

Francisco de Vitoria and Alberico Gentili on the Juridical Status of Native American Polities

DARAGH GRANT, *Harvard University*

Over the course of the sixteenth century, Europeans writing about the ius gentium went from treating indigenous American rulers as the juridical equals of Europe's princes to depicting them as little more than savage brutes, incapable of bearing dominium and ineligible for the protections of the law of peoples. This essay examines the writings of Francisco de Vitoria and Alberico Gentili to show how this transformation in European perceptions of Native Americans resulted from fundamental changes in European society. The emergence of a novel conception of sovereignty amid the upheavals of the Protestant Reformation was central to this shift and provided a new foundation for Europe's continued imperial expansion into the Americas.

INTRODUCTION

IN THE COURSE of his magnum opus, *De Iure Belli* (The laws of war, 1598), the Protestant Italian jurist and regius professor of civil law at Oxford University, Alberico Gentili (1552–1608), offered a scathing critique of Spanish justifications for the conquest of America. Following earlier critics of the Spanish conquest—most notably the Spanish theologian, Dominican friar, and prima professor of theology at the University of Salamanca, Francisco de Vitoria (ca. 1485–1546), whom he often cited favorably—Gentili argued that no appeal to the notion of natural enmity, to the vacancy of American soil, or to the superior right of Christians to the land of so-called infidels could warrant conquest. Nor could a refusal to listen to the Gospel or to engage in commercial relations necessarily license Spanish *dominium* over the

For helpful comments on this paper I am grateful to the participants in the Political Theory Workshop at the University of Chicago, as well as to Cliff Ando, Paul Cheney, Julie Cooper, Oliver Cussen, Christopher Dunlap, Michael Gilsenan, Andreas Glaeser, Rohit Goel, Sarah Johnson, David Lebow, Karuna Mantena, Patchen Markell, Pablo Maurette, Sankar Muthu, Jonathan Obert, Jennifer Pitts, Becky Ploof, Sayres Rudy, Céline Spector, Larry Svabek, Don Tontiplaphol, Lisa Wedeen, and the anonymous reviewers at *Renaissance Quarterly*.

Americas. But in a shift in tone toward the end of the first book of *De Iure Belli*, Gentili diverged sharply from Vitoria's critique of the conquest: "I approve the more decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians," whose "abominable lewdness" amounted to a sin "contrary to human nature." War with Native Americans, on this account, was war "made as against brutes."¹

This article explores the divergence between Gentili's ultimate endorsement of the Spanish conquest and Vitoria's earlier criticism of Spanish conquistadors. I situate both Vitoria's and Gentili's treatments of the Spanish conquest and of the juridical status of Native American polities in the context of their respective efforts to secure a new ground for political authority in the midst of the Reformation. Vitoria's efforts to assess the status of Native American polities had defended the rights of native princes and peoples by recognizing their property and jurisdiction over the land as the formal equivalents of cognate rights held in Europe. These claims were grounded on the authority of the *ius gentium* (law of peoples), a body of Roman law that was understood to be common to all people.² However, with the emergence of a doctrine of princely sovereignty during the Reformation, most notably in the writings of Jean Bodin (1530–96), a novel interpretation of the *ius gentium* emerged that gave a new foundation to European imperial enterprises. Assertions of princely sovereignty—whether in a monarchy, aristocracy, or republic—implied the supreme authority of princes when acting within or beyond the realm and dispensed with older notions of a hierarchy that bound the whole world together. Princes, on this view, were answerable only to God.³ The broadly developmental accounts of princely sovereignty and the *ius gentium* that came to the fore in the writings

¹ Gentili, 1933, 2:38–41, 55, 80–81, 89, 122 (quotation), 123. The 1598 edition of *De Iure Belli* was a substantially revised and expanded version of three commentaries on the laws of war that Gentili published in 1588–89. Gentili, 1933, 2:14a. For Gentili's earlier discussion of the Spanish conquest, see Gentili, 1588, C3^r, F3^r.

² The *ius gentium* was distinct from the civil law, which denoted the specific laws enacted within a given commonwealth. The two most influential ancient definitions of the *ius gentium* in later debates over this concept were those of Gaius (130–180) and Ulpian (ca. 170–223). For Gaius the *ius gentium* was synonymous with natural law. Ulpian, in contrast, treated natural law as common to both humans and animals, whereas he argued that the *ius gentium* was specific to humans: Watson, 1:1–2 (paragraphs 1, 6, 9). On the turn to Roman law and the *ius gentium* from the eleventh century onward in the context of struggles against the Holy Roman emperor and of the expansion of long-distance trade, see Lee, 51–77; Mousourakis, 410–41; Nicholas, 38–59; Pennington, 8–30.

³ Bodin, 1962, 86, 89; Fasolt, 199–200. For a discussion of the distinction between princely sovereignty—understood as an attribute of a natural person or a group of natural persons—and its seventeenth-century development into the notion of state sovereignty, which conceived of the state as "an entity with a legal personality and possession of sovereign control

of Bodin and Gentili depicted Native Americans either as the denizens of a primitive state of nature or, with a more moralizing valence, as savage and barbarous violators of the law of nature. In either view, Native Americans found themselves trapped in the conceptual space that Michel-Rolph Trouillot has called “the savage slot,” where their rulers were treated as if they were incapable of exercising the new form of authority attributed to sovereign princes, putting at risk the rights to property and jurisdiction that Vitoria had attributed to them.⁴

From their earliest encounters with the Spanish, Native Americans found themselves increasingly enclosed within, if never fully determined by, a Eurocentric global order. They played their own part in this story, to be sure, but theirs was the role of “conscripts of [Western] civilization, not volunteers,” to borrow Stanley Diamond’s evocative formulation.⁵ Yet this process of conscription was part of a global transition to modernity. Native Americans were not merely interpolated into Europe’s preexisting representational schemes. Rather, these representational schemes were themselves refashioned by the upheavals of the Protestant Reformation and by the imperial expansion of Renaissance Europe that was spinning webs of commercial and cultural exchange across the globe. As Europe’s princes drew more of the world into their fields of power, the old Christian idea that a universal jurisdictional hierarchy bound the whole world together began to give way. Over the course of the sixteenth century, this idea yielded to a new ordering of the world based around the concept of princely sovereignty. As jurists like Gentili envisaged it, this order was to be maintained by the balance of power, on the one hand, and the tenuous threads of trust and good faith among sovereign princes, on the other. As these two models of temporal order wrestled for preeminence, the vision of the well-ordered commonwealth ruled by a sovereign prince became an unavoidable touchstone for theorists of the *ius gentium*. In turn, this model called into question older conceptions of jurisdiction by which Europeans had made sense of the juridical status of Native American polities. Whether in Europe or America, societies were compelled to respond to, and be managed by, this new concept of princely sovereignty, a concept “brought into play by modern forces.”⁶

over a spatial unit comprising subjects, laws, and sinews of power,” see Von Friedeburg, 26–41 (quotation on 19).

⁴ Trouillot, 14–23.

⁵ Diamond, 204.

⁶ Asad, 333–34; see also Scott, esp. 8–9, 115–19; Trouillot, 20–23. If *sovereignty* is a modern category, with its roots in the specific history of Reformation-era Europe, one might doubt the merits of the recent call to use this term to describe pre-Columbian American polities. See Merrell, 477–84. For the argument that sovereignty is an “inappropriate concept” for Native American history, see Alfred, 79–93.

In order to investigate how the emergence of the idea of princely sovereignty in Renaissance Europe affected America's indigenous polities, I contrast Vitoria's writings in the early sixteenth century with Gentili's thought at the end of that century. Vitoria and Gentili came from opposite sides of the prominent disciplinary divide separating theologians from jurists.⁷ They each made expansive claims about the authority of their respective professions. And while they both cited authorities from either side of this divide, they also called into question the authority of their disciplinary opponents.⁸ In spite of these differences, a comparison of Vitoria's and Gentili's writings on the *ius gentium* can illuminate the shifting juridical status that Europeans attributed to Native American polities.⁹ Both men addressed similar problems, and their arguments proved influential in European debates over the legal and moral foundations for imperial expansion.¹⁰ They were both concerned with the disruptive effects of Spanish imperialism, and they struggled to theorize the possibility for order among princes in the wake of the Reformation. Where the Spanish theologian worried about the effect of the conquest of America on the moral fabric of Christendom, the Italian jurist sought to place limits on Spain's imperial expansion within Europe itself. The disciplinary differences that separated them were important. But they functioned, in part, through the increasingly divergent understandings that jurists and theologians had of political authority and of the sources of order and disorder in the world.¹¹ These preoccupations with the nature of political authority and with order and disorder were central to European understandings of the status of the Americas.

The divergence between Vitoria's and Gentili's accounts of political authority has been obscured, however, by a tendency in the scholarship on the early modern *ius gentium* to treat sovereignty—understood as a variant of *dominium*—as a settled feature of European legal and political thought from the

⁷ Pagden, 2015, 46, 75–78. This disciplinary divide is sometimes framed as a dispute between Scholastics and humanists: Panizza; Tuck, 1999, 9, 16–77; cf. Straumann, 2015, 133–35. On humanism and humanists' critiques of the manner in which jurists and theologians sought to use the *Corpus iuris civilis* to find solutions to the problems of the late Middle Ages, see Fasolt, 16–20; Mousourakis, 440–41; Skinner, 1:101–12, 201–08.

⁸ Gentili, 1933, 2:17, 57; Vitoria, 1991c, 3; Vitoria, 1991f, 238. See also Malcolm, 127–29, 144–45; Panizza, 215.

⁹ For more detailed accounts of the ways in which jurists and theologians theorized the *ius gentium* in the sixteenth and seventeenth centuries, see Belda Plans; Brett, 1997 and 2011; Deckers; Fernández-Santamaría; Fitzmaurice; Pereña; Tierney, 2001; Tuck, 1999.

¹⁰ For discussions of the influence of Vitoria and Gentili on colonizing practices, see Armitage, 87–90, 104–05; Fitzmaurice, 59–84; Springborg, 141–42; Tomlins, 144–46; Williams, 211. Cf. Benton and Straumann, esp. 29–37.

¹¹ See Straumann, 2015, 133–34.

fourteenth century onward. On this prevailing view, Vitoria is already a theorist of sovereignty.¹² But Vitoria's commitment to the refashioning of Christendom, and his conception of the world as a nested order of jurisdictions, entailed a theory of civil power that differed in important ways from later understandings of princely sovereignty. It was Vitoria's understanding of civil power and of the relationship among jurisdictions that allowed him to treat Native American polities as the formal equals of European commonwealths. In contrast, Gentili incorporated Bodin's novel concept of princely sovereignty into his account of the *ius gentium*. He dismissed any equality between European and Native American princes, instead representing indigenous American rulers as akin to pirates who reigned over communities of lawless savages. While this conclusion bore some resemblance to earlier claims by the Cordoban humanist Juan Ginés de Sepúlveda (1490–1573) that American Indians were an example of Aristotle's (384–322 BCE) natural slaves, Gentili's argument differed from this view.¹³ For the Italian jurist, the rumored practices of Native Americans were not a sign of a natural deficiency. Instead, they marked a morally blameworthy repudiation of the bonds of human sociality and a threat to the very order of the world. By the end of the sixteenth century, then, Gentili had drawn a sharp contrast between an Old World, which comprised civilized commonwealths ruled by sovereign princes, and America, depicted as a region of savage lawlessness devoid of any legitimate political authority and open to free appropriation by Europeans. Although those engaged in the practice of colonization rarely adopted a position as extreme as Gentili's, his argument exemplified an emerging ideological repertoire that was to prove influential to later justifications of colonial dispossession.¹⁴

By emphasizing the emergent quality of the doctrine of princely sovereignty, this essay recovers the underlying theoretical dispute that shaped Vitoria's and Gentili's very different accounts of the juridical status of Native American polities. It tells the story of how sovereignty came to appear normative for political life, and why Native American rulers were deemed ineligible to exercise it. Before turning to the question of the Spanish conquest and the status of America's princes, therefore, it is necessary to sketch out how Vitoria and Gentili understood the nature of civil power and the status of the *ius gentium*. While Vitoria's writings at the beginning of the Reformation were still animated

¹² Anghie, 13–31; Benton and Straumann, 20–23; Fernández-Santamaria, 77; Panizza, 214–15; Tierney, 2001, 295–96; Tomlins, 122–23, 128; Williams, 97.

¹³ Sepúlveda's defense of war with the Indians carried little influence in its own day and was refused a royal license, in part because he claimed that Indians were less than real human beings. Pagden, 1986, 109–18.

¹⁴ See, for example, Grant, 466–68, 472–74.

by a universal Christian ideal, Gentili turned to the concept of sovereignty to imagine a new order among princes that did not depend upon confessional uniformity. This new order was built on precarious grounds. It would be maintained, paradoxically, both by the possibility for trust among princes and by their competition for power. The tensions that these opposing foundations produced were alleviated, on Gentili's broadly Stoic view, by the natural bonds that tied humanity together. While Gentili eschewed the idea that individual princes were subject to a universal jurisdiction, he nevertheless insisted that all human beings were obliged to obey a universal moral law—the natural *ius gentium*—as it appeared in the *Corpus iuris civilis*. When the forms of life of Native American peoples appeared to conflict with this body of law, the Italian jurist placed them beyond the association of the human race, in the company of pirates and brigands who posed a threat to the very order of the world. The preoccupations of Reformation-era theologians and jurists colored how they made sense of the different forms of life that Europeans encountered in America, leading them in some cases to invest these differences with a new political salience that would prove foundational to later forms of colonial domination.

