Primitive Legal Scholarship.

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I. INTRODUCTION

A. *The Primitive Scholars*

International legal scholars have made much of 1648.[1] Using that date to mark the beginning of their discipline, they have generally

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1. There have been very few general histories of international legal scholarship. A short standard history is A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1954). Recent general histories include: W. SCHIFFER, THE LEGAL COMMUNITY OF MANKIND (1954) (a skeptical naturalist analysis of the history of scholarship as a prologue to the League of Nations and United Nations); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963) (contains a short and superficial history of the relationship between law and international political development without internal analysis of legal scholarship); Ehrlich, *The Development of International Law as a Science*, 105 RECUEIL DES COURS 172 (1962) (a linear and somewhat superficial treatment of classic international legal scholarship); Gross, *The Peace of Westphalia 1648–1948*, 42 AM. J. INT'L L. 20 (1948) (a positivist account of the continuing influence on post-World War II international law of the conceptual system set in place in 1648, containing a useful analysis of the scholarship of the late sixteenth and early seventeenth centuries); Onuf, *International Legal Order as an Idea*, 73 AM. J. INT'L L. 244 (1979) (contains interesting and useful analysis of post-1800 scholarship, including such moderns as Hans Kelsen and Richard Falk). Classic treatments of the field were: D. Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (1785) (a somewhat annotated bibliography); H. WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA (Leipzig 1841) (1st English ed. New York 1845) (19th century positivist description of diplomatic practices); K. KALTENBORN VON STACHAU, KRITIK DES VÖLKERRECHTS (Leipzig 1847) (useful positivist treatment of international legal scholarship since Gentili); E. NYS, LE DROIT INTERNATIONAL (1912). Perhaps because international law has had a positivist flavor for over a century, histories of the field have concentrated on doctrinal developments. A standard doctrinal history is J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE (1968). Due to the disputed boundary between international law and international politics which has been the subject of much modern scholarship, international legal scholarship is seldom treated historically except as an appendage to a history of political theory. *See, e.g.*, R. WARD, ENQUIRY INTO THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE, FROM THE TIME OF THE GREEKS AND ROMANS TO THE AGE OF GROTIUS (London 1795) (perhaps the earliest example of this political approach to international legal history); E. MIDGLEY, THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS (1975); A. DE LA PRADELLE, MAÎTRES ET DOCTRINES DU DROIT DES GENS (2d ed. 1950); F. PARKINSON, THE PHILOSOPHY OF INTERNATIONAL RELATIONS: A STUDY IN THE HISTORY OF THOUGHT (1977); F. MELIAN STRAWELL, THE GROWTH OF INTERNATIONAL THOUGHT (1929); I. BROWNLIE, *supra*; A. WEGNER, GESCHICHTE DES VÖLKERRECHTS (1936) (a history of legal scholarship which becomes a history of international relations and diplomacy, this volume classifies scholars by their place in political history rather than internal critique); Le Fur, *La Théorie du Droit Naturel Depuis le XVIIe Siècle et la Doctrine Moderne*, 18 RECUEIL DES COURS 263 (1927) (containing a valuable historical analysis of primitive scholars).

treated earlier work as immature and incomplete—significant only as a precursor for what followed.[2] In fact, Western international legal scholarship prior to the 1648 Treaty of Westphalia shares a style of presentation and analysis which, while sharply different from subse-

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2. Many contemporary authors use historic texts either to demonstrate that the author's contemporary vision is fully present, if in a nascent form, or that modern doctrinal and systemic developments are foreshadowed in the historical text. *See, e.g.*, W. SCHIFFER, *supra* note 1, (who traces the ideas of the United Nations and of a World State to Grotius and Pufendorf). When discussing scholarship itself, such historians are tempted to read their own methodological concerns onto the work of their predecessors. The signficance of an earlier scholar is found in his foresight. For example, naturalist writers of the early twentieth century generally emphasize the "modernity" of scholars like Vitoria, Suárez or Grotius. *See, e.g.*, J.B. SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW (1934) [hereinafter cited as J.B. SCOTT, SPANISH ORIGIN], who describes his project as "to state some of the fundamental principles of the law of nations and see if they are to be found . . . in the readings of Vitoria . . . ." *Id.* at 281. Historians writing in the 1920's, for example, were fond of discovering references to the League of Nations in the works of various medieval and Enlightenment scholars. *See also* Trelles, *Francisco de Vitoria et l'Ecole Moderne du Droit International*, 17 RECUEIL DES COURS 113 (1927), who sees in Vitoria a forerunner of the ideas of "international solidarity," and the League of Nations; and Goyau, *L'Eglise Catholique et le Droit des Gens*, 6 RECUEIL DES COURS 122, 181 (1925). Scholars concerned with methodology in the same period were preoccupied with dividing primitive authors as they were themselves divided: into naturalist and positivist schools. *Compare* A. NUSSBAUM, *supra* note 1, *with* A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1947) (the 1954 version emphasizes the division of scholars into "naturalists" and "positivists"). *See also* C. OLIVER, N. LEECH, & J. SWEENEY, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1198–99 (2d ed. 1981). Similarly, modern scholars who consider the scholarship of international law to be about the relative political nature of the international legal system undertake historical scholarship to trace the origins of this approach. *See, e.g.*, Vagts & Vagts, *The Balance of Power in International Law: A History of An Idea*, 73 AM. J. INT'L L. 555 (1979). In their historiography, these authors grapple with the concept of foreshadowing: for example, is Grotius the "founder" or "predictor" of modern international law? *See, e.g.*, Phillipson, *Introduction* to A. Gentili, *De Iure Belli Libri Tres* (Three Books on the Law of War) (Hanover 1612) (1st ed. Hanover 1598) *reprinted in* CLASSICS OF INTERNATIONAL LAW (J. Rolfe trans.) (J.B. Scott ed. 1933) [hereinafter cited as A. Gentili, *De Jure Belli*]; Nézard, *Albericus Gentilis*, in LES FONDATEURS DU DROIT INTERNATIONAL 37, 91 (Pillet ed. 1904) (defending Gentili's modernity against Grotius). *See also* W. SCHIFFER, *supra* note 1, at 30; A. NUSSBAUM, *supra* note 1, at 296 app. II. (both defending Grotius' title as the founder of modern international law against the Spanish theologians). Although often describing a historical development which advanced in fits and starts, many historians of international law, perhaps as part of their project of emphasizing the solidity of contemporary international law, emphasize the linear development of international law scholarship. *See, e.g.*, Ehrlich, *supra* note 1; H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983). This type of analysis can also be identified in court decisions (particularly in the last century). *See, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). Lauterpacht states, in *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, at 15 (1946): "[t]he standing of *De Jure Belli ac Pacis* as an authority relied upon in judicial decisions, national and international, has been higher and more persistent than that of any other of the founders of international law." He cites as an example "the pleadings and arguments before and by the various Claims Commissions established by the Jay Treaty of 1796 between Great Britain and the U.S., the first modern treaty of arbitration." *Id.* at 15. Grotius was also quoted in Triquet v. Bath, 7 Burr. 1478, 97 Eng. Rep. 936, 937 (K.B. 1764) (involving a question of diplomatic immunity) and more recently, in the Judgment of 31 August 1946 of the International Military Tribunal at Nuremberg. *See* Trial of the Major War Criminals, International Military Tribunal (Nuremberg) (Judgment of Aug. 31, 1946), *reprinted in Judicial Decisions*, 41 AM. J. INT'L L. 172 (1947). Statistics on the citation of various authors are given in A. NUSSBAUM, *supra* note 1, at 162.

