash at a fundamental level. That is to say, one can now imagine a situation where a state has exhausted all reasonable alternatives outside the use of force to secure the legitimate end of self-defense, but the threat is not imminent. The narrative in Part III and this analysis provide a means to sort out this conflict. The tradition has always conceived of imminence as a proxy for the more fundamental requirement of necessity, understood as last resort. Where necessity is satisfied but the threat is not imminent, the tradition is clear that necessity must govern. An imminent threat almost always makes the use of force necessary if a state is to defend itself, but in the absence of an imminent threat the use of force might still satisfy the principle of necessity. In contemporary doctrine, the function of the

\(^{112}\) PUFENDORF, LAW OF NATURE, supra note 63, at 276 (emphasis added).
imminence criterion as a proxy for necessity has calcified, obscuring the relationship between these two concepts and giving the imminence criterion a fixed place in the standard that it previously did not possess. Although the temporal proximity of the threat will always inform judgments about whether a particular use of force is necessary, the tradition on its own terms provides grounds for a standard that does not grant the imminence criterion exclusive importance.

V. CONCLUSION

While it is possible that the circumstances shaping some areas of international law might change so radically that states would need to craft altogether new norms, the contemporary challenge of preemption does not present such a case. Revisionists shoulder the weighty burden of showing that revision can preserve important moral commitments that have profoundly shaped the present standard governing the use of preemptive force. This investigation has suggested two grounds for believing revisionists can meet this burden. First, prior to Webster the moral tradition consciously and consistently rejected the requirement of an imminent threat in the context of state self-defense. Second, the tradition always assigned priority to necessity and demanded the presence of an imminent threat only in the context of individual self-defense, and then only as a proxy for the more fundamental requirement of necessity.

Although not the focus of this inquiry, achieving legitimacy will also require that revisionists offer an acceptable alternative standard. The emergence of imminence as the predominant criterion in assessing uses of preemptive force had the effect of obscuring other points of moral assessment developed within the tradition. These other criteria included certainty of intent, sufficiency of means, active preparation, magnitude of harm, and probability of harm. In one sense, these measures were preconditions of an imminent threat. With the exception of magnitude of harm, an imminent threat presumably satisfied all these requirements. Once the criterion of imminence emerged as a necessary condition for the use of preemptive force, it assumed near exclusive importance. If the standard can no longer require an imminent threat in every instance, then these other criteria in the moral tradition may serve as a rich resource for developing a new standard—one that is continuous with the underlying norms that have informed the doctrine in the past, but takes into account the realities of today.