FROM THE LORD OF ALL THE WORLD TO A WORLD OF SOVEREIGN PRINCES

When Henry VIII (r. 1509–47) declared in the Act in Restraint of Appeals (1533) that “This realm of England is an empire,” he stood, as Walter Ullmann put it, “at the end of a long development.”¹⁵ By claiming that a king was emperor in his own kingdom, Henry was continuing a long-standing opposition to the right of the Holy Roman emperor to interfere in the affairs of any particular kingdom. But he was now also making a series of more extensive claims by asserting his authority “to play in his own kingdom the role and function of the late Roman emperor” as outlined in the *Corpus iuris*, by insisting that England's ecclesiastical jurisdictions were independent of the pope's spiritual authority, and by asserting that the king had papal authority over the English church.¹⁶ By claiming to reign over all civil and ecclesiastical jurisdictions within England, Henry married the long-standing claim of the English king's supremacy within his own kingdom to a repudiation of the idea that the king had any earthly superior, whether temporal or spiritual. Even as a notion of the Christian universal persisted in the obligation of Christians to spread the Gospel

¹⁵ Ullmann, 194. Act in Restraint of Appeals in Tanner, 41.

¹⁶ Ullmann, 176. See also Ullmann, 175–78, 181, 187–88, 195–96, 200; Muldoon, 35–37, 45–46.

throughout the world, the understanding of Christendom as a nested hierarchy of jurisdictions was directly challenged by the idea of competing papal powers. The external affairs of church and commonwealth would now be subject to the king's sovereign will alone. It may have lain at the end of a long development, then, but Henry's declaration also registered a wholesale rupture in the conceptual apparatus of legal and political authority in sixteenth-century Christendom.

To be sure, the order of Christendom by which pope and emperor, each as *dominus totius mundi* (lord of all the world), claimed jurisdiction over Europe's princes had always been aspirational.¹⁷ The universal lordship of the emperor was contested, to one degree or another, since France's Philippe II (r. 1180–1223) refused to acknowledge his subjection to the contemporary emperor in 1201.¹⁸ Nevertheless, as a matter of law, jurists like Bartolus of Sassoferrato (1313/14–1357) distinguished between the *de facto* limits on the emperor's power and his *de iure* right to universal jurisdiction. As Constantin Fasolt demonstrates, crucial to this distinction was Bartolus's contention that there was no contradiction between a prince's exercise of *dominium* over his own particular commonwealth and the universal jurisdiction of the emperor. On the contrary, as *dominus mundi* the emperor had a right to jurisdiction only over the world as a whole, at the apex of a nested hierarchy of *dominium*. That the emperor exercised jurisdiction over all matters of universal reach afforded him no right to pass judgment on a matter that was particular to a self-sufficient commonwealth; such matters were the exclusive prerogative of the prince. Similarly, that a prince might legitimately refuse to obey the emperor did not alter the fact that, *de iure*, the emperor was lord of all the world, or that any denial of that fact would constitute heresy.¹⁹

But by challenging the very idea of a unitary Christendom, the Reformation irreparably fractured this medieval order. This had profound implications for Europeans who began to journey into the wider world in the sixteenth century, whether in search of trade or in pursuit of new territories and peoples to add to their realms. Europe's princes, who needed to ground their imperial projects on moral foundations in order to secure their own eternal salvation, could no longer appeal for justification to a shared normative framework or to the pope as judge of all men. This posed an especially grave problem when imperial

¹⁷ On the medieval order, see Burns; Fasolt, 155–218; Lee, 51–78.

¹⁸ Ullmann, 188n48

¹⁹ Fasolt, 46–50, 155–218, esp. 192–95. Cf. Pennington, 276–84; Skinner, 1:9–12. The dominant view among medieval jurists was that the Roman Empire persisted to their day, though the members of the Neapolitan school did reject the emperor's universal authority. Lee, 51–61.

expansions proceeded through wars of conquest that placed the souls of conquerors in peril.²⁰ Alongside the jurisdictional implications of the Reformation, the massive influx of silver and gold from American mines and the growth of transoceanic commerce stretching from Europe to the East and West Indies introduced peculiar new challenges for those, like Francisco de Vitoria, tasked with the moral regulation of Christians. Commercial society generated new social pressures and invited a reconsideration of traditional conceptions of sin. Jurists and theologians were compelled to rethink the implications of *dominium* understood as private property, to consider what might make for a just price in commercial transactions, and to distinguish between the sinful practice of usury and forms of credit that might be free of the stain of sin. The idea of empire that began to take shape in Europe, that is, also entailed “an empire of private rights” established upon and enforced by the authority of princes and the instrument of just war.²¹

From the 1530s onward, then, the old adage that the king is emperor in his own kingdom increasingly connoted a claim to exclusive, non-overlapping authority that could brook no supranational intervention as European princes sought to secure their temporal authority against a backdrop of the Reformation’s ecclesiastical crisis. It was against this backdrop that the modern understanding of princely sovereignty took shape in the midcentury writings of Jean Bodin, initially in his *Methodus ad Facilem Historiarum Cognitionem* (Method for the easy comprehension of history, 1566) and more fully in his *Les six livres de la république* (The six books of the commonwealth, 1576).²² It was only with this emergent doctrine that de facto obedience to the *de iure* ruler was demanded.²³

The medieval notion of jurisdiction, which lived on in Vitoria’s account of civil power, envisaged overlapping and nonexclusive jurisdictions culminating in the universal authority of the whole world at the apex of an integrated jurisdictional hierarchy, whether embodied in the person of the emperor or not. On this view, a polity might be self-sufficient, in Aristotle’s sense, and yet nested within a wider jurisdiction.²⁴ Vitoria thus occupied a transitional position, aware of the disintegration of the old jurisdictional order of Christendom and yet unable to

²⁰ Fitzmaurice, 9–10; Pagden, 2015, 45–46, 56–57.

²¹ Koskenniemi, 2011, 16–29 (quotation at 28). Vitoria’s innovation was to marry the Thomist understanding of objective right with a number of traditions of subjective right. See Brett, 1997, 124–37; Tierney, 2001, 13–42, 242–72.

²² Bodin, 1945, 172–79; Bodin, 1962. On the Roman law background of Bodin’s concept of sovereignty, see Lee, 159–86. For a discussion of Bodin’s writings in the context of religious conflict, and in particular of Huguenot resistance theory, see Skinner, 2:239–301.

²³ Fasolt, 201–02.

²⁴ Aristotle, 3 (*Politics* 1.2, 1252b 27–30).

envision a world without a unitary commonwealth of nested jurisdictions. Doctrines of princely sovereignty, in contrast, took the prince to be supreme within the commonwealth, and commonwealths to be independent of one another in space and time. For those, like Bodin and Gentili, who took princely sovereignty to be the normative standard for a well-ordered commonwealth, it was “not law, not right, not *ius*, and certainly not jurisdiction, but sovereignty, *maiestas*, *summa potestas*” that was the defining feature of ordered political life.²⁵

*Francisco de Vitoria on Self-Sufficient Commonwealths and the
Authority of the Whole World*

Along with the other members of the so-called second Scholastic, Francisco de Vitoria offered an influential and sustained critique of the conquest of America. He developed this critical position in response to an immediate theological question. When conquistadors returned from New Spain, they flocked, in search of absolution, to the Dominican theologian’s home at the Convent of St. Esteban in Salamanca. Driven by a concern to secure a Christian ethic in a world where the foundations of Christendom were fast eroding, Vitoria was compelled to investigate the nature of the sins that these conquistadors confessed. His *relectios* (literally, rereadings) sought to clarify how the sacrament of penance might be adequately ministered in this new context, but they also testify to the shifting moral and political landscape of sixteenth-century Europe itself. In addition to the aggressive and un-Christian conquest of America, the Christian ethic Vitoria sought to defend was assaulted from all sides by the fracturing of the church in the Reformation, the rapid expansion of commercial society, and the emergence of doctrines of reason of state, according to which princes placed the narrow interests of their commonwealths ahead of the project of universal Christendom.²⁶ Some of these problems were related. For example, Vitoria was especially concerned to contest the Lutheran revival of the old heresy of Richard Fitzralph (ca. 1300–60) and John Wycliffe (1330–84), who had claimed that *dominium* was dependent upon God’s grace. This heresy threatened to destabilize political societies across Europe, but it had also been invoked by some conquistadors to justify the dispossession of Native Americans.²⁷

²⁵ Fasolt, 195–204 (quotation at 199).

²⁶ Fernández-Santamaría, 58–119; Koskenniemi, 2011, 13, 16–29; Pagden, 2015, 45–74; Tierney, 2001, 255–72.

²⁷ Vitoria, 1991c, 17–18, 32–42; Vitoria, 1991f, 240. See also Vitoria, 1991a, xvi–xviii; Tierney, 2001, 290–91. Within the ambit of the church, Vitoria took up the task of defending the spiritual authority of the papacy—including some measure of temporal authority—against the writings of the conciliarists: Vitoria, 1991f, 258–64, 284–87; Vitoria, 1991i, 55, 82–101; Vitoria, 1991j, 111–29. See also Burns, 138–45; Vitoria, 1991a, xxi–xxiii.

In defending the rights of Native Americans, then, Vitoria was not merely motivated by a righteous concern to defend the innocent. He was also responding to the imperative of preserving the political and moral order of a Christ-centered world.

If Vitoria was to pursue this project, however, he could no longer do so within the confines of the old medieval order. He rejected the idea that the emperor was *dominus mundi*, finding no warrant for this claim in divine, natural, or human law. And while he acknowledged that the pope possessed an indisputable supremacy over spiritual matters, his power to intervene in temporal affairs was limited to securing the spiritual well-being of Christians and did not extend to the affairs of non-Christians.²⁸ Without the support of Christendom's old jurisdictional order, Vitoria needed to provide a new foundation for the legitimate authority of independent polities, whether American or European. He had no doubt that God originally "made everything to be owned by all and [that] human beings are the common owners of everything by natural law." At issue was how humankind had separated itself into distinct commonwealths.²⁹ To understand the situation of the Americas, that is, Vitoria had to tell the history of the whole world.

With the exception of commonwealths founded on the command of Noah after the Flood, Vitoria argued that the world was colonized by various families and divided into kingdoms "by mutual consent of the nations." Governments were established in these kingdoms either when some men "set themselves up as tyrants" or when "some of them gathered together in one commonwealth and by common consent set up a prince."³⁰ In either case, following Aristotle and Thomas Aquinas (1225–74), Vitoria argued that a commonwealth fulfilled man's nature in a manner that the family could not. While "the family provides its members with the mutual services which they need . . . [it] does not make it whole and self-sufficient especially in defence against violent attack." This need for self-defense was only met with the formation of "the city [*ciuitas*] . . . the most natural community," which was an effect of "a device implanted by Nature in man for his own safety and survival." This establishment of a civil power—an "overseeing power or governing force"—was essential to prevent each man in the community from pulling "in his own direction as opinion or whim directed."³¹ It was necessity, in other words, that required the division

²⁸ Vitoria, 1991i, 84, 92–94; Vitoria, 1991f, 252–64.

²⁹ Vitoria, 1934, 74–75; quoted and translated in Koskenniemi, 2011, 14.

³⁰ Vitoria, 1991f, 255.

³¹ Vitoria, 1991c, 8–10 (quotations on 9); see also Aquinas, 9–10 ("De Regimine Principum" 1.2); Aquinas, 79 (*ST IaIIae* 90.2); Aristotle, 3 (*Politics* 1.2, 1252b 27–30). Vitoria's *relectio* was drafted against the backdrop of a series of upheavals: the revolt of the

of the world into distinct commonwealths. Although the development of these separate commonwealths was a product of history, the civil power “had its origin in nature and may thus be said to belong to natural law” even though it “was undoubtedly not instituted by nature, but by an enactment [*lex*].”³² Civil power did not result automatically from the law of nature, but nor did it contradict it.

Vitoria also distinguished between the authority of the commonwealth that established the civil power and the power of the prince who wielded it. He argued that it was impossible for the civil “power [*potestas*] to be administered by the commonwealth itself, that is to say by the multitude.” Some power of direction and command—the constituted power of the prince—had to be established, but it was not transferred from the people to the ruler. Instead, it derived “immediately from God.” In establishing this civil power, the community merely transferred its authority (*auctoritas*)—its constituting capacity—to the prince. Once this civil power was constituted, however, the commonwealth retained no right to abolish it, nor did it retain any power in itself after the creation of the prince. The civil power was “not merely power above any individual, but above all . . . citizens together.” There could, therefore, be no appeal against the king to the commonwealth as “the commonwealth is not higher than the king.”³³

Vitoria found evidence of this kind of “power or dominion or jurisdiction, either public or private” everywhere. It was not the sole right of Christians. “There can be no doubt at all,” he argued, “that the heathen have legitimate rulers and masters [*veri principes*].”³⁴ Native Americans—or “barbarians,” as Vitoria termed them—“undoubtedly possessed as true dominion, both public and private, as any Christians.” They “could not be robbed of their property,

comuneros of Castile against the authority of Charles V (r. 1519–56) in 1520–21, the German Peasants’ War of 1524, and what he took to be an antinomian Protestant Reformation. He was concerned to defend the view that “kingly power . . . comes from God” against those who took all princes to be “tyrants and robbers of human liberty”: Vitoria, 1991c, 12. See also Tierney, 2001, 290.

³² Vitoria, 1991f, 254–55 (quotation on 254); Vitoria, 1991c, 7–10; Aquinas, 5–8 (“De Regimine Principum” 1.1). See also Brett, 1997, 134–36; Fernández-Santamaría, 63–68.

³³ Vitoria, 1991c, 10–18, 31 (quotations on 14, 16, 31); see also Vitoria, 1991e, 199. For the original Latin text of “On Civil Power,” see Vitoria, 2008. Vitoria argued that princes were bound by the laws they passed, and he afforded subjects a qualified right to resist a tyrant who threatened their interests. In America, however, he suggested that if Christian converts were a majority in a polity they could replace an infidel ruler with a Christian. Vitoria, 1991c, 40, 42; Vitoria, 1991e, 180–82; Vitoria, 1991f, 288–89.