quent work, is no less coherent and complete. Like scholars of both what might be called the traditional (1648–1900) and modern (1900–1980) periods, primitive scholars grappling with the issues posed by the discipline of international law displayed a distinctive lexicon with its own textual characteristics and assumptions.[3] Within the confines of this lexicon, primitive texts are markedly diverse. Modern scholars of international law, who offer a numbing variety of humble responses to the collapse of traditional legal scholarship, might rightly be jealous of the elegance and coherence with which primitive scholarship expresses its diversity.

Close examination of the work of the Catholics Francisco Vitoria (1480–1546)[4] and Francisco Suárez (1584–1617)[5] and of the Protes-

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3. In using the terms "primitive," "traditional," and "modern" to describe these periods I do not mean to suggest that early scholarship was rudimentary, or poorly developed, or that the movement from one to another represented progress of some particular sort. Other historians have not classified or contrasted scholars in precisely this way. Some contrast "medieval" and "modern" scholarship about international law; most, however, lack any sense of the relationship between these periods. *See, e.g.*, W. SCHIFFER, *supra* note 1 (contrasting "disappeared medieval Christendom" with modern scholarship which progresses from Grotius to the League of Nations); K. KALTENBORN VON STACHAU, *supra* note 1, (dismissing Vitoria and Suárez as "medieval"); *see also* Scott, *Francisco Suárez, His Philosophy of Law and of Sanctions*, 22 GEO. L. J. 405 (1934) (classifying Vitoria, Grotius and Suárez in the "Spanish school"). Although he overemphasizes their continuity with later scholarships of which, in Scott's view, they are the "founders," he is aware of their similarity. He states: "if Grotius was not a Spaniard by blood, he was a Spaniard in his conception of international law, and so far as the basic principles of his system are concerned, he was indubitably a member of the Spanish School." *Id.*, at 407. Furthermore,

> from a different approach, they reached a common goal—the establishment of a single and universal standard of right and wrong in the relations of individuals within a state, in the relations of states with one another and in the relations of the international community composed of these individuals and of these states . . . .

Id. The basic premise of their system is that "[l]aw is of God, whether derived directly or through a human legislator." *Id.* at 411. *See also* von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665, 678–80 (1939) (viewing Grotius more on the side of Vitoria and Suárez, and emphasizing Pufendorf's significant departure from those scholars); I. BROWNLIE, *supra* note 1, at 14 (including Grotius in a pre-Westphalian era). *But see* A. NUSSBAUM, *supra* note 1, at 296. *See also* G. MATTINGLY, RENAISSANCE DIPLOMACY (1955). This work on diplomatic history and usage during the Renaissance contains two remarkable chapters on law which describe the unity of medieval legal theory and suggest the sophistication of medieval legal techniques for avoiding confrontation with the potential for conflict among sovereign powers. For a classification scheme similar in its appearance to the one suggested here (positing a "canonistic period" up to and including Grotius, followed by a period of "naturalists and positivists" from Zouche to Martens, and of "neo-positivism" after the mid-nineteenth century), but without any analysis of the nature of the conceptual distance between scholarship of each period, see also Ehrlich, *supra* note 1, at 179–252.

4. Vitoria's major works include *Relectiones Theologicae* (n.p. 1557), two of which relate to international law: Vitoria, *De Indis Noviter Inventis* (On the Indians Lately Discovered) and Vitoria, *De Jure Belli Hispanorum in Barbaros* (On the Law of War Made by the Spaniards on the Barbarians), in F. Vitoria, *De Indis et de Jure Belli: Relectiones* (Cologne & Frankfurt 1696) (1st ed. n.p. 1557), *reprinted in* CLASSICS OF INTERNATIONAL LAW (J. Bate trans.) (J.B. Scott ed. 1917) [hereinafter cited as Vitoria, *De Indis* and Vitoria, *De Jure Belli*]. Some other *Relectiones* are translated in J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at apps. C to E. Major secondary sources include: J.B. SCOTT, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW (1934) (emphasizing Vitoria's—and Suárez'—contribution to the field from a naturalist perspective);

tants Alberico Gentili (1552–1608)[6] and Hugo Grotius (1583–1645)[7] demonstrates both a distinctive common style of presentation and

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Q. ALBERTINI, L'OEUVRE DE FRANCISCO DE VITORIA ET LA DOCTRINE CANONIQUE DU DROIT DE LA GUERRE (1903); Nys, *Introduction* to F. Vitoria, *De Indis et de Jure Belli Relectiones* (CLASSICS OF INTERNATIONAL LAW, J.B. Scott ed. 1917) (uncritical, biographical and anecdotal study); Barthelemy, *François de Vitoria*, in LES FONDATEURS DU DROIT INTERNATIONAL 1 (Pillet ed. 1904) (a naturalist eulogy praising the scholastic method for its logic and focusing on Vitoria as a realist and forerunner of the modern scholar); Goyau, *supra* note 2 (expressing a similar naturalist and uncritical view); Trelles, *supra* note 2 (a naturalist eulogy containing a lengthy and detailed analysis of the content of Vitoria's doctrinal work); Von der Heydte, *Franciscus de Vitoria und sein Völkerrecht*, 13 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 239, 266-67 (1933) (a classical attempt to "let Vitoria express himself" by focusing on the historical and philosophical premises of his scholarship which praises Vitoria as "in part the present law of nations and . . . in no small part the future law of nations."); Hentschel, *Franciscus de Victoria und seine Stellung in Ubergang von mittelalterlichen zum neuzeitlichen Völkerrecht*, 17 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 319 (1937). Hentschel is useful in understanding the intellectual and spiritual framework of Vitoria's thinking. This long article is characteristic of attempts in the 1920's to rehabilitate the Spanish theologians as the true founders of international law against positivists who prefer to begin the modern period with Grotius. Typically, Hentschel underemphasizes the break between primitive and traditional scholarship. He concludes: "[d]er Blick in einige Lehrer des mittelalterischen Völkerrechts und der Gang durch das Werk Victorias haben gezeigt wie . . . Mittelalter und Neuzeit unvermittelt zusammen stossen." *Id.* at 338. *See also* A. NUSSBAUM, *supra* note 1, at 79–84.

5. Suárez' most comprehensive treatise is F. Suárez, *De Legibus, ac Deo Legislatore* (On Laws and God the Lawgiver) (Coimbra 1612). Of his theological works, two contain discussions of issues which we would recognize as part of international law. The treatise F. Suárez, *De Triplici Virtute Theologica: Fide, Spe et Charitate* (A Work on the Three Theological Virtues: Faith, Hope, and Charity) (Coimbra 1621), considers treatment of unbelievers, including foreign heathens, in the book *Fide*, and the law of war in the book *Charitate*. His shorter work, F. Suárez, *Defensio Fidei Catholicae et Apostolicae* (A Defence of the Catholic and Apostolic Faith) (Coimbra 1613), is a theological refutation of the Anglican faith which considers the supremacy of papal power and the possibility that a temporal sovereign might be disposed by the Pope should he overstep his authority. Aspects of these three works bearing on international law are translated and collected in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ (G. Williams, A. Brown, J. Waldron trans.) (CLASSICS OF INTERNATIONAL LAW, J.B. Scott ed. 1944) [hereinafter cited as SELECTIONS].

Numerous secondary sources consider Suárez' work, in part, because he is almost uniformly recognized to be the primary expositor of "medieval" international law. *See* Rolland, *Fransisco Suárez*, in LES FONDATEURS DE DROIT INTERNATIONAL 95 (J. Pillet ed. 1904) (emphasizing Suárez' place as a typical 16th century theologian); Scott, *supra* note 3 (classifying Suárez with Vitoria and Grotius, as the "philosopher" of the "Spanish School"); Trelles, *Francisco Suárez*, 43 RECUEIL DES COURS 384 (1933) (especially at 401, describing the common philosophical premises of Suárez and other 16th century theologians). *See also*, Sherwood, *Francisco Suárez*, 12 TRANSACTIONS OF THE GROTIUS SOCIETY 19, 27 (1927) (an uncritical naturalist eulogy concluding that the League of Nations is the remedy for Grotius' defective judicial theory of war); A. NUSSBAUM, *supra* note 1, at 84–91. For biographical information, see R. DE SCORRAILLE, FRANCOIS SUÁREZ, DE LA COMPAGNIE DE JÉSUS (1912); J.H. FICHTER, MAN OF SPAIN: FRANCISCO SUÁREZ (1940).

6. Gentili's major works: A. Gentili, *De Legationibus Libri Tres* (On Embassies) (Hanover 1594) (1st ed. London 1585), *reprinted in* CLASSICS OF INTERNATIONAL LAW (G. Laing trans.) (J.B. Scott ed. 1924) [hereinafter cited as *De Legationibus*]; A. Gentili, *De Jure Belli*, *supra* note 2; A. Gentili, *Hispanicae Advocationis Libri Duo* (The Two Books of the Pleas of a Spanish Advocate) (Amsterdam 1661) (1st ed. Hanover & Frankfurt 1613), *reprinted in* CLASSICS OF INTERNATIONAL LAW (F. Abbott trans.) (J.B. Scott ed. 1921) [hereinafter cited as *Hispanicae Advocationis*]. Major secondary sources include: G. VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW (1937) (a thorough and reliable analysis which

analysis, and a variety of individual doctrinal and methodological expressions. The tone, method and doctrinal argument of these texts suggest that primitive scholars addressed international legal problems similar to those treated by later scholars, but in a fashion so dissimilar from later work that historians who focus on the primitives' role as "founders" of modern international law, distort the primitive texts' opposition to modernity. Recognition of this basic incongruity allows for consideration of both the disciplinary continuity which unites scholars of international law and the differences within primitive scholarship which signalled its dissolution and replacement by traditional scholarship. By the end of the primitive period, international legal scholarship had become increasingly confused and seemed ready to tip into a new era.