³⁴ Vitoria, 1991c, 18.

either as private citizens or as princes, on the grounds that they were not true masters [*ueri domini*].” The *dominium* of an American prince could even extend over Spaniards: “children born in the Indies of a Spanish father,” Vitoria argued, would by the law of nature and the *ius gentium* have a right “to become citizens of that community,” just as would a Spanish man who took up domicile.³⁵ In short, there was no impediment to a Christian falling under the *dominium* of a non-Christian prince.

The term *dominium* carried a number of different meanings, and Vitoria worked with two of them here: first, the right of ownership over “private chattels and possessions,” and second the right of “jurisdiction” proper to a prince.³⁶ He attended to both in his analysis of the conquest of America, examining the conditions under which a Spanish subject might acquire (or an Indian might lose) the right of private ownership, as well as how and under what circumstances the Spanish Crown might acquire (or an Indian prince might lose) jurisdiction over part of the Americas. But it is the second of these forms of *dominium*—the jurisdiction proper to the prince—that is crucial to understanding the juridical status Vitoria envisaged as being shared by Indian and European princes.

“The temporal commonwealth,” Vitoria argued, “is self-sufficient [*perfecta*], and therefore cannot be subject to anyone outside itself.”³⁷ In his writings on the Indies, he underscored this point further: “a ‘perfect’ thing is one in which nothing is lacking, just as an ‘imperfect’ thing is one in which something is lacking: ‘perfect’ means, then, ‘complete in itself.’ . . . [It] is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates.”³⁸ Some scholars have taken this account of the self-sufficient commonwealth as evidence of a theory of sovereignty in Vitoria’s writings.³⁹ But if the theologian was no longer beholden to the universal lordship of the emperor, he was not yet committed to the *summa potestas* of sovereignty; his theory of civil power remained fundamentally transitional.⁴⁰

What Vitoria meant when he described a polity as self-sufficient was that it had three capacities: “complete power to avenge itself, to recover its own property, and to punish its enemies.” This is what differentiated the commonwealth and its prince from a private person, for while “a private person may defend

³⁵ Vitoria, 1991f, 250–51, 281.

³⁶ Vitoria, 1991f, 239, 241.

³⁷ Vitoria, 1991i, 87.

³⁸ Vitoria, 1991h, 301.

³⁹ Fernández-Santamaria, 77; Koskenniemi, 2011, 28–29; Míaja de la Muela, 359; Pagden, 2015, 57; Tomlins, 128.

⁴⁰ Tierney, 2007, 105–06.

himself and his property, it is nevertheless impermissible for him to avenge himself or to reclaim his own property save through the judge.”⁴¹ Princes were the bearers of supreme authority within the self-sufficient commonwealth, to be sure, but this was not yet the concept of sovereignty that Bodin would arrive at. The prince of a perfect community might have all the powers of an autonomous ruler, including the right to wage war or make peace, yet he could still fall under the authority of another prince.⁴² Vitoria, moreover, situated the bearers of civil power within the wider jurisdiction of the world as a whole, a locus of authority above the self-sufficient commonwealth. It was this universal locus of authority that grounded his account of the *ius gentium*. Vitoria might have boldly swept aside the emperor’s claim to be *dominus mundi*—all the more boldly given that Charles V was both Holy Roman emperor and Vitoria’s liege lord as king of Castile and Aragon—but he nevertheless aspired to the restoration and expansion of Christendom. If the *ius gentium* was to regulate the disorders of the world, Vitoria first had to provide it with a foundation from which to do so. His notion of a universal global commonwealth was central to this justification.

Following Aquinas, Vitoria understood the natural law to be the basis for right (*ius*) and the foundation on which the legitimacy of all human institutions and laws rested. But he offered conflicting opinions on the relationship between natural law and the *ius gentium*, in part reproducing a set of confusions in Aquinas’s own discussion of the *ius gentium*, which had sometimes emphasized Gaius’s conflation of the *ius gentium* and natural law and at other times appeared to accept Ulpian’s sharp distinction between them.⁴³ Vitoria at times argued that the law of peoples “either is or derives from natural law,” consistent with Gaius’s view.⁴⁴ More often, however, and in spite of the fact that he rejected Ulpian’s claim that there was a strict separation between the *ius gentium* and the natural law, he insisted that the *ius gentium* had a consensual character: “on the occasions when it is not derived from natural law the consent of the greater part of the world is enough to make it binding, especially when it is for the common good of all men.” As “the common consensus of all peoples and nations,” it “ought to be placed more under positive law [*jure positivo*]

⁴¹ Vitoria, 1932a, cxvi–cxvii.

⁴² For example, Vitoria observed that though the emperor was not *dominus mundi*, he was the temporal superior of the Duke of Milan even though the duke had all the powers of an autonomous prince because “the state of Milan is . . . perfect and does not share its being with any other state”: Vitoria, 1932a, cxvii.

⁴³ Aquinas, 133–37 (*ST IaIIae* 95.4), 163–65 (*ST IaIIae* 57.3); Watson, 1:1–2 (paragraphs 1, 6, 9). See also Fernández-Santamaria, 98–100, 112–13; Miaja de la Muela, 349; Tierney, 2007, 110–14; Brett, 2011, 12–15, 62–89.

⁴⁴ Vitoria, 1991f, 281. For Vitoria’s rejection of Ulpian’s view, see Vitoria, 1932b, cxi–cxii.

than under natural law.”⁴⁵ His account of the *ius gentium* in his *relectio* “On Civil Power” is revealing: “the law of nations does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment [*vis legis*]. The whole world, which is in a sense a commonwealth [*respublica*], has the power [*potestas*] to enact laws which are just and convenient to all men; and these make up the law of nations. . . . No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world [*totius orbis auctoritate*].”⁴⁶ The order that Vitoria imagined here was neither the self-regulating system of the balance of power that would animate theories of princely sovereignty, nor was it the order among states that later traditions of international law would aim at. And the *ius gentium* was neither a system of laws that governed affairs among commonwealths nor those between individual men. Instead, as Annabel Brett notes, it was a law “between all human beings as forming one community.”⁴⁷ In subordinating all human beings and all commonwealths to this universal *ius gentium*, Vitoria was preserving a nested hierarchy of jurisdiction while simultaneously insisting upon the juridical equality of European and American commonwealths.

The notion that humanity was joined into a single community that shared certain obligations was not a novel idea in the sixteenth century. But in responding to the disorders of a disintegrating Christendom, Vitoria was arguing for a kind of obligation that bound princes and their subjects alike. Recall that when Vitoria defined the nature of civil power he argued that it resulted from an irrevocable transfer of authority from the commonwealth. But the whole world, which was “in a sense a commonwealth,” had made no such transfer. Vitoria was explicit about this when denying that the emperor was *dominus mundi*, for “if he were it would be solely by authority of some enactment, and there is no such enactment.”⁴⁸ If the whole world was a kind of commonwealth, it clearly had no locus of command, no executive function whatsoever, which is striking given that Vitoria had earlier insisted that a commonwealth “cannot exist without some overseeing power or governing force [*potestas*].” If the *ius gentium* had the legal character of a positive enactment, therefore, this flowed not from its enforcement by a constituted power, but from the “sanction [*auctoritas*] of the whole world.”⁴⁹ And Vitoria found ample evidence of this kind of

⁴⁵ Vitoria, 1932b, cxii–cxiii. For the original Latin text of “De Jure Gentium et Naturali,” see Vitoria, 1934, 12–17.

⁴⁶ Vitoria, 1991c, 40. While this consensual *ius gentium* was binding on the whole world, Vitoria allowed for it to be improved upon by agreement among princes: Vitoria, 1932b, cxiii.

⁴⁷ Brett, 2011, 13–14.

⁴⁸ Vitoria, 1991f, 257.

⁴⁹ Vitoria, 1991c, 9, 40.

universal legal enactment in the division of the world into different commonwealths after the Flood.⁵⁰ Moreover, this was a law that burdened all, even those who “have not yet given their sanction.”⁵¹

To be sure, Vitoria insisted that no civil power had ever been established over the whole world. But he did not rule out the possibility of a constituted global power. On the contrary, because “the human race once had this power [*potestas*] of electing a single supreme prince” before the original division of the world, he insisted that it “was part of natural law” and “must still exist.”⁵² Vitoria registered a trace of this power in his account of Christendom, which, like the world as a whole, “is in some sense a single commonwealth [*respublica*] and a single body.”⁵³ A majority of Christians retained the capacity, as he saw it, to elect a universal monarch over all Christian commonwealths. In the context of the Reformation, Vitoria argued that this could be done even “against the opposition of the minority” if it were expedient “for Christendom and the commonwealth of the faithful to have a single prince for their defence against tyranny or defeat by the infidel.”⁵⁴ And because “temporal ends are subordinate to and directed toward spiritual ends,” he allowed that the pope might “compel Christians to elect a single prince.”⁵⁵ While he questioned the authority of the pope to pass judgment on the temporal affairs of non-Christians, then, Vitoria had no doubt about his authority over Protestant princes. Moreover, in aspiring to a reconstituted and expanded Christian commonwealth, he did not doubt that the spiritual authority of the papacy “should be acknowledged in the whole world.”⁵⁶

Vitoria’s account of the whole world as a commonwealth was not an atavistic remainder in an otherwise modern account of sovereignty. Instead, it marked the transitional character of his account of civil power and the *ius gentium*. He registered the new forms of political organization taking shape against the backdrop of the Reformation while remaining wedded to a model of legal, moral, and political authority that imagined a global arrangement of nested jurisdictions, none of which had the characteristics of what theorists later in the century would come to call *sovereignty*. Moreover, Vitoria’s model of the whole world as

⁵⁰ Vitoria, 1991f, 255, 281. These were customary enactments, not statutes, but their customary character nonetheless burdened them with the force of law: Vitoria, 1991e, 185–86. On this point, see Miaja de la Muela, 346–62; Wagner, 567–73.

⁵¹ Vitoria, 1932b, cxii.

⁵² Vitoria, 1991c, 31–32.

⁵³ Vitoria, 1991c, 31.

⁵⁴ Vitoria, 1991c, 31. For Vitoria’s discussion of the binding character of majority decisions, see also Vitoria, 1991e, 186; Vitoria, 1991f, 280–81, 288–89.

⁵⁵ Vitoria, 1991c, 31.

⁵⁶ Vitoria, 1991c, 28; see also Vitoria, 1991i, 95–101.

a commonwealth placed significant constraints on the authority of princes.⁵⁷ As will become clear from his discussions of the Americas, Vitoria required princes to abide by capacious norms of “natural partnership and communication” that afforded people a “right to travel and dwell [*ius peregrinandi*]” in other countries as well as to spread the truth (i.e., to evangelize) among their inhabitants.⁵⁸ He also argued that the authority of the whole world had implications for the authority of a prince to wage a just war. Because “any commonwealth is part of the world as a whole, and in particular since any Christian country is part of the Christian commonwealth,” then “any war which is useful to one commonwealth or kingdom but of proven harm to the world or Christendom . . . [is], by that very token, unjust.”⁵⁹ He even licensed princes to intervene in the affairs of other commonwealths to defend the innocent. The “purpose and good of the whole world” demanded action against the cruelty of tyrants on the grounds that a failure to punish them would make it “impossible for the world to be happy.”⁶⁰ A commonwealth may have been self-sufficient, and a prince may indeed have been supreme over his commonwealth, but this fell short of the *summa potestas* that would characterize the doctrine of princely sovereignty by midcentury.

Absent the creation of a universal monarch, however, the world as a whole could not give effect to its authoritative pronouncements by intervening in the affairs of particular commonwealths. Vitoria reserved that power—of just war—to individual princes, who alone could exercise the coercive powers of the *ius gentium*.⁶¹ A prince, on this account, had “authority not only over his own people but also over foreigners to force them to abstain from harming others; this is his right by the law of nations and the authority of the whole world [*orbis totius auctoritate*].”⁶² The justification of acts of war was a separate matter, which depended on the identification of a discernable injury, an infringement on a right granted by natural law or the *ius gentium*. Such an injury formed the basis of a just cause.⁶³ Because a war could be just only on one side, the capacity to maintain the order of the world turned, for Vitoria, on a proper understanding of the *ius gentium* and a dispassionate adjudication of the merits of claims made under it.⁶⁴

⁵⁷ Wagner, 570–71.

⁵⁸ Vitoria, 1991f, 278–86 (quotation on 278). For the original Latin text of “On the American Indians,” see Vitoria, 1917, 217–68.

⁵⁹ Vitoria, 1991c, 21.

⁶⁰ Vitoria, 1991h, 298.

⁶¹ Vitoria, 1991h, 299–302.

⁶² Vitoria, 1991h, 305. For the original Latin text of “On the Law of War,” see Vitoria, 1917, 269–97.

⁶³ Vitoria, 1991h, 298, 303–04; Vitoria, 1991f, 270. See also Tierney, 2001, 265–72.

⁶⁴ Vitoria, 1991h, 312–13.

This account of civil power and of the *ius gentium* was fundamental to Vitoria's efforts to secure the order of the world amid the upheavals of the Reformation and of Spain's imperial expansions. He gathered up the fragments of the old Christian order and attempted to fashion from them a new order for the whole world. But his aspiration remained bound to the ideal of a unitary Christendom that was ill equipped to contain the diversity of the world he now faced. Before turning to the Americas, it will be helpful to contrast this position to Alberico Gentili's treatment of civil power and the *ius gentium* at the end of the sixteenth century in order to illuminate how the emergent doctrine of princely sovereignty envisioned a very different temporal order.