B. The Distinctive Style and Method of Primitive Texts

The tone and style of primitive scholarship differ from that of traditional scholars, suggesting different methodological preoccupations and sensibilities as well as distinctive visions of the international world. In general, primitive scholarship is more self-assured and less self-consciously analytical or argumentative than tradtional scholarship. Primitive scholarship connects legal authority and doctrinal result in a direct and unproblematic fashion. Specific authoritative

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emphasizes that Gentili was "the principal predecessor of Grotius although still a primitive"); Nézard, *supra* note 2 (descriptive and uncritical, emphasizing Gentili's modernity and adherence to the historical school). *See also* A. NUSSBAUM *supra* note 1, at 94–101 (a balanced appraisal of Gentili's work which terms him "the originator of the secular school of thought in international law").

7. Grotius's major work: H. Grotius, *De Jure Belli ac Pacis Libri Tres* (On the Law of War and Peace) (Amsterdam 1646) (1st ed. Paris 1625),*reprinted in* CLASSICS OF INTERNATIONAL LAW (F. Kelsey trans.) (J.B. Scott ed. 1925) [hereinafter cited as H. Grotius, *De Jure Belli*]. Major secondary sources include: K. KALTENBORN VON STACHAU, *supra* note 1 (a thorough and reliable analysis—the only to have perceived the significance of Grotius as a dialectic moment in the development of XVIIth century international law); Basdevant, *Hugo Grotius*, in LES FONDATEURS DU DROIT INTERNATIONAL 125 (Pillet ed. 1904) (a valuable critical study). *See also* Vollenhoven, *The Framework of Grotius' Book* De Jure Belli ac Pacis, VERHANDELINGEN DER KONINKLIJKE AKADEMIE DER WETENSCHAPPEN, TE AMSTERDAM AFDEELING LETTERHUNDE, NIEWERACKS, deel 30, no. 4 (1931); Balogh, *The Traditional Element in Grotius' Conception of International Law*, 7 N.Y.U. L. Q. REV. 261 (1929) (emphasizing Grotius's similarity to the earlier scholarship); Lauterpacht, *supra* note 2, at 19 (discussing in a quite systematic and functionalist manner eleven "features of the Grotian tradition"); A. NUSSBAUM, *supra* note 1 (a modern positivist view); Guivitch, *La Philosophie du Droit de Hugo Grotius et la Théorie moderne du Droit international*, 34 REVUE DE MÉTAPHYSIQUE ET DE MORALE, 365 (1927 no. 3); Van der Vlugt, *L'Oeuvre de Grotius et Son Influence sur le Développement du Droit International*, 7 RECUEIL DES COURS 399 (1925) (a lengthy, systematic, and philosophically oriented study); Sandifer, *Rereading Grotius in the Year 1940*, 34 AM. J. INT'L L. 459 (1940) (an oversimplified beginner's guide to Grotius' work); Note, *Grotius: Law of War and Peace—Prolegomena*, 35 AM. J. INT'L L. 205 (1941) (eulogy demonstrating the "correctness" and "soundness" of Grotian views applied to the Second World War).

propositions about peace, justice or the natural order are linked unproblematically with doctrines. The doctrines are valid because the authoritative propositions are valid. Relatively little energy goes into interpretation—even less into methodological elaboration or argument. Typically, if primitives criticize each other at all, they begin with a statement of their opponent's doctrinal position and an assertion that it is wrong. They then elaborate a connection between some principle or some authority and their preferred solution, leaving the reader to dismiss the false view once the true connection has been carefully made.

Traditional texts argue more about the appropriateness of various authorities and their proper interpretation. The doctrines which traditional texts generate out of this self-conscious argument are more often presented as interpretations of authority, valid because the method of their derivation is valid. Paradoxically, then, the traditional scholar both enters his text more assertively and argues more vociferously that his doctrinal discussion is independently authoritative. Although the modern scholar typically absents himself from his text, he lacks the methodological and doctrinal confidence of the primitive.

These differences are related to the forms of authority upon which primitive, traditional and modern texts rely. Primitive scholars invoke a variety of textual authorities, ranging from the Gospel and scholastic authors to various ancient and medieval jurists. These constitute a catalog of available citations, each authoritative whenever invoked. The primitive does not engage in argument among citable propositions or authorities. Each doctrinal position is simply linked to one or another without internal criticism. The resulting scheme of authority seems diverse, incoherent and analytically unsatisfying to the modern reader.

The traditional scholar, by contrast, is much more likely to imagine and even specify some general conceptual system of authority which is meant to be internally coherent and unified. He might, for example, posit an elaborate conceptual state of nature from which propositions of legal doctrine can be authoritatively deduced. The resulting argument concerning the connection of certain authoritative propositions to certain outcomes can be, and often is, criticized in methodological terms. Traditional texts envision authoritative propositions in a defensible hierarchy. They may differ about that hierarchy—placing the norms of either "natural" or "positive" law in first place—but their catalog of authorities tends to be internally coherent and defensible.

The distinctive style and method of primitive texts suggest a more uniform faith in universal principles than does the methodological argument of traditional work. But the patterns of primitive authority seem incoherent and diffuse, while those of most traditional scholars

seem unified and internally coherent. In this sense we might think of traditional scholarship as more unified in its belief that universal principles structure the international social and legal world, despite disagreement about the source and application of those principles. This confusion arises only from the perspective of modern scholarship which accepts the validity of uniform principles only when methodologically defensible but at the same time is skeptical of all methodological defenses. As a result, modernists think only schemes of internal methodological coherence (such as those of traditional scholarship) can be uniformly principled, but yet have lost faith in each of the traditional schemes. Unlike the traditional scholar, who needed to construct and defend a particular authority structure, the primitive took the authority for granted.

Modern texts share the diversity of primitive authority, relying at times on propositions about justice and at times on state practice to provide a basis for doctrinal elaborations. But their eclecticism results from scepticism about traditionally posited schemes of authoritative hierarchy. Thus, modern texts appear both ashamed of their inability to propound doctrine in the imperious tone of traditional texts, which forces them to retreat behind a general humility about scholarship, and proud of having avoided the difficulties plaguing each traditional scheme of authority, which results in their assertion of eclecticism as a self-conscious method. For the primitive, by contrast, authoritative diversity was neither a virtue nor a vice. It was just a fact of life.