*Alberico Gentili on the Sovereignty of the Prince and the
Association of the Human Race*

Gentili's writings on the *ius gentium* and the laws of war were motivated, in part, by the Protestant jurist's aspiration to undermine the linked ideals of a unitary Christendom and an authoritative global commonwealth at the heart of the writings of the School of Salamanca. This required both a repudiation of universal papal authority and a rejection of religious difference as a basis for war.⁶⁵ His essentially defensive position drew on a wide range of authorities. In addition to ancient and medieval sources of civil law, Gentili was indebted, following Cicero (106–43 BCE), to a Stoic account of the thick sociability that naturally bound all people into an association of the human race.⁶⁶ He also showed a deep appreciation for Niccolò Machiavelli's (1469–1527) account of the importance of political calculation.⁶⁷ However, most important to the account offered here was Gentili's commitment to Bodin's recent theory of princely sovereignty, which placed the prince above the civil law as the bearer of supreme legislative authority, and granted the commonwealth a more robust autonomy by dispensing with the idea that the world as a whole could legislate universally and license intervention within particular polities.⁶⁸ This very different understanding of civil power led Gentili to fashion a conception of the *ius gentium* at odds with Vitoria's.

⁶⁵ Koskenniemi, 2010, 299–305; Schröder, 2010a, 83–86.

⁶⁶ Panizza, 243; Straumann, 2010.

⁶⁷ Koskenniemi, 2010, 299–301; Panizza, 213–14, 229–30; Schröder, 2010a, 92–100. Gentili celebrated Machiavelli for marrying history with “that branch of philosophy which deals with morals and politics”: Gentili, 1924, 2:156.

⁶⁸ For Bodin's influence on Gentili, see Burgess, 75–79; Lee, 278–81; Schröder, 2010b, 169–81; Straumann, 2010, 104–11. For Gentili's critique of Bodin's methodology, see Gentili, 1933, 2:4.

In his widely circulated *Six Livres*, Bodin argued that “Soueraigntie is the most high, absolute, and perpetuall power ouer the citisens and subiects in a Commonweale. . . . That is to say, The greatest power to commaund.” Bodin’s primary concern was to defend the prince’s supreme authority within the commonwealth.⁶⁹ His theory of sovereignty was not an apologia for tyrannical absolutism, however. Although the prince might be answerable “to the immortall God alone,” with no temporal superior, the French jurist insisted that even sovereigns were subject to the “law of God and nature.”⁷⁰ But this formulation of authority within the commonwealth simultaneously did away with the idea that a global commonwealth could bind the prince’s actions externally. To be sure, Bodin discussed the *ius gentium* in terms that bore some similarity to Vitoria’s writings. He acknowledged that the world was, in a sense, “just like a city-state” in which men “are of one blood and subjected to the same guardianship of reason,” and held together “by nothing but the rule of reason and the common law of nations.” But unlike Vitoria, he insisted that “this dominion of reason constrains no one,” and he ruled out the idea that a universal commonwealth could “be forged out of all peoples.” It was precisely the anarchic structure of interpolity relations that meant that princes would have to exercise the sovereign prerogative to wage war and make peace “to obtain lawful conduct and adjudication of affairs outside the borders of the kingdom.”⁷¹

These ideas informed Gentili’s own account of the absolute character of royal power and his defense of the Bodinist theory of government advanced by England’s newly crowned James I (r. 1603–25).⁷² Gentili combined Bodin’s understanding of princely sovereignty with two well-known maxims of the civil law: that the prince was above the law, and that what pleased the prince had the force of law. Citing Bodin, he observed that “Sovereignty [*Supremitas*] . . . is that absolute and perpetual power which the Latins call *majestas*.”⁷³ The

⁶⁹ Bodin, 1962, 14, 84 (quotation). See Lee, 189–91, 198–99. On the reception of Bodin, see Lloyd.

⁷⁰ Bodin, 1962, 86, 89. While Bodin held that sovereignty was formally absolute, he cautioned that sovereign princes should exercise self-restraint in their use of power. See also Lee, 192–95.

⁷¹ Bodin, 1945, 168; see also Bodin, 1962, 163–66. Bodin distinguished the *ius gentium* from natural law, allowing that sovereign princes might derogate from unjust aspects of the law of peoples, but not from any aspect of natural law. See Bodin, 1962, 113.

⁷² Gentili took up this position against the view of the School of Salamanca that the pope had spiritual authority over James I. See Koskenniemi, 2010, 303–04.

⁷³ Gentili, 1605, 9; quoted and translated in Burgess, 75. Gentili argued that subjects retained a right of self-defense against the prince but that a subject had no right to resist the legitimate force of his lord: Gentili, 1933, 2:126–27.

prince, on this account, was bound neither by any human being nor by the civil law, but was possessed of a power that was absolute and without limitation within the realm: "Sovereign are those to whom nobody is superior."⁷⁴ But, once again, Gentili maintained Bodin's appreciation for the limits that bound princes. For all their supremacy within the realm, Gentili insisted that princes remained subject to divine and natural law as well as to the *ius gentium*.⁷⁵ But what kind of restraint did the *ius gentium* represent here?

Gentili envisaged the law of peoples as resting upon the Ciceronian idea of an "association of the human race [*generis humani societas*]" that was rooted in the "kinship, love, kindliness, and a bond of fellowship" that nature established among men.⁷⁶ This human association lacked the authoritative weight and potentially constituted character of Vitoria's concept of the whole world as a kind of commonwealth. For Gentili, the *ius gentium* was binding and irrevocable, but not because it was the result of a positive enactment of the whole world. To be sure, he had begun *De Iure Belli* by examining this latter idea and by suggesting that histories of the ancient world would reveal "that which has successively seemed acceptable to all men," which could represent "the intention and purpose of the entire world." In order for these similar principles to have been found in the positive laws of men as diverse as "Romans, Greeks, Jews, and barbarians"—in short, among "all known peoples"—he argued that these peoples must have made use of the "same code." From the known histories of peoples, then, "we learn the unknown." Even if some of the world set itself against these customs, the binding *ius gentium* was in the hands of the majority of humankind.⁷⁷

If this first definition suggested something like Vitoria's consensual *ius gentium*, Gentili rejected it in favor of his second, "more elegant definition." Echoing Gaius's Stoic formulation, which equated the *ius gentium* with the natural law, Gentili held that if the *ius gentium* was common to all mankind, it must have been "given to them by God." The principles of the law of peoples were "not written, but inborn." He continued: "we have not learned, received, and read them, but we have wrested, drawn, and forced them out of nature herself."⁷⁸ For Gentili, the *ius gentium* was universally binding not because it rested on a common consensus, be it derivative of natural law or not, but because the law of peoples and the natural law were one and the same: "Natural law is

⁷⁴ Gentili, 1605, 8; quoted and translated in Straumann, 2010, 105.

⁷⁵ Gentili, 1605, 17.

⁷⁶ Gentili, 1933, 2:67. For the original Latin text of *De Iure Belli*, see Gentili, 1933, vol. 1.

⁷⁷ Gentili, 1933, 2:8–9.

⁷⁸ Gentili, 1933, 2:9–10. See also Watson, 1:2 (paragraph 9).

natural instinct, which is also immutable.”⁷⁹ When he sought out evidence of this natural *ius gentium*, Gentili found it in “the books of Justinian”—the *Corpus iuris*—which reflected the law “not merely . . . of the state [Rome], but also that of the nations and of nature.”⁸⁰ As Andreas Wagner notes, by rejecting the idea that the *ius gentium* was the result of actual legislation by the whole world, Gentili located the binding force of this law in “the moral nature of man.” A majority of humankind “no longer legislate[d] but rather exemplifie[d] and reveal[ed] the nature present in every human being.” Here, the *ius gentium* was depicted as a development “of (reasonable) human nature.”⁸¹

The developmental character of Gentili’s account of the *ius gentium* comes to the fore, however, not so much in *De Iure Belli*’s Stoic invocations of an association of the human race bound together by the exercise of right reason, but rather in the more Epicurean picture he draws of the state of nature as an original barbarism lacking any normative force, which he deploys in his earlier and later writings.⁸² In “so primitive a state,” as he put it (following Lucretius) in *De Legationibus* (On embassies, 1585), people “were incapable of respect for the common good, nor did they know enough to adopt customs or laws of a reciprocal nature.”⁸³ Humanity could be removed from this lawless state by the application of right reason, but so too could people descend back into it if they abandoned the rule of sovereign princes. Gentili underscored this point in his defense of the civilizing effects of the Roman Empire in *De Armis Romanis* (The wars of the Romans, 1599). Speaking in the voice of Rome’s defender, Gentili described the inhabitants of pre-Roman Spain in the same Epicurean mode that he had deployed earlier, as “barbaric and wild . . . people, whose minds are said to be closer to those of animals than men” but who were “brought over by our laws to a more cultivated way of life.”⁸⁴ Empire here was the means to civilization, but the civilized human condition remained precarious. After the empire was overthrown, humanity was cast back into chaos, into “the wars of all, of all peoples among themselves.”⁸⁵ If the principles of the natural *ius gentium* were inborn, then, they still needed to be wrested from nature,

⁷⁹ Gentili, 1933, 2:345.

⁸⁰ Gentili, 1933, 2:17. See also Straumann, 2010, 107–09, 115–21.

⁸¹ Wagner, 575–76.

⁸² Brett, 2011, 189–91.

⁸³ Gentili, 1924, 2:51.

⁸⁴ Gentili, 2011, 349.

⁸⁵ Gentili, 2011, 355. There is a striking similarity here to Thomas Hobbes’s (1588–1679) later account of humanity’s natural condition as “a warre, as is of every man, against every man.” Hobbes, 2:192; see also Gentili, 2011, xvii–xviii.

and empire was one means to realize them within the confines of a civil commonwealth.

Gentili's association of the human race, therefore, differed in important respects from Vitoria's whole world. The absence of any legislative assembly or public authority made the enactment of binding norms impossible. Moreover, for Gentili, the principle of sovereignty—the idea that there could be no authority above the prince—rendered the constitution of any global commonwealth conceptually impossible. The *ius gentium*—as natural law—was certainly morally binding, and princes were obliged to follow it, but it did not rest on an appeal to the authority of the whole world as supreme over the prince. A world of commonwealths ruled by sovereign princes could not, as a whole, possess either power or authority in the sense that Vitoria had imagined them.⁸⁶

Gentili was well aware that this new account of political authority and the absence of any global authority posed serious problems. It was precisely the fact that “the sovereign [*principes*] has no earthly judge” that made it “inevitable that the decision between sovereigns should be made by arms.” To count as a war, and to come under the protections of the laws of war that Gentili outlined, required that “the war on both sides must be public and official and there must be sovereigns on both sides to direct the war.”⁸⁷ In place of Vitoria's understanding of just war, which allowed that war could be just only on one side, Gentili conceived of war as by definition just: “War is a just and public contest of arms.” In Gentili's entirely new formulation, war was fought as a “duel” among “equal parties”—enemies—each of whom could legitimately claim to be fighting on behalf of a “just cause.” “He is an enemy [*hostis*],” the Italian jurist asserted, “who has a state [*respublica*], a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace.”⁸⁸ If war was to be public and just, then, the first criterion was fulfilled by any conflict that pitted sovereign princes against one another, while the second criterion was given by the fact that both parties could argue “on a plausible ground” for the justness of their cause.⁸⁹ Most important, however, was that the precondition for a lasting peace remained in place. The parties to a war had to envisage

⁸⁶ Wagner, 576–80.

⁸⁷ Gentili, 1933, 2:15. See also Schröder, 2010b, 173. On the preference for arbitration over war, see Gentili, 1933, 2:15–17, 93. See also Schröder, 2010b, 177. The advance of the Reformation and the failure of Charles V to reunite Christendom at the Council of Trent (1545–63) were central to Gentili's innovative realization that “the very nature of . . . sovereignty seemed to undermine any pacification of this anarchical society”: Schröder, 2010a, 83.

⁸⁸ Gentili, 1933, 2:12, 25, 31. Cf. Vitoria, 1991h, 312–13.

⁸⁹ Gentili, 1933, 2:32. See also Panizza, 218.

the prospect of the conflict's termination in a treaty of peace that would rest on the possibility of renewing relations of good faith.

Gentili drew on Machiavelli to argue that these just and public contests would be limited by the obligation to renew good faith among contending princes. This depended upon his view that even enemies still participated in some set of shared moral principles that inclined them toward the reestablishment of peace—a point of significant importance in the context of Europe's confessional wars.⁹⁰ Gentili had made this point abundantly clear in *De Legationibus*, where he insisted, quoting Livy, that “he who shows good faith . . . has a claim on good faith” and that “good faith . . . is the essence of the law of nations and of embassies.”⁹¹ Together with the operation of the balance of power—the cornerstone of international order—Gentili held that the possibility of a return to peace, good faith, and trust among princes could preserve a temporal order even in a context of deep spiritual disagreement.⁹²

Central to Gentili's account of war, therefore, was the notion that sovereign princes who warred with one another remained engaged in the common enterprise of giving a just order to the world. War, paradoxically, was the crucial regulative apparatus of the association of the human race, the means of maintaining peace. It was through war, and through its termination in treaties, that peace could be ensured. Whether brought about by the victor, or by all the parties to a war negotiating together, the aim of conflict was the “permanent establishment of peace.” In short, “the end of war for which all ought to strive is peace.”⁹³

But this aim of perpetual peace, and the self-correcting balance of power that was supposed to preserve it, was imperiled by those people who rejected faithfulness and the bonds of human fellowship. Gentili argued that pirates, brigands, and runaway slaves introduced a precarious disorder into the world and made it more difficult to preserve the possibility of trust and of a return to relations of good faith. By attempting to emancipate themselves from the bonds of the law, these renegades repudiated the authority of sovereign princes and tore

⁹⁰ Schröder, 2010b, 179–81.

⁹¹ Gentili, 1924, 2:87, 162. See also Gentili, 1933, 2:145, 148, 156–57, 184, 191–92, 361, 378, 403.

⁹² For Gentili's celebration of the balance of power, see Gentili, 1933, 2:65. Gentili's claim that war could result in the punishment of a sovereign prince might appear to puncture the concept of sovereignty whereby princes are without a temporal judge. However, this punishment was not licensed by natural law, but by the political calculations of a victor who sought to secure himself against his otherwise lawful enemy. See Schröder, 2017, 37–42.

⁹³ Gentili, 1933, 2:289–90. Gentili followed Saint Augustine (354–430) in defining peace as an “ordered harmony,” a “proper distribution of things” having the sole claim on justice: Gentili, 1933, 2:290.

at the natural bonds of human sociality. They had “broken the treaty of the human race” that underpinned the law, and as foes to the *ius gentium* they could receive no protection from it. Atheists were similarly incapable of faithfulness. Being “wholly without religious belief,” in contrast to idolaters or pagans, atheists “liv[ed] rather like beasts than like men.” And because “religion is a part of the law of nature . . . that law will not protect those who have no share in it.”⁹⁴ Faithless men lived beyond the rights and protections of the natural *ius gentium* that they were taken to have violated by their morally blameworthy forms of life. Radical difference appears here as a dangerous threat to the association of the human race.

Conflicts fought against the faithless were not wars, then, and they were not bound by the laws of war. Such “malefactors do not enjoy the privileges of a law to which they are foes,” and “the laws of war are not observed towards one who does not himself observe them.” As Gentili put it toward the end of *De Iure Belli*: “faith may be broken with one who breaks faith.” Although they might command armies and sack cities, the status of the brigand could not be confounded with the just enmity of contending sovereign princes, for they lacked the necessary “assumption of a public cause.” Conflicts with pirates, therefore, could not end in “agreement” or treaties of peace, but only in either the pirates’ victory or their death.⁹⁵ Only the bearers of the supreme authority of sovereignty, who “cannot be controlled by the laws” but who still accord themselves to the principles of the natural and irrevocable *ius gentium*, could claim rights under the laws of war as just enemies.⁹⁶

For Gentili, faithless persons—pirates, brigands, and atheists—were “the common foes of all mankind.”⁹⁷ Although clearly indebted to a tradition reaching back to Cicero, Gentili’s position here was strikingly similar to the opening of Bodin’s *Six Livres*. There, Bodin had argued that “although they seeme to liue in neuer so much amitie and friendship together,” bands of pirates “ought not to be of right called societies and amities, or partnerships; but conspiracies, robberies, [and] pillages,” because they lacked “right gouernment, according to the lawes of nature.” Pirates were “enemies to mankind.”⁹⁸ While Cicero had used this same formulation, he had insisted that even pirates were bound to observe some “particle of justice,” whereas Bodin depicted them

⁹⁴ Gentili, 1933, 2:22, 41. Gentili accused the runaway slave of committing the offense of “steal[ing] himself”: Gentili, 1933, 2:242.

⁹⁵ Gentili, 1933, 2:22, 24, 272, 432. See also Gentili, 1924, 2:79–81.

⁹⁶ Gentili, 1933, 2:15 (quotation), 17–18.

⁹⁷ Gentili, 1933, 2:22, 41.

⁹⁸ Bodin, 1962, 2–3. See also Von Friedeburg, 358–59. Bodin did not acknowledge his own debt to Cicero, but the connection is undeniable. See Schröder, 2010b, 174n49.

lying altogether beyond the sphere of justice and right.⁹⁹ Following Bodin, Gentili cast the pirate band as the very antithesis of the well-ordered polity. As he saw it, piracy violated “the common law of nations” and was contrary to “the league of human society.” Moreover, because the *ius gentium* and natural law were equated, pirates were tantamount to “violators of nature,” who were guilty of an assault on what was “common to all men.” The gravity of this kind of violation of the *ius gentium* enjoined a common action against the foes of humankind. “War should be made against pirates by all men,” Gentili argued, “because in the violation of that law we are all injured.” Pirates showed themselves incapable of faith, not because of “the atrocity of [their] crime, but [because of] its nature.”¹⁰⁰ What placed these men beyond the *ius gentium* was not their contingent violence or brutality, but the form of life that they led beyond the reaches of a sovereign prince in a condition of faithlessness that threatened the very prospect of peace among men.

In depicting the world as an order of sovereign princes, Gentili offered an account of the sources and possibilities of order and disorder among human communities that diverged from Vitoria’s. In contrast to the Spanish theologian’s aspiration to establish a new order out of a crumbling Christendom, the Italian jurist saw this drive to universal monarchy and restored papal supremacy as a threat to the possibility for reciprocity in temporal affairs. Moreover, Gentili drew a sharp distinction between the sovereign princes who bore rights under the *ius gentium*—whether Christians, infidels, or barbarians—and the “brutish men [*homines bruti*]” whose actions threatened to breed disorder in the association of the human race, and who, therefore, merited no such rights.¹⁰¹ Instead of the medieval hierarchy of *dominium* that placed the emperor at the apex of the world, or of Vitoria’s transitional account of the universal global commonwealth, Gentili envisaged the world as a community of independent commonwealths, in which temporal and spiritual affairs were subject to the final adjudication of the sovereign prince.¹⁰² But having dispensed with the ideal of a binding global commonwealth, Gentili needed a new foundation for good faith among princes. He found this foundation in the idea of a universal moral law—the natural *ius gentium*. This commitment to the inborn character of the *ius gentium*, however, made it difficult for Gentili to

⁹⁹ Cicero, 77–78, 141 (quotation on 77).

¹⁰⁰ Gentili, 1933, 2:124–25.

¹⁰¹ Gentili, 1933, 2:122.

¹⁰² While the aspiration to a worldwide commonwealth would persist in the tradition of European political thought, it was fundamentally transformed by the doctrine of sovereignty, which made such a body subject to the sovereign will of individual princes. See, for example, Tuck, 1999, 207–25.

accommodate radical differences, not least of the kind that Europeans reported encountering in the Americas.

As will become clear by examining their respective treatments of the Americas, where Vitoria treated supposed deviations from natural law as examples of potentially correctable error, Gentili could only conceive of them as signs of a morally blameworthy decline into brutishness. Behaviors and forms of life that appeared to Gentili to violate the *ius gentium*—and thus to be contrary to man’s supposed nature—were taken to be evidence of the repudiation of human sociality. They posed a threat to the possibility of good faith among princes, and on this basis any ruler who engaged in or condoned such behaviors could not be accorded the status of a sovereign prince that was enjoyed by European rulers. The remainder of this essay illuminates this divergence between Vitoria’s and Gentili’s approaches and shows how their different theories of civil power and the *ius gentium* were decisive in shaping their respective assessments of the juridical status of Native American polities.

THE AFFAIRS OF THE INDIES

Vitoria lectured extensively on what he termed the “affairs of the Indies,” and he did so, as I have already suggested, against the backdrop of the significant upheavals that were reshaping the moral and political landscape of Europe and the threat that he thought the conquest posed to the moral fabric of Christendom.¹⁰³ He was sharply critical of Spanish imperial practice, though his universalism also placed significant obligations on the princes and peoples of the Americas.¹⁰⁴ In contrast, Gentili’s remarks on the Americas were less systematic. He was ultimately less concerned with the transatlantic context than he was with the threat of universal monarchy in Europe, and when America did make an appearance in his work it did so less as the primary topic under discussion than as an exemplary case to which he applied his understanding of the law of peoples and the laws of war. Nevertheless, the framework Gentili employed and his assessment of the character of Native American polities both served to license an unbridled imperial intervention in America by casting indigenous rulers—like pirates—as the antithesis of Europe’s sovereign princes.

¹⁰³ Vitoria, 1991b, 331. Vitoria gave three *relectios* dedicated to the Indies. “On Dietary Laws, or Self-Restraint” was prepared in 1537 and delivered in early 1538; “On the American Indians” was written in 1537–38 and delivered in January 1539; and “On the Law of War” was composed after January 1539 and delivered in June of that year: Vitoria, 1991a, 205, 231, 293.

¹⁰⁴ For depictions of Vitoria as a defender of empire, see Anghie, 29; Tuck, 1999, 75; Williams, 97–98, 103–08. For accounts of Vitoria as empire’s critic, see Benton and Straumann, 20–26; Fitzmaurice, 48–49; Tomlins, 128.

Consistent with his view that Americans were governed by true princes, Vitoria argued that prior to arriving in the Indies the Spanish had no right to *dominium* there.¹⁰⁵ He dismissed as spurious the claim that Indians lacked the capacity for public or private *dominium* because they were “sinners, unbelievers, madmen, or insensate.”¹⁰⁶ The order of Indian societies, for all it differed from Christian Europe, was clearly founded on reason, which entitled indigenous Americans to the same rights—to jurisdiction and property—commonly afforded to Christians and non-Christians in the Old World.¹⁰⁷ Moreover, even had the Indians been “as foolish and slow-witted as people say they are,” akin to Aristotle’s “slaves by nature,” Vitoria argued that it would be “wrong to use this as grounds to deny their true dominion.”¹⁰⁸ Finally, given that neither the pope nor the emperor was *dominus mundi*, Vitoria rejected their authority to grant lands in the Americas to Christian princes: “When they first sailed to the land of the barbarians,” the Spaniards “carried with them no right at all to occupy their countries.”¹⁰⁹

Having dispensed with the idea that Christian princes had an a priori right to the Americas, Vitoria turned to arguments that found a warrant for Spanish rule in the interactions between Christians and Native Americans. Some of these grounds were also clearly spurious. The doctrine of discovery, for example, far from bolstering a Spanish right to the Indies clearly confirmed the Indians’ *dominium*. If it were a rule of natural law and the *ius gentium* that “all things which are unoccupied or deserted become the property of the occupier,” then it was trivial to show that these rights fell to the Indians rather than to the Spanish.¹¹⁰ Nor could a Christian prince claim any right to the Americas by “special gift from God” or by the putative consent of the Indians.¹¹¹ Even the Indians’ alleged engagement in the mortal sins of “cannibalism, incest with mothers and sisters, or sodomy,” or “pederasty, buggery with animals, or lesbianism,” could not justify the Spanish conquest. Every jurisdiction contained those guilty of sins against nature (e.g., murder or blasphemy) and sins against the law of nature (e.g., fornication). If these pervasive sins provided a just cause for war, the world would be permanently disordered and “kingdoms could be

¹⁰⁵ Vitoria used the language of *veri principes* (true princes) or *veri domini* (true masters) to describe Native American princes: Vitoria, 2008, 36; Vitoria, 1917, 232.

¹⁰⁶ Vitoria, 1991f, 240.

¹⁰⁷ Vitoria, 1991f, 240–51.

¹⁰⁸ Vitoria, 1991f, 239, 251. Vitoria was refuting the authority of John Mair (1467–1550), a Scottish theologian who taught at the University of Paris and who in 1510 suggested that Native Americans might be an example of Aristotle’s slaves by nature: Vitoria, 1991a, xxv.

¹⁰⁹ Vitoria, 1991f, 264; see also Vitoria, 1991b, 332.

¹¹⁰ Vitoria, 1991f, 264.

¹¹¹ Vitoria, 1991f, 275–77 (quotation on 276).

exchanged every day.”¹¹² For Vitoria, if the purpose of civil power was to secure “the blessedness and happiness of the city and the citizens,” it would be contradictory to allow the punishment of those who violated the natural law to lead “to unrest or worse consequences.”¹¹³

But Vitoria was still committed to an understanding of the *ius gentium* that bound all peoples by the authority of the whole world. He identified a number of obligations under this law of peoples, the violation of which by native princes would have constituted an injury to the Spaniards. Moreover, he argued that such injuries might have furnished a just cause for war such that the Indies “could have come under the control of the Spaniards.” For example, under the *ius gentium* Native Americans were obliged to recognize a universal right to travel, dwell, and trade in other lands and to exploit unused natural resources such as “gold in the ground or pearls in the sea” under the law of wild beasts (*ferae bestiae*), assuming that doing so was not harmful to them.¹¹⁴ They were also obliged to recognize the right to spread the truth, exemplified by the preaching of the Gospel.¹¹⁵ The Spaniards might also have a just cause for war if indigenous princes were to do harm to others. The Dominican theologian argued that the Spaniards could intervene in a conflict to aid their own allies and to defend Christian converts. Moreover, they might intervene in the affairs of a native polity in order to protect the innocent from tyrannical and cruel treatment by their rulers.¹¹⁶ Referring to the oft-invoked specter of human sacrifice, Vitoria argued that the Spaniards could intervene to protect the innocent or even to defend criminals who were to be killed for the purposes of consuming human flesh, even if the Indians themselves offered no objection to these practices.¹¹⁷ As Vitoria had made clear earlier, the issue was not anthropophagy as such, as a sin against the law of nature. Instead, the consumption of the bodies of the dead was blameworthy because it involved “injustice to other men.”

¹¹² Vitoria, 1991f, 273–74; see also Vitoria, 1991d, 218–19, 224–25; Vitoria, 1991g, 347.

¹¹³ Vitoria, 1991d, 221.

¹¹⁴ Vitoria, 1991f, 278–84 (quotations on 277, 280); Vitoria, 1991d, 228. As in his discussion of unoccupied places, Vitoria was alluding here to the Roman law *ferae bestiae*, which allowed that a thing that belonged to nobody could be acquired by taking (*occupatio*). Along with land, things that were owned by no one but open to use by all (*res communes*), like the air and the sea, were generally excluded from acquisition by taking. For discussions of this and the related concept of *res nullius* (things that belong to no one), see Benton and Straumann; Fitzmaurice, 51–58; Tomlins, 113–20.

¹¹⁵ To deprive Native Americans of this truth would be to place them “in a state beyond any salvation”: Vitoria, 1991f, 284.

¹¹⁶ Vitoria, 1991f, 286–90; Vitoria, 1991d, 225; Vitoria, 1991g, 347.

¹¹⁷ At this point in the *relectio*, Vitoria’s language changes from *potest* (can) to the more conditional *posset* (could). See Vitoria, 1991f, 287n82.

Moreover, he argued that because “anthropophagy is held in abomination by all nations who have a civil and humane way of life; therefore it is unjust” under the consensual *ius gentium*.¹¹⁸ If a prince refused to punish such crimes among his subjects, or if he endorsed them in the form of “tyrannical and oppressive laws,” these injuries and violations of the *ius gentium* could be avenged by any other prince.¹¹⁹ Where the Indians were provably guilty of infringing upon the rights of the Spanish, their allies, or any innocent persons, then, Vitoria argued that Spain might justly vindicate these rights by resorting to war.