C. The Distinctly Primitive Doctrinal World

The corpus of international legal doctrine developed by primitives expresses their distinctive perspective. Unlike traditional scholars, primitive scholars do not distinguish between legal and moral authority,[8] national and international law, or the public and private capacities of sovereigns. The modern scholar considers both the traditional and the primitive text naive. The traditional scholar seems to assert these distinctions a bit too aggressively, while the primitive text appears unaware of their importance.

The primitives develop elaborate distinctions between various types of law—civil, natural, divine, etc., but they are differences of form or concreteness, not of binding power. Traditional scholars, by con-

8. Most historians who distinguish medieval from later international scholarship make this point. In doing so, however, many are concerned with the distinction between theological and secular law. They are not concerned about the source of normative authority, but with the extent of religious doctrine in the corpus of international law. Consequently, they tend to emphasize the departure from "medieval" work of later primitives such as Gentili, or to a certain extent Grotius, who secularize international law. These scholars, however, also shared the primitive fusion of law and morality.

trast, distinguish the binding force of moral and legal norms. They often explain, for example, that a sovereign may be bound by a particular rule as a matter of conscience, but not as a matter of law. Likewise, natural law and international law are not distinguished in primitive scholarship as they are in traditional scholarship.

Similarly, the primitives do not distinguish municipal law from international law, nor the law which binds sovereigns in their relations with one another from that which binds their citizens or themselves in their relations with their citizens. The primitive text envisions a single law which binds sovereigns and citizens alike. Propositions of civil law about self-defense are easily transposed into discussions of inter-sovereign relations. Both are governed by the same moral-legal order. Although the primitive may suggest that sovereigns and citizens are bound by different rules (the sovereign may have a higher duty to inquire into the justice of war, for example, than the citizen), he generally does not differentiate between two spheres of legal competence and activity as is typical of traditional texts. Such differences as exist seem to flow from differing capacities within a unified moral-legal system.

The traditional scholar tends to distinguish municipal and international law quite sharply. The two legal orders are different as well as separate. The traditional scholar views the municipal realm as a vertical legal order of sovereign powers and citizen rights. The international legal order, by contrast, is a horizontal order among sovereign authorities, concerned with allocating jurisdictions and building order among independent sovereigns. The international legal order is contractual, while the municipal order is a matter of public authority. As a result, the sovereign plays a far more central role in traditional thought, for he is the source of vertical authority and has the capacity for horizontal contract. The sovereign is the boundary between two major legal spheres. He acts *either* internally or externally. The primitives do not make this basic distinction.

To the modern scholar, the traditionalists are unduly formal in their insistence on these distinctions. Modern scholarship attempts in numerous ways to set aside or overcome distinctions between moral/political and legal order. The modern characteristically downplays the importance of the sovereign as a law-maker (emphasizing cultural, political, administrative and judicial forces of various sorts) and blurs the boundary between international and municipal law (focusing perhaps upon the role of municipal courts in interpreting international law). In the modernist view, primitive texts are hopelessly simplistic, unaware of the importance of the distinctions to which the moderns devote so much effort qualifying and eroding.

Primitive and traditional scholars discuss the public and private acts of sovereigns quite differently. To traditional scholars, the public international sovereign defines the international sphere, while relations between the municipal sovereign and private citizens defines the domestic sphere. In both realms, the sovereign might act either publicly or privately. To primitives, all acts take place within a single legal/moral order, so that, while the sovereign might act to serve communal or personal goals, only his public sovereign acts are legitimate. Thus, for example, in the primitive view, a prince acting for personal greed is acting unjustly and hence illegitimately. Wars for private empire are likewise unjust.

Traditional scholars read the primitives as having originated the distinction between public and private acts. But this is a misunderstanding. Traditional scholars begin with the sovereign act, assess its status as public or private, and come to some conclusion about the legal sphere which it structures. They might suggest, for example, that all wars publicly declared by a sovereign are just. In constrast, the primitive scholars begin with an idea of justice, grounded in a moral/legal order which defined sovereignty and the capacities of sovereigns. Justice entrusts sovereigns with certain prerogatives, among them the capacity to engage in wars. Private wars, not expressive of sovereign capacity, are unjust.

To modern scholars, these distinctions seem arcane. Once the sovereign has lost his central place as the boundary among legal spheres, the legitimacy of his various acts seems a technical or procedural matter. To moderns, the notion that a public sovereign declaration marks the boundary between war and peace seems unduly formal and remarkably out of touch with the play of forces within and without sovereign territories which generate interstate violence. The primitive notion that communal acts of sovereigns are automatically legitimate both overestimates the power of the legal order to confer legitimacy and ignores the difficulty of disentangling public and private motives. Modernists have abandoned the traditional scholar's focus on the sovereign without recovering the primitives faith in social order. Having invalidated the doctrinal distinctions upon which traditional scholars relied to construct their formal legal order, the modernists have been unable to return to the primitive world of clear distinctions in a single fabric of morality and law.

As a result of their differences, the traditional and primitive texts organize doctrinal discussion so as to suggest radically different assumptions about international law. First, the traditional scholar begins with a conception of sovereign authority and seeks to elaborate its competence, while the primitive begins with a notion of moral and

legal justice and elaborates the capacities of sovereigns. Second, the traditional scholar begins with a notion of a separate municipal realm and seeks to explain the international legal order compatible with it, while the primitive begins with a vision of a single law which sometimes permits and always controls national differences. Finally, the traditional scholar begins with a notion of international law which can be elaborated separately from national law, and a concept of legal obligations which arise from sovereign authority and may differ from moral obligations, while the primitive envisions a single moral and legal order which permits and controls sovereign authority.

In tone, method and doctrinal structure, the primitive text begins with a sense of legal and moral authority from which it derives a social scheme of political and sovereign authority. The traditional text proceeds in precisely the opposite direction. To the modern, both take too much for granted, and assert faith too strongly in an origin from which analysis can proceed. The modern text appears unsure of its beginning, constantly oscillating among methods and images of doctrinal consistency. If the assertion of the author is present in both traditional and primitive texts, it is absent in the modern scholarly work—replaced by an effacing humility which reads both primitivism and traditionalism as immature phases in the development of sophisticated and cynical realism.