However, this right to just war was heavily qualified. Vitoria repeatedly insisted that these warrants for war under the *ius gentium* were predicated on the idea that the Spaniards were “doing no harm” to the Indians.¹²⁰ Given that he frequently condemned the injustices that Spaniards had wrought in the Indies, it is safe to assume that he was not endorsing Spanish imperial claims or practices.¹²¹ Moreover, he was clear that any resort to war would only be justified after a prince first attempted to convince the Indians of the injustice of their actions by “reasoning and persuasion” and that these should be wars of moderation.¹²² The right to wage wars of vindication would cease “once the cause ceases,” and they could not license “the power to eject the enemy from their dominions [*dominium*] and despoil them of their property.” The conquest of the Indies could only be justified if there was no other means to “secure safety for the future.”¹²³ Only under very specific circumstances, none of which described the actual history of the conquest of America, could the Spanish secure themselves by “conquering . . . [the Indians’] communities and subjecting them”—namely, in the case where the Spaniards had been scrupulous in avoiding any injury to indigenous peoples, had been cognizant of the possibility that the opposition they faced was driven by a just fear rather than an unjust malice, and had made every effort to reason with the Indians.¹²⁴

While Vitoria’s arguments applied equally to all polities, he also suggested that the peculiar condition of the Americas—as he saw it—placed even more onerous obligations on the Spaniards. Native Americans did not have “complete knowledge” of the law of nature and they had no knowledge of the Gospel. Therefore, their ignorance of divine and natural law was invincible and the actions that resulted from this ignorance were not morally

¹¹⁸ Vitoria, 1991d, 209, 225–26.

¹¹⁹ Vitoria, 1991f, 287–88. See Pagden, 2015, 60–61.

¹²⁰ Vitoria, 1991f, 278 (quotation), 279, 283–84, 286.

¹²¹ Vitoria, 1991b, 331–33.

¹²² Vitoria, 1991f, 281.

¹²³ Vitoria, 1991d, 226.

¹²⁴ Vitoria, 1991f, 283–86 (quotation on 283).

blameworthy.¹²⁵ Here Vitoria's approach differed from Gentili's later claim that the natural law was inborn. Instead, he argued that natural law is "not so-called because it is in us from birth, for children do not have natural law nor the disposition [for it], but because from the inclination of nature we judge those things that are right."¹²⁶ On this basis, the native peoples of the Americas were to be treated differently from Christendom's so-called infidel enemies, Saracens and Jews, because the traditional justifications for warring against these infidels did not apply to Native Americans.¹²⁷ Indigenous Americans, for example, could not be guilty of the sin of unbelief before they had heard anything about the Christian faith, notwithstanding all the other sins of which they might be guilty.¹²⁸ Nor were they bound to believe the truth of the Christian faith at its first announcement, for absent "palpable signs or . . . some other means" by which the Indians could be made aware of the truth of the faith, they would have no way to judge the credibility of the priest. Even had such "provable and rational arguments" been peaceably presented to the Indians, moreover, their refusal to believe them would have offered no just cause for war. War offered "no argument for the truth of the Christian faith," and instead risked the "monstrous and sacrilegious" possibility of feigned belief.¹²⁹ What was decisive in cases of evangelism was the "practical outcome of the affair." Good intentions counted for little if the actions based on them "fuel[ed] greater hatred of the Christian religion."¹³⁰ Similarly, in those cases where Indians violated their obligations to welcome travelers and traders under the *ius gentium*, Vitoria argued that this likely reflected their understandable fear "of men whose customs seem so strange, and who they can see are armed and much stronger," rather than any intent to cause injury. Were indigenous peoples to attack the Spanish, the latter would have the right to defend themselves, of course, but they would be obliged to do "as little harm to the

¹²⁵ Vitoria, 1991f, 266–69, 273–75 (quotation on 275). On the conditions for ignorance to be invincible, see Vitoria, 1991f, 237.

¹²⁶ Vitoria, 1952, 25; quoted and translated in Brett, 2011, 12n3.

¹²⁷ In his final *relectio* on the Indies, on the laws of war, Vitoria suggested that "our war against the pagans is . . . permanent because they can never sufficiently pay for the injuries and losses inflicted," though he continued in revealingly specific terms that it is therefore "not to be doubted that we may lawfully enslave the women and children of the Saracens": Vitoria, 1991h, 318. This argument did not apply to those, like Native Americans, who were invincibly ignorant. Vitoria, 1991h, 313. Cf. Anghie, 26–27. See also Brett, 2011, 14–15n19.

¹²⁸ Vitoria, 1991f, 266–67.

¹²⁹ Vitoria, 1991f, 269–72 (quotations on 270–72).

¹³⁰ Vitoria, 1991d, 229. Of the practice of Spanish evangelism he noted: "I hear only of provocations, savage crimes, and multitudes of unholy acts": Vitoria, 1991f, 271.

barbarians as possible” and would have no right to “exercise the other rights of war . . . such as putting them to death or looting or occupying their communities.”¹³¹ That the customs of the Americans differed, often substantially, from those of Europeans demanded prudence; it did not license war. In short, although Vitoria identified principles of the *ius gentium* by which the inhabitants of the Americas could have fallen under Spanish *dominium*, he did not think such conditions had been met.

However, the rights of Native Americans as true lords, both public and private, rested on fairly precarious grounds in Vitoria’s writings. His *ius gentium* enclosed the Americas within an ideological imaginary that remained firmly centered on Europe and on his aspiration to reformulate and extend Christendom. Vitoria’s account of the invincible ignorance of Native Americans, and his anticipation of their eventual enclosure within this Eurocentric Christian order, is an early example of that structure of global historical time that Dipesh Chakrabarty describes as having the form, “first in Europe, then elsewhere,” whereby the future of the non-European world is anticipated by Europe’s own past.¹³² The precariousness of this arrangement came to the surface at the end of Vitoria’s *De Indis* (On the American Indians), when he tentatively broached another “possible title” that the Spaniards might claim over America on the strength of the “mental incapacity of the barbarians.” He argued that “these barbarians, though not totally mad . . . are nevertheless so close to being mad, that they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms.”¹³³ Vitoria appeared here to reverse his earlier claim that even if the inhabitants of the Indies were natural slaves this would not have provided a just ground for depriving them of their *dominium*. This final “possible title” leaves little room for the juridical equality of European and American polities.

Where earlier Vitoria had insisted that the Americans had “some order [*ordo*] in their affairs,” had “properly organized cities [*civitates*], proper marriages, magistrates [*magistratus*] and overlords [*domini*],” and were possessed of “laws [*leges*], industries, and commerce, all of which require the use of reason,” he now raised the possibility of their having “neither appropriate laws [*leges*] nor magistrates [*magistratus*] fitted to the task” and being “unsuited even to governing their own households.”¹³⁴ Vitoria was careful to note that he “d[id] not dare either to affirm or condemn” this title, but suggested that it might still “be argued that for . . . [the Indians’] own benefit the princes of Spain might take

¹³¹ Vitoria, 1991f, 281–82.

¹³² Chakrabarty, 7.

¹³³ Vitoria, 1991f, 290–91.

¹³⁴ Vitoria, 1991f, 250, 290.

over their administration, and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest."¹³⁵ And he insisted that this could only be done "for the benefit and good of the barbarians, and not merely for the profit of the Spaniards."¹³⁶ But in spite of this crucial caveat about the best interests of the Indians being paramount, Vitoria had swerved sharply toward the kinds of protectionist doctrines that would be a hallmark of future colonizing projects, whereby Europeans would assert for themselves a right to determine the best future course for colonized peoples.¹³⁷ The colonization of the Americas was not merely a matter of conquest and settlement, but also of this kind of ideological enclosure that made it possible for Europeans to imagine that their coercive interventions were just (or not) in the first place. Vitoria may have been one of the clearest critics of colonialism in sixteenth-century Europe, but his criticisms were indented to the ideological core of imperialism.¹³⁸

In contrast to Vitoria, Gentili offered no systematic treatment of the justice of the Spanish conquest or of other European colonizing enterprises. But nor did he ignore this controversy entirely. Instead, America, and the case of the Spanish conquest, offered Gentili an opportunity to probe the limitations of previous accounts of the *ius gentium* and to point to some of the ways in which these earlier accounts threatened the peaceful order among princes in Europe. For example, while he cited Vitoria approvingly throughout *De Iure Belli*, Gentili took issue with some of the qualified justifications for intervention that the theologian had outlined, often on the basis of the effects they would have in Europe. When Gentili did turn his attention toward America, however, his treatment of native polities was shaped by his theory of princely sovereignty and the very different account of the *ius gentium* on which it rested.

Much like Vitoria's, most of Gentili's remarks on America were sharply critical of the Spanish conquest. Citing the Dominican theologian, he argued that "the Spaniards were not just in giving that pretext [that men are 'foes of one another by nature'] or the pretext of religion as the reason for their war with the Indians."¹³⁹ He also rejected the idea that the Americas had been a vacant territory, "as if to be known to none of us were the same thing as to be possessed

¹³⁵ Vitoria, 1991f, 290.

¹³⁶ Vitoria, 1991f, 250, 291.

¹³⁷ Koskenniemi, 2011, 9–10; Williams, 103–08.

¹³⁸ Colonialism, on this view, "inheres less in political overrule than in seizing and transforming 'others' by the very act of conceptualizing, inscribing, and interacting with them on terms not of their choosing": Comaroff and Comaroff, 15.

¹³⁹ Gentili, 1933, 2:55. See also Gentili, 1933, 2:39, 123.

by no one.”¹⁴⁰ To be sure, Gentili did ponder the fact that much of the world remained unoccupied, even that it was “being reduced more and more to the wilderness of primeval times.” And following Thomas More’s (1478–1535) *Utopia* (1516), he allowed that vacant land could be occupied and made use of on the basis that the “law of nature . . . abhors a vacuum.” The “property of no one,” which he equated with “uncultivated land,” would fall to those who “take possession of it and improve it.”¹⁴¹ Nevertheless, this was a claim about the acquisition of property, not jurisdiction. Gentili was clear that the existing “sovereign of that territory [*princeps territorii*]” retained “jurisdiction” over the newcomers and the territory in which this property was claimed. Improved lands, therefore, were held by a legal title subject to the sovereignty of the prince within whose realm the lands were found.¹⁴² One might be forgiven here for thinking that Gentili was placing Native American polities on a much firmer footing than Vitoria had done.

Gentili’s initial critique of the Spanish conquest was further strengthened by his rejection of some of the titles by which Vitoria had suggested the conquest might have been justified. The Italian jurist agreed with Vitoria that the Spanish certainly had a right under the *ius gentium* to trade with the Indies, which could be enforced by war if necessary. But he also insisted that Spain was aiming “not at commerce, but at dominion,” and that a war to vindicate the right of commerce could not produce a title to rule over the territory itself. Moreover, he argued that the right to trade under the *ius gentium* was not unlimited. Just because some sorts of commerce were forbidden did not mean that commerce itself was prohibited. A local population might legitimately prohibit the importation of particular items that they took to be harmful or impious, just as some items were prohibited in “the commonwealth of Lycurgus or of Plato”—or in late sixteenth-century England, for that matter, where the importation of Catholic relics had been prohibited by Elizabeth I (r. 1558–1603) in 1571. “Strangers” had no right “to argue about these matters, since they have no licence to alter the customs and institutions of foreign peoples.”¹⁴³ Finally, while Gentili defended interventions in defense of the innocent, he constructed a different justification from the one proposed by Vitoria. Defending those with

¹⁴⁰ Gentili, 1933, 2:89.

¹⁴¹ Gentili, 1933, 2:80–81. See also Tuck, 1999, 47–50.

¹⁴² Gentili, 1933, 2:81.

¹⁴³ Gentili, 1933, 2:89–90. See also Cawley, 51–52 (13 Eliz. c.2 §6). Gentili echoed Vitoria’s call for prudence in assessing such titles, noting that “it is a common characteristic of all uncivilized peoples [*omnibus barbaris*] to drive away strangers.” In his critique of Vitoria, however, he largely ignored the Spanish theologian’s own qualifications of the possible warrants he had identified for Spanish *dominium*. Gentili, 1933, 2:89.

whom one existed in the “kinship of nature and the society formed by the whole world” was clearly an obligation. But Gentili could not abide establishing “a supervision of one sovereign by another.” To avoid this outcome, he drew a distinction worthy of a Scholastic theologian. He argued that when a dispute concerned a sizable proportion of a commonwealth’s population, the rebelling masses took on a public character as a sovereign unto themselves. Under such circumstances, defense of the erstwhile subjects of another prince was tantamount to a sovereign’s intervention, as ally or mediator, into a dispute among contending princes.¹⁴⁴

Gentili, like Vitoria before him, effectively dismantled the Spanish claim to the Americas. But to read him in this way is to mistake his purpose. The jurist had little interest in America, on its own terms. He was animated, instead, by the affairs of Europe and by a desire to defend the sovereignty of Protestant princes against the encroachment of papal jurisdiction and the rise of a universal monarchy. He feared that latter threat on two fronts: the Spanish and the Ottomans, he warned, were “planning and plotting universal dominion.”¹⁴⁵ Although Gentili may have understood the Spanish conquest of America as contributing to Spain’s dominance in Europe, the titles that Spaniards had used to justify that conquest—and which he had just repudiated—had a more immediate contemporary relevance for Protestants, especially in light of the Spanish Crown’s attempts to suppress the Dutch Revolt (1566–1648).¹⁴⁶ By opposing these titles in America, Gentili was arguing that confessional difference, reasonable restrictions on what might be traded into any commonwealth, or the use and occupancy of vacant lands—which he identified in sixteenth-century Greece, Turkey, Africa, Spain, and Italy, as well as in America—could not justify conquest and the seizure of sovereignty in

¹⁴⁴ Gentili, 1933, 2:74–78 (quotations on 74). See also Wagner, 578n49.