But the primitive vision can only partly be resurrected by elaboration of its distinctive qualities. To understand primitivism as an alternative textual practice requires an account of textual differences within the common lexicon as well. Despite similarities in tone, method and doctrinal emphasis, primitive texts differed quite dramatically from one another. Within the lexicon of primitivism, it was possible to carry on elaborate discussions about doctrine, and indeed about the foundations of the moral/legal order whose existence seems to have been presumed. Some envisioned a fairly concrete political order, others an order of universal values. Each text emphasizes something different. Sometimes these differences elucidate the primitive lexicon. In this sense, Vitoria's lengthy doctrinal work supplements the more theoretical typology of law developed by Suárez. But often these texts differ in their approach to similar topics. From a common starting point alternative doctrines are generated. In the period between Vitoria's and Grotius' writings, most doctrinal and methodological assumptions were reversed without shattering the primitive lexicon.

D. A Continuous Discipline of International Law

Although primitive, traditional and modern texts differ dramatically in emphasis, method and doctrinal structure, they seem never-

theless to belong to a single disciplinary tradition. All, from a modern perspective, respond to a set of issues raised by the problem of social order among separate authorities. The primitives analyzed problems which arose out of the increasing diversity of contact among civil authorities.[9] They considered, for example, the treatment due newly discovered aborigines, a topic not unlike modern discussions of self-determination, decolonization or the rights of indigenous peoples. They considered problems of war and peace among European powers and elaborated a system of embassy and diplomatic protection.

These similarities render it unsurprising that primitive, traditional, and modern texts are now thought to belong to a single discipline concerned about order among diverse sovereign powers, despite the dramatic shift in scholarship between the primitive and traditional periods. Moreover, once the issue of order among autonomous sovereigns was identified as the central problem for international legal scholarship, it is not surprising that differences in perspective on this issue should be used to differentiate texts of different "periods," or that earlier texts should be treated as "forerunners" of contemporary responses. One wants to know why primitives came to struggle with modern problems, and seeks answers in a developing international system and a changing scholarship. The Reformation produced a large anti-papal scholarship, much of it defensive of the prerogatives of secular local authorities. Suddenly it is significant that while primitives organized their doctrinal presentations and emphasized problems in a way which suggests that they presumed social order and sought to explain the exercises of individual authority within it, traditional scholars presumed the independence of sovereign authorities and worried about elaborating a social order which would make coexistence possible. To the extent each of these approaches seems partial, modern eclecticism seems a reasonable and perhaps inevitable alternative.

In order to counteract this historical tendency I have attempted to reconstruct the primitive texts as expressions of a coherent and complete discipline without implying that they are the product of an incomplete, if promising, attempt to resolve the modern problem of international social order. Most historians who treat primitive texts do so in a way which both presupposes and proves the continuity of the discipline of international law—reaffirming in the process that the project for international legal scholars is and always was to construct a social order among autonomous sovereigns. Although it seems perfectly possible to read primitive texts in this way, doing so misses

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9. Many historians have described the rise of secular and independent civil authorities after the Reformation. *See, e.g.*, A. NUSSBAUM, *supra* note 1, at 71–79; G. MATTINGLY, *supra* note 3, at ch. 27.

their coherence and internal diversity. Instead, primitive scholarship is treated as the source for some more recent scholarly development.

Some modern positivists, for example, suggest that the religious wars of the early seventeenth century introduced an awareness of the autonomous authority of sovereigns which scholars increasingly recognized as requiring a positivist approach to international law. The move from Vitoria to Grotius expresses the foundations of positivism. In this view, the remaining "naturalists" simply missed the boat. After passing reference to ancient and non-European analogues, modern historians of international law often begin their accounts with the works of Vitoria, Suárez, Gentili or Grotius. The standard histories of the positivist Arthur Nussbaum and naturalist James Scott illustrate this tendency. They wonder who initiated the "positivist" method or who discovered the truly independent nature of international law. Nussbaum titles his chapter devoted to primitive scholarship "Early Modern Times." Scott delights in uncovering an obscure passage resembling, when removed from its context, some modern naturalist position.

The work of Suárez and Vitoria is understood either as a last holdover of medieval universalism to be superceded by the latter, more balanced Grotius or as the forerunner of modern scholarship. The second reading is achieved by emphasizing its relatively tolerant attitude toward foreign, particularly American Indian, authorities, while the first emphasizes its reliance on diffuse scholastic authorities. Both readings are plausible, but each imagines a linear historical progression and misses the idiosyncratic dimensions of primitive scholarship.

E. A Methodological Disclaimer

My attempt to concentrate upon the primitive texts, reconstructing a primitive vision of international law and society "in its own terms" is, of course, also the product of a particular modern vision. The suggestion that the works of Vitoria, Suárez, Gentili and Grotius relied on a vision which was as complete and as contradictory in its response to the issues of order and freedom raised by a world of distinct sovereigns as that of the traditional scholars or moderns is itself the product of an image of modernism—an image of eclectic disintegration. I have returned to primitive texts in search of a viable historical alternative to a traditional problematic which no modern can resolve but none seems able or willing to abandon.

As a result, this structured analysis is an act of violence. Scholars are grouped in stereotypical ways. I repeatedly answer the question "what would one have to think to write this" without claiming that the author in fact thought that. I suggest connections which emphasize

similarities more than differences, and which present alternatives to the traditional preoccupations of international legal scholarship. I describe transformations between scholarships and epochs without a coherent theory of causation. Throughout this article, my analysis remains at the level of description: description of texts.[10] This essay, then, is neither a history of the development of legal doctrines nor a social history. It attempts to explain the work of the primitives as extensively and as sympathetically as possible within the four corners of their own lexicon.[11]

II. FRANCISCO VITORIA

A. Introduction

Vitoria was a Dominican monk whose teachings survive only in posthumously published transcriptions of his lectures.[12] In the two most important of his surviving short texts, he discusses the just treatment of newly discovered American Indians and just war through analysis of natural law principles which seem part of a divine order enforced by the church and defended by his sovereign. The traditional or modern scholar concerned with elaborating the conditions of order among independent sovereigns might think it odd that Vitoria should

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10. One risk of such a structural description is that it appears to suggest that assumptions give rise to textual characteristics or that textual characteristics can be supported only by certain assumptions. Although there is something quite appealing to this way of looking at the text, it seems to ignore how assumptions depend not only on each other, but also on the characteristics which seem to suggest them and how many different assumptions can be consistent with any textual characteristic. The rich life of the vocabulary which we use to describe a text, its assumptions as well as its tone, method and explicit conclusions, have a life that defies simple characterization. For example, one way of looking at the two assumptions would be to consider the first primary and the second derivative. This essay avoids looking at relations so one-sidedly. Instead it understands how certainty in one helps stabilize certainty in the other. Thus, doubt about the unity of the political world can vanish in the presence of the sense of the unity of the legal and moral world; doubt about the unity of the legal and moral world can vanish in the presence of the unity of the political world. However, irrefutable doubt in one can just as easily infect the text with doubt in the other and upset both assumptions completely.

11. One might also search for "what we would have to think that we do not currently think in order to consider these texts complete and coherent in the manner in which we are accustomed to considering contemporary texts coherent." This formulation emphasizes the analytical relationship between the modern and the historical texts. My textual formulation emphasizes the placement of the investigated text in its own context. Both elements are required for a fully satisfactory treatment of a text: one requires analytic and empirical tools of criticism, the other, tools of valuative judgement and intuition.

The idea of an authorless text is developed in modern literary criticism. *See, e.g.*, R. BARTHES, S/Z (Eng. ed. 1974); R. BARTHES, THE PLEASURE OF THE TEXT (Am. ed. 1975); R. BARTHES, IMAGE MUSIC TEXT (S. Heath trans. & ed. 1977). For an introduction to these aspects of Barthes' work, see STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA (J. Sturrock ed. 1979). *See also* M. BLANCHARD, DESCRIPTION: SIGN, SELF, AND DESIRE—CRITICAL THEORY IN THE WAKE OF SEMIOTICS (1980) (describing some pitfalls of this approach).

12. *See supra* note 4.

consider issues of intersovereign discord in a way that does not envision discord about the norms which structure intersovereign relations. Nonetheless, while elaborating the implications of his faith for the conduct of his king, Vitoria treats subjects which the modern reader is accustomed to thinking of as classic doctrinal topics in the discipline of international law, directly concerning the relations among separate civil authorities.[13]

Historians have treated the apparent dissonance between Vitoria's topics and method in various ways.[14] Those who consider Vitoria a forerunner of modern naturalism emphasize that he was the first Catholic theologian to suggest doctrines that involve a notion of independent authorities in a diffuse political order.[15] They want to show that a modern notion of sovereign independence has long been compatible with faith in principles of justice derived from a source beyond sovereign consent. Historians who consider Vitoria a holdover of medieval universalism focus on his faith and methodology, hoping to prove that a modern notion of sovereign independence cannot be squared with reliance on a law grounded outside sovereign consent.

Although the modern age perceives a tension between Vitoria's concern with matters of sovereign separation or independence and his methodological notion of an overarching moral order, superior to the will of various sovereigns, Vitoria seems not to have been conscious of any such tension. Two critical aspects of Vitoria's work preclude textual awareness of this modern tension. First, Vitoria seems not to imagine the possibility of authoritative disagreement about the binding power or content of the divine order which he elaborates. Rather than asserting that sovereigns do not argue about such things, he assumes it. This assumption is clearest in his methodological and doctrinal unwillingness to distinguish moral and legal authority or municipal and international law which places the sovereign in the role of the source of normative authority. Second, Vitoria organizes his doctrinal system in a way which renders unjust and illegitimate what

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13. *See* W. SCHIFFER, *supra* note 1, at 30–31 (differentiating Vitoria's universalism from Grotius's conception on this ground). On Vitoria's vision of this theological project, see Barthelemy, *supra* note 4; A. NUSSBAUM, *supra* note 1; and Von der Heydte, *supra* note 4.

14. *See, e.g.*, G. MATTINGLY, *supra* note 3, at ch. 28, who underlines the gap between theory and practice at the time Vitoria was elaborating his *Relectiones*. This conflict is often discussed in treatments of Vitoria's notion that, through ignorance, war may come to seem to be just on both sides. Although these commentators misunderstand what Vitoria means, see *infra*, pp. 57–58, they are correct to suggest that if he had meant that war could actually be just on both sides, he would have contradicted his notion of a single global order. *See* A. NUSSBAUM, *supra* note 1, at 61; Nussbaum, *Just War—A Legal Concept?*, 42 MICH. L. REV. 453 (1943); Trelles, *supra* note 2, at 293–98; von Elbe, *supra* note 3, at 675–79.

15. Most historians emphasize that the distinction between public and private wars was known to the primitive scholars as well. They do not identify the change in the way this distinction is used to structure the idea of sovereignty in each period.

would today be termed exercises of sovereignty which conflict with each other or the moral/legal order. These two central aspects of Vitoria's work—and primitive legal scholarship generally—relate in that Vitoria's sovereigns seem unable to disagree about moral fundamentals in an authoritative fashion.

B. Vitoria's Theory

1. The Conflation of Morality and Law

In tone, explicit theoretical discussion and doctrinal structure, Vitoria conflates what we think of as the separate realms of law and morality. This is fostered by the fact that his tone is consistently authoritative and unproblematic. Nowhere does he address his methodology or the relative value of various authorities upon which he relies. In doctrinal discussions, Vitoria cites one passage after another from Scripture, from St. Thomas Aquinas, or from one or another ancient philosophical text, without mentioning any technique or canon for selecting such citations. He does not compare citations or use one citation to criticize another, although he occasionally strings together a list of citations, each of which supports some proposition in its own way. The references are simply quoted or paraphrased and attached to a doctrinal problem or solution.