¹⁴⁵ Gentili, 1933, 2:64. The Ottomans occupied an exceptional status for Gentili as “enemies” (“hostes”) against whom Christian Europeans “constantly have a legitimate reason for war” by dint of the threat they posed: Gentili, 1933, 2:56–57. While he distinguished the times when the Turks “wage war”—a public capacity reserved to the public enemy—from when they “practice piracy,” he did not conflate the Turks with pirates: Gentili, 1933, 2:332. In the posthumously published *Hispanicae Advocationis* (Plea of a Spanish advocate, 1613), he even went so far as to suggest that the alliances with infidels that he ruled out in *De Iure Belli* as “never right” might be permissible when the Turks warred against other enemy infidels: Gentili, 1933, 2:402; Gentili, 1921, 2:93. While it might have been imprudent to depend on the faith of the sultan, then, some minimal possibility of faithfulness still separated him, as enemy (*hostis*), from the pirate. Cf. Malcolm, 138–39, 143–45; Schröder, 2010a, 91–92; Schröder, 2010b, 179–81.

¹⁴⁶ This conflict formed an ongoing context for *De Iure Belli*, though it is referenced only once in the text: Gentili, 1933, 2:200.

Europe. If these titles were invalid against indigenous American polities, that is, then they could offer no just basis for Spain's project of universal monarchy within Christendom. Gentili left his reader in no doubt as to the pressing necessity of this kind of argument, and of a defensive alliance against the Spaniards: "Unless there is something which can resist Spain, Europe will surely fall."¹⁴⁷ His careful dismissal of the Spanish titles to the Americas, then, was primarily driven by the parochial concerns of European politics.

But this cannot explain why, when he did return to the question of America in the final chapter of book 1 of *De Iure Belli*, Gentili offered a blanket endorsement of Spanish conquest. It is useful to recall the terms of this license: "I approve the more decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians, who practised abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose. For such sins are contrary to human nature, and the same is true of other sins recognized as such by all except haply by brutes and brutish men. And against such men, as Isocrates says, war is made as against brutes [*fēras*]." Both princes and individuals could justly make war against such people, and "no rights will be due to these men who have broken all human and divine laws and who, though joined with us by similarity of nature, have disgraced this union with abominable stains." Native Americans, according to the Italian jurist, had "divest[ed] themselves of human nature" and were to be subject to "a war of vengeance to avenge our common nature."¹⁴⁸ Taking aim at Diego de Covarrubias (1512–77), who had followed Vitoria in rejecting the idea that either sins against nature or sins against the law of nature could warrant intervention, and in contrast to his own earlier view that it was not for strangers to "alter the customs and institutions of foreign peoples," here Gentili invoked precisely such a right when the actions in question were supposedly "contrary to human nature."¹⁴⁹ Where a community's customs were radically different, then, Gentili suggested that this could warrant that community's separation from the association of the human race.

With this line of reasoning, Gentili continued an older strand of humanist thinking that divided the world into spheres of civility and barbarism.¹⁵⁰ But in

¹⁴⁷ Gentili, 1933, 2:65; see also Gentili, 1933, 2:81.

¹⁴⁸ Gentili, 1933, 2:122, 124–25. Bodin, for his part, described the West Indies as "devoid of humanity": Bodin, 1962, 735.

¹⁴⁹ Gentili, 1933, 2:89–90, 122. Cf. Vitoria, 1991f, 273–74. Later, Gentili reiterated a similar point, arguing that those who were "alien to humanity" could justly be compelled "to change conduct which is contrary to nature": Gentili, 1933, 2:341. Covarrubias and Vitoria did allow for intervention in defense of the innocent: see Panizza, 243–44.

¹⁵⁰ On this early humanist view, see Tuck, 1979, 33–35.

emphasizing the alleged cannibalism of America's indigenous peoples, he was also drawing on the genre of early American ethnography that was coming to the fore at the same time that he was writing and that was beginning to outline a new anthropology based on (often fantastical) reports of the contrast between Europe and the Americas. Even as he deployed the earlier humanist distinction between civility and barbarism, that is, Gentili was producing a new formulation of that distinction. And by pressing accounts of Native American customs into the service of his own vision of a global order based on princely sovereignty, he was infusing these accounts with a novel political salience. Like other writers in this genre, Gentili was inventing, perhaps unwittingly, a repertoire of justifications for later European imperial expansion.¹⁵¹

To explain Gentili's abrupt turn to a defense of the Spanish conquest, it is worth noting that his critique of Covarrubias was entirely consistent with his earlier account of the sources of disorder in the world, which he identified with a broad category of behaviors—atheism, piracy, and brigandage—that injured all people by violating “the common sentiments of humanity” and undermining the capacity for human beings to maintain relations of good faith. For Gentili, the order of the world was held together by the gossamer threads of faith among sovereign princes, and this faith, in turn, was secured by the natural law, that “natural instinct” that was “common to all men.”¹⁵² This contrast between sovereign princes and faithless men was fundamental for Gentili. Princes, by virtue of their supreme authority within their realms and their participation in the *ius gentium* and the balance of power, preserved some minimal possibility for good faith and, therefore, for a return to peace. They were afforded the status of the just enemy and the protection of the laws of war attendant on it. In contrast, supposedly faithless persons—a category in which Gentili now included America's

¹⁵¹ Perhaps the most influential contributor to this genre was the Jesuit missionary José de Acosta (1540–1600), whose *De Procuranda Indorum Salute* (On securing the salvation of the Indians, 1588) was published in the same year that Gentili published the first edition of book 1 of *De Iure Belli*. Although Gentili made no reference to Acosta in the course of his expanded discussion of the Indies in 1598, his position bears some resemblance to that of the Jesuit missionary. While Acosta shared Vitoria's critique of the Spanish conquest, his classification of barbarisms placed him closer to Gentili inasmuch as it insisted upon the absence of well-ordered government among Native Americans. Acosta defined *barbarism* as the abandonment of “true reason” and the “common way-of-life of mankind,” which he contrasted with a civil condition of European Christians. He identified its most acute form with the customs of the native peoples of Brazil and Florida: “savages similar to wild animals . . . without law, without agreements, without governments,” who, among other things, “devour human flesh”: Acosta, 1:4–5 (quotations), 84–88. On Acosta, see Fitzmaurice, 75–84.

¹⁵² Gentili, 1933, 2:124, 345; see also Gentili, 1933, 2:22, 124–25. See also Schröder, 2017, 43–44; Panizza, 242–45.

indigenous peoples—were afforded no such protection. They were taken, instead, to “have utterly spurned all intercourse with their fellowmen” and to be “endeavor[ing] to drag back the world to the savagery of primitive times.”¹⁵³ If Native Americans engaged in practices that violated the inborn *ius gentium*, by Gentili’s lights they lost all protection afforded by it.

Gentili’s point here was not that indigenous Americans were not properly human. He was clear that as humans “we are by nature all akin.” This is an argument very different, therefore, from Sepúlveda’s claim that Indians were subhuman natural slaves. Instead, Gentili argued that Indians—like pirates, brigands, and atheists—had placed themselves beyond the “association of the human race” on account of their alleged faithlessness.¹⁵⁴ Whereas Vitoria had argued that radical difference was the result of a correctable error and had appealed to the idea of invincible ignorance as he counseled moderation toward Native Americans, Gentili rejected such leniency. His developmental account of the *ius gentium* could accommodate some customary differences, but in extremis difference marked for him the very repudiation of human sociality.¹⁵⁵ If indigenous Americans violated the tenets of his Eurocentric *ius gentium*, Gentili read this as an assault on the very foundations of good faith. Native Americans might have had princes of their own who claimed jurisdiction over the continent, as he had earlier implied, but their failure to uphold the irrevocable *ius gentium* abrogated their right to be treated as sovereigns. Therefore, where Vitoria understood jurisdiction as an essential attribute of a self-sufficient commonwealth, Gentili made the possibility of wielding the *summa potestas* of sovereignty contingent on both a polity’s internal organization and its adherence to a natural and irrevocable *ius gentium* that enabled the community of sovereign princes to maintain relations of faith and trust.

Sovereignty was now normative for political life, and Gentili (following Bodin) granted the recognition of sovereignty only to those supposedly capable of engaging in relations of good faith.¹⁵⁶ Because Native Americans lived under a rule that was at odds with the Eurocentric *ius gentium*, Gentili refused to grant that native princes could be true bearers of sovereignty.¹⁵⁷ This marked, in effect, a spatial distinction between the Americas and Europe. Christian Europe was envisaged as being already occupied by polities ruled by sovereign

¹⁵³ Gentili, 1924, 2:79–81 (quotation on 79).

¹⁵⁴ Gentili, 1933, 2:54, 67.

¹⁵⁵ Gentili, 1933, 2:90.

¹⁵⁶ On the normative character of princely sovereignty for Bodin, see Bodin, 1962, A6; Skinner, 2:292–93.

¹⁵⁷ For a more forgiving assessment of Gentili’s treatment of the Spanish conquest, see Fitzmaurice, 74–75. Closer to my view is Tomlins, 128–31.

princes, while America was depicted as a space lacking sovereignty. Here Gentili offered a different iteration of the process of ideological enclosure, which I have already identified in Vitoria's writings. Native Americans were again drawn into a Eurocentric global order and subjected to a set of moral demands that were not of their own choosing. But when he cast America's indigenous peoples as brutes Gentili simultaneously excluded them from the supposed benefits of that order by rejecting the idea that native princes could exercise rightful *dominium*. America was depicted as a jurisdictional void, ripe for seizure and ready to be folded into the order of sovereign European princes. This was a particularly striking example of the production of Trouillot's "savage slot," which anchored the West's visions of colonial and metropolitan order from the sixteenth century onward. Within this conceptual space, the savage was discursively figured as the alter ego of the European, whether as the untutored inhabitant of the state of nature or—as in this case—as the counterpoint to the West's ideal and didactic utopian universals.¹⁵⁸ Gentili had swept aside whatever vestiges of jurisdictional recognition had remained in the writings of Vitoria and offered a blanket justification for European colonization of the putatively lawless Americas.

CONCLUSION

This article has traced a change in European treatments of the juridical status of Native American polities over the course of the sixteenth century. Vitoria's Christian universalism had aspired to the incorporation of Native Americans within a refashioned and expanding order of Christendom. But by midcentury, the fracturing of the Christian universal during the Reformation had generated an entirely new set of problems for men like Bodin and Gentili. In attempting to secure political order in a world of deep religious strife, these jurists turned to a concept of princely sovereignty that necessarily excluded any appeal to a global or universal order, whether temporal or spiritual. Though this innovation was not directly concerned with the question of the Americas, the doctrine of princely sovereignty came to be fused with the older humanist opposition between civility and barbarism and served to endow the "savage slot" with its juridical character. It established a normative standard for the commonwealth and for political life that was antithetical to the forms of social organization that Europeans purported to have found in the Americas, which they came to represent either as disordered societies that violated the fundamental norms of human sociality or as primitive states of nature that lacked any legal order whatsoever.

In their representations of America, Europeans both found a counterpoint to their present political order and gained a means for triumphantly imagining their past development. As Francis Bacon (1561–1626), an associate of

¹⁵⁸ Trouillot, 14–23.

Gentili's, put it, "Let anyone reflect how great is the difference between the life of men in any of the most civilized provinces of Europe and in the most savage and barbarous region of New India; and he will judge that they differ so much that deservedly it may be said that 'man is a God to man,' not only for help and benefit, but also in the contrast between their conditions."¹⁵⁹ For Bacon, Europe's voyages of exploration were crucial to new possibilities of philosophical discovery.¹⁶⁰ It is little wonder, then, that when Thomas Hobbes—a protégé of Bacon's and (perhaps) one-time student of Gentili's—sought evidence of the state of nature to contrast to the civil state, he found it, among other places, amid "the savage people in many places of America."¹⁶¹

The theoretical and practical crystallization of the concept of sovereignty was a product of the confessional fracturing of Renaissance Europe. But when Europeans sought to secure the status of their polities and the peace among them with this concept, they found its counterpoint in the figure of the putatively savage American. Later theorists of the *ius gentium*—most notably Hugo Grotius (1583–1645)—would draw both on the tradition of Spanish Scholasticism and on Gentili's novel account of the international order. But by now the concept of sovereignty was an indispensable touchstone that posed a profound hurdle to the imaginary of a reconstituted global commonwealth.¹⁶² The coercive conscription of America's indigenous peoples to a global order that takes sovereignty to be normative for political life, and that has little interest in indigenous conceptions of politics, has played a central role in the history of colonial dispossession and domination to which Native Americans have been condemned for over five hundred years.

¹⁵⁹ Bacon, 100. As Reinhart Koselleck noted, Bacon's suggestion that different levels of development could be compared synchronically and ordered diachronically "was increasingly interpreted in terms of 'progress'": Koselleck, 238. On Bacon's relation to Gentili, see Tuck, 1999, 17. Bacon may also have been influenced by Acosta, whose work is cited elsewhere in the *New Organon*: Bacon, 160.

¹⁶⁰ Bacon, 69.

¹⁶¹ Hobbes, 2:194. There is some evidence that Hobbes's discussion of the state of nature drew on Gentili's account of primitive times in *De Legationibus*, though Hobbes's account of human nature eschewed the moral valence that the Italian jurist gave to the natural *ius gentium*. See Warren, 270, 272–73. On the connections between Gentili and Hobbes, and their limits, see Brett, 2011, 82–83; Gentili, 2011, xx–xxi, xxiii–xxv; Tuck, 1999, 17, 126–28.

¹⁶² See, for example, Grotius, 1:259, 2:421–22, 1022–25. On Grotius's particular theorization of sovereignty as potentially divisible, which responded to "a very messy, from the 'modern' point of view, state of Europe (but not only of Europe)," see Brett, 2019, esp. 21–27 (quotation on 25). For differing views of Grotius's indebtedness to the Vitorian and Gentilian traditions, see Fitzmaurice, 87–101; Koskenniemi, 2011, 29–35; Panizza; Tierney, 2001, 316–42; Tuck, 1999, 78–108.

BIBLIOGRAPHY

- Acosta, José de. *De Procuranda Indorum Salute*. Trans. G. Stewart McIntosh. 2 vols. Tayport: Mac Research, 1995–96.
- Alfred, Taiaiake. *Peace, Power, Righteousness: An Indigenous Manifesto*. Oxford: Oxford University Press, 2009.
- Anghie, Anthony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press, 2004.
- Aquinas, Thomas. *Political Writings*. Ed. and trans. R. W. Dyson. Cambridge: Cambridge University Press, 2002.
- Aristotle. *Politics: A New Translation*. Trans. C. D. C. Reeve. Indianapolis, IN: Hackett, 2017.
- Armitage, David. *The Ideological Origins of the British Empire*. Cambridge: Cambridge University Press, 2000.
- Asad, Talal. "Conscripts of Western Civilization." In *Dialectical Anthropology: Essays in Honor of Stanley Diamond*, ed. Christine Ward Gailey, 333–51. Gainesville: University Press of Florida, 1992.
- Bacon, Francis. *The New Organon*. Ed. Lisa Jardine and Michael Silverthorne. Cambridge: Cambridge University Press, 2000.
- Belda Plans, Juan. *La Escuela de Salamanca y la renovación de la teología en el siglo XVI*. Madrid: Biblioteca De Autores Cristianos, 2000.
- Benton, Lauren, and Benjamin Straumann. "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice." *Law and History Review* 28.1 (2010): 1–38.
- Bodin, Jean. *Method for the Easy Comprehension of History*. Trans. Beatrice Reynolds. New York: Columbia University Press, 1945.
- Bodin, Jean. *The Six Bookes of a Commonweale*. Ed. Kenneth Douglas McRae. Trans. Richard Knowles. Cambridge, MA: Harvard University Press, 1962.
- Brett, Annabel S. *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*. Cambridge: Cambridge University Press, 1997.
- Brett, Annabel S. *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*. Princeton, NJ: Princeton University Press, 2011.
- Brett, Annabel S. "The Subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius." *Modern Intellectual History* (2019): 1–27. <https://doi.org/10.1017/S1479244319000040>.
- Burgess, Glenn. *Absolute Monarchy and the Stuart Constitution*. New Haven, CT: Yale University Press, 1996.
- Burns, J. H. *Lordship, Kingship, and Empire: The Idea of Monarchy, 1400–1525*. Oxford: Clarendon Press, 1992.
- Cawley, William. *The laws of Q. Elizabeth, K. James, and K. Charles the First*. London, 1680.
- Chakrabarty, Dipesh. *Provincializing Europe: Postcolonial Thought and Historical Difference*. Princeton, NJ: Princeton University Press, 2000.
- Cicero. *On Duties*. Ed. M. T. Griffin and E. M. Atkins. Cambridge: Cambridge University Press, 1991.
- Comaroff, Jean, and John Comaroff. *Of Revelation and Revolution, Volume 1: Christianity, Colonialism, and Consciousness in South Africa*. Chicago: University of Chicago Press, 1991.

- Deckers, Daniel. *Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)*. Freiburg: Universitätsverlag, 1991.
- Diamond, Stanley. *In Search of the Primitive: A Critique of Civilization*. New Brunswick, NJ: Transaction Books, 1974.
- Fasolt, Constantin. *The Limits of History*. Chicago: University of Chicago Press, 2004.
- Fernández-Santamaría, J. A. *The State, War and Peace: Spanish Political Thought in the Renaissance, 1516–1559*. Cambridge: Cambridge University Press, 1997.
- Fitzmaurice, Andrew. *Sovereignty, Property and Empire, 1500–2000*. Cambridge: Cambridge University Press, 2014.
- Gentili, Alberico. *De Iure Belli Commentatio Prima*. London, 1588.
- Gentili, Alberico. *Regales Disputationes Tres*. London, 1605.
- Gentili, Alberico. *Hispanicae Advocacionis Libri Duo*. Trans. Frank Frost Abbott. 2 vols. Oxford: Oxford University Press, 1921.
- Gentili, Alberico. *De Legationibus Libri Tres*. Trans. Gordan J. Laing. 2 vols. Oxford: Oxford University Press, 1924.
- Gentili, Alberico. *De Iure Belli Libri Tres*. Trans. John C. Rolfe. 2 vols. Oxford: Clarendon Press, 1933.
- Gentili, Alberico. *The Wars of the Romans: A Critical Edition and Translation of “De armis Romanis.”* Ed. Benedict Kingsbury and Benjamin Straumann. Trans. David Lupher. Oxford: Oxford University Press, 2011.
- Grant, Daragh. “The Treaty of Hartford (1638): Reconsidering Jurisdiction in Southern New England.” *William and Mary Quarterly*, 3rd ser., 72.3 (2015): 461–98.
- Grotius, Hugo. *The Rights of War and Peace*. Ed. Richard Tuck. Trans. John Morrice. 3 vols. Indianapolis, IN: Liberty Fund, 2005.
- Hobbes, Thomas. *Leviathan*. Ed. Noel Malcolm. 3 vols. Oxford: Oxford University Press, 2012.
- Koselleck, Reinhart. *Futures Past: On the Semantics of Historical Time*. Trans. Keith Tribe. New York: Columbia University Press, 2004.
- Koskenniemi, Martti. “International Law and *raison d'état*: Rethinking the Prehistory of International Law.” In *The Roman Foundations of the Law of Nations* (2010), 297–339.
- Koskenniemi, Martti. “Empire and International Law: The Real Spanish Contribution.” *University of Toronto Law Journal* 61.1 (2011): 1–36.
- Lee, Daniel. *Popular Sovereignty in Early Modern Constitutional Thought*. Oxford: Oxford University Press, 2016.
- Lloyd, Howell A., ed. *The Reception of Bodin*. Leiden: Brill, 2013.
- Malcolm, Noel. “Alberico Gentili and the Ottomans.” In *The Roman Foundations of the Law of Nations* (2010), 127–45.
- Merrell, James H. “Second Thoughts on Colonial Historians and American Indians.” *William and Mary Quarterly*, 3rd ser., 69.3 (2012): 451–512.
- Miaja de la Muela, Adolfo. “El Derecho ‘Totius Orbis’ en el Pensamiento de Francisco de Vitoria.” *Revista Española de Derecho Internacional* 18.3 (1965): 341–64.
- Mousourakis, George. *The Historical and Institutional Context of Roman Law*. Farnham: Ashgate, 2003.

- Muldoon, James. "Discovery, Grant, Charter, Conquest, or Purchase." In *The Many Legalities of Early America*, ed. Christopher L. Tomlins and Bruce H. Mann, 25–46. Chapel Hill: University of North Carolina Press, 2001.
- Nicholas, Barry. *An Introduction to Roman Law*. Oxford: Clarendon Press, 1962.
- Pagden, Anthony. *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology*. Rev. ed. Cambridge: Cambridge University Press, 1986.
- Pagden, Anthony. *The Burdens of Empire: 1539 to the Present*. Cambridge: Cambridge University Press, 2015.
- Panizza, Diego. "Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The Great Debate between 'Theological' and 'Humanist' Perspectives from Vitoria to Grotius." In *The Roots of International Law / Les fondements du droit international: Liber Amicorum Peter Haggemacher*, ed. Pierre-Marie Dupuy and Vincent Chetail, 211–47. Leiden: Martinus Nijhoff Publishers, 2014.
- Pennington, Kenneth. *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition*. Berkeley: University of California Press, 1993.
- Pereña, Luciano. *La Idea de Justicia en la Conquista de América*. Madrid: Editorial MAPFRE, 1992.
- The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Ed. Benedict Kingsbury and Benjamin Straumann. Oxford: Oxford University Press, 2010.
- Schröder, Peter. "Taming the Fox and the Lion—Some Aspects of the Sixteenth-Century's Debate on Inter-State Relations." In *War, the State, and International Law in Seventeenth-Century Europe*, ed. Olaf Asbach and Peter Schröder, 83–102. Farnham: Ashgate, 2010a.
- Schröder, Peter. "Vitoria, Gentili, Bodin: Sovereignty and the Law of Nations." In *The Roman Foundations of the Law of Nations* (2010b), 163–86.
- Schröder, Peter. *Trust in Early Modern International Political Thought, 1598–1713*. Cambridge: Cambridge University Press, 2017.
- Scott, David. *Conscripts of Modernity: The Tragedy of Colonial Enlightenment*. Durham, NC: Duke University Press, 2004.
- Skinner, Quentin. *The Foundations of Modern Political Thought*. 2 vols. Cambridge: Cambridge University Press, 1979.
- Springborg, Patricia. "Hobbes, Donne, and the Virginia Company: *Terra Nullius* and 'The Bulimia of Dominionium.'" *History of Political Thought* 36.1 (2015): 113–64.
- Straumann, Benjamin. "The *Corpus iuris* as a Source of Law between Sovereigns in Alberico Gentili's Thought." In *The Roman Foundations of the Law of Nations* (2010), 101–23.
- Straumann, Benjamin. *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*. Trans. Belinda Cooper. Cambridge: Cambridge University Press, 2015.
- Tanner, Joseph Robson, ed. *Tudor Constitutional Documents, A.D. 1485–1603*. Cambridge: Cambridge University Press, 1922.
- Tierney, Brian. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625*. Grand Rapids, MI: William B. Eerdmans, 2001.
- Tierney, Brian. "Vitoria and Suarez on *ius gentium*, Natural Law, and Custom." In *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreault-Saussine and James B. Murphy, 101–24. Cambridge: Cambridge University Press, 2007.

- Tomlins, Christopher L. *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865*. Cambridge: Cambridge University Press, 2010.
- Trouillot, Michel-Rolph. *Global Transformations: Anthropology and the Modern World*. Basingstoke: Palgrave Macmillan, 2003.
- Tuck, Richard. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press, 1979.
- Tuck, Richard. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. Oxford: Oxford University Press, 1999.
- Ullmann, Walter. "This Realm of England is an Empire." *Journal of Ecclesiastical History* 30.2 (1979): 175–203.
- Vitoria, Francisco de. *De Indis et de Iure Belli Relectiones*. Ed. Ernest Nys. Trans. John Pawley Bate. Washington, DC: Carnegie Institution, 1917.
- Vitoria, Francisco de. "De Bello [on *ST IIaIIae* 40]." Trans. Gwladys L. Williams. In *The Spanish Origins of International Law: Francisco De Vitoria and His Law of Nations*, James Brown Scott, appendix F, cxv–cxxi. Oxford: Clarendon, 1932a.
- Vitoria, Francisco de. "De Jure Gentium et Naturali [on *ST IIaIIae*. 57.3]." Trans. Francis Crane Macken. In *The Spanish Origins of International Law: Francisco De Vitoria and His Law of Nations*, James Brown Scott, appendix E, cxi–cxiv. Oxford: Clarendon, 1932b.
- Vitoria, Francisco de. *Comentarios a la Secunda secundae de Santo Tomás, Lomo III: De Justitia (qq. 57/66)*. Ed. Vicente Beltrán de Heredia. Salamanca: Apartado, 1934.
- Vitoria, Francisco de. *Comentario al tratado de la ley*. Ed. Vicente Beltrán de Heredia. Madrid: CSIC, 1952.
- Vitoria, Francisco de. *Political Writings*. Ed. Anthony Pagden and Jeremy Lawrance. Trans. Jeremy Lawrance. Cambridge: Cambridge University Press, 1991a.
- Vitoria, Francisco de. "Letter to Miguel de Arcos, OP, Salamanca, 8 November, 1534." In *Political Writings*, ed. Pagden and Lawrance (1991b), 331–33.
- Vitoria, Francisco de. "On Civil Power." In *Political Writings*, ed. Pagden and Lawrance (1991c), 3–44.
- Vitoria, Francisco de. "On Dietary Laws, or Self-Restraint." In *Political Writings*, ed. Pagden and Lawrance (1991d), 207–30.
- Vitoria, Francisco de. "On Law [on *ST IaIIae* 90–105]." In *Political Writings*, ed. Pagden and Lawrance (1991e), 155–204.
- Vitoria, Francisco de. "On the American Indians." In *Political Writings*, ed. Pagden and Lawrance (1991f), 233–92.
- Vitoria, Francisco de. "On the Evangelization of Unbelievers." In *Political Writings*, ed. Pagden and Lawrance (1991g), 341–51.
- Vitoria, Francisco de. "On the Law of War." In *Political Writings*, ed. Pagden and Lawrance (1991h), 295–327.
- Vitoria, Francisco de. "On the Power of the Church I." In *Political Writings*, ed. Pagden and Lawrance (1991i), 47–108.
- Vitoria, Francisco de. "On the Power of the Church II." In *Political Writings* ed. Pagden and Lawrance (1991j), 111–51.
- Vitoria, Francisco de. *Relectio de Potestate Civili*. Ed. Jesús Cordero Pando. Madrid: CSIC, 2008.

- Von Friedeburg, Robert. *Luther's Legacy: The Thirty Years War and the Modern Notion of "State" in the Empire, 1530s to 1790s*. Cambridge: Cambridge University Press, 2016.
- Wagner, Andreas. "Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth." *Oxford Journal of Legal Studies* 31.3 (2011): 565–82.
- Warren, Christopher N. "Hobbes's Thucydides and the Colonial Law of Nations." *The Seventeenth Century* 24.2 (2009): 260–86.
- Watson, Alan, ed. *The Digest of Justinian*. 4 vols. Rev. ed. Philadelphia: University of Pennsylvania Press, 1998.
- Williams, Robert A. *The American Indian in Western Legal Thought: The Discourses of Conquest*. Oxford: Oxford University Press, 1990.