Thus, Vitoria typically opens each work with a scriptural passage,[16] apparently chosen, not because of its weighty authority with respect to the matters being discussed, but because its content summarizes or is analogous to the content of the discussion in the text. Indeed, such passages are only occasionally reintroduced in the textual discussions and are then treated as if introduced for the first time.

For example, *De Indis* begins with a passage from the last chapter of St. Matthew. "Teach all nations, baptizing them in the name of the Father, and of the Son and of the Holy Ghost."[17] While much of Vitoria's discussion of the relative legal positions of Spaniards and Indians is related to their respective statuses as Christians and heathens, this passage is not treated as the source of that central theme, nor is the theme carried through the work coherently. Rather, a number of doctrines are tied to scriptural passages which relate to proselytizing. Most importantly, Vitoria extends this authoritative system unproblematically to heathens and believers alike. Vitoria's

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16. *See, e.g.*, Vitoria, *De Indis*, *supra* note 4; Vitoria, *De Potestate Civili* (On Civil Power) and *De Potestate Ecclesiae* (On the Power of the Church) (Cologne & Frankfurt 1696) (G. Williams trans.) (1st ed. 1557) in J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at apps. C and D respectively [hereinafter cited respectively as *De Potestate Civili* and *De Potestate Ecclesiae*].

17. Vitoria, *De Indis*, *supra* note 4, at 115.

relative complacency about methodological issues suggests a presumption that this diffuse moral system is superior to the independent beliefs of separate heathen or Christian sovereigns.[18]

In fact, Vitoria's texts contain no explicit or implicit distinction of the binding power of the moral or divine and legal orders.[19] Distinctions made in the shorter conceptual works (particularly "*De Potestate Ecclesiae*")[20] turn out to be fundamentally different from the separation of moral and legal obligation with which later theorists are familiar. For example, although they distinguish ecclesiastic and civil power, spiritual and temporal authority, and mortal and venial sin, Vitoria does not imagine a human law whose binding force arises other than from divinely ordained morality or which binds in action but not in conscience. Vitoria does not "argue" that sovereigns can not disagree about such things; he assumes it.

For Vitoria, the majesty of divine law precludes the existence of a separate sphere of normative authority. He distinguishes between civil and ecclesiastic power by the subjects each concerns and by the spheres of activity of two concrete institutions: the state and the church. Indeed, Vitoria justifies their identical binding force by invoking the comprehensive primacy of divine authority.[21] For example, his short conceptual work on civil authority, "*De Potestate Civili*," opens with a text from the thirteenth chapter of Romans: "There is no power but of God."[22] Vitoria then begins his discussion of civil power with the "conclusion" that: "all power—whether public or private—by which the secular State is governed, is not only just and legitimate, but is so surely ordained of God, that not even by the consent of the whole world can it be destroyed or annulled."[23] He proceeds to argue that human and divine law do not differ in their ability to bind the conscience. He grounds this conclusion in the logical priority of divine law ("human law is derived from God therefore it is binding even as

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18. The presumption of a holistic moral order which is indicated by this methodology has been confused with later, more traditional approaches which elaborated norms deductively from a self-conscious theoretical structure. The point of primitive holism is that it is not a self-conscious vision of this sort with methodological rules of deduction and internal criticism. *See, e.g.*, J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at 130 (crediting Vitoria with a notion of "the international community").

19. *See* Barthelemy, *supra* note 4, at 26, who writes: "[a]u XVIe siècle [le droit international] ne se distinguait pas de la morale et pour Vitoria c'est un chapitre de la théologie."

20. *De Potestate Ecclesiae*, *supra* note 16.

21. Interestingly, later authors, such as Pufendorf, rely on a similar notion of a single, comprehensive, divine authority to justify the *separate* binding force of human law. *See, e.g.*, Avril, *Pufendorf*, in LES FONDATEURS DU DROIT INTERNATIONAL 331, 342–343 (Pillet ed. 1904); and *infra* text accompanying notes 70–71.

22. *De Potestate Civili*, *supra* note 16, at lxx.

23. *Id.* at lxxii.

divine law is binding") and various Scriptural passages which suggest that the civil power is to be obeyed.[24] The text summarizes:

> We have asserted that we must preserve the same attitude towards human and divine laws, in so far as their binding force is concerned and that, with regard to the manner and extent in which human laws are binding, we ought to consider them as being divine. For a human law which if it were divine, would involve transgressions in venial guilt, actually has that force and one which, if it were divine, would involve transgressions in mortal guilt, already so involves them.[25]

Although Vitoria maintains that human law is binding only when in accord with the divine order, he does not mean that all of human law is derivative of divine law. Rather, exercises of civil authority which do not comport with the ordained sphere of civil authority do not give rise to human law.

> The two kinds of law [divine and human] differ also in the fact that, in the case of divine law, the Will of the Legislator—since His Will has the force of reason—suffices to render the law just and binding whereas the will of the legislator does not suffice to render human law just and binding, for the precepts of the latter must also be advantageous to the State and in harmony with the other laws.[26]

In this theoretical discussion, Vitoria constructs the sovereign's capacity so as to exclude acts of sovereign will which depart from what he repeatedly terms the joint moral/legal "consensus of the whole world." When the sovereign fails to act in a way "advantageous to the State," his will simply does not create law.[27]

Vitoria's conflation of morality and law also finds expression in his doctrinal analyses. He does not suggest any rule which is morally but not legally binding. In Vitoria's work, distinctions between the moral and the legal concern only the way law is made known and the division of responsibility between the church and state. Vitoria suggests different subjects and institutions with which human and divine law are concerned, but he affirms that their binding quality in these divergent spheres is identical.[28]

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24. *Id.* at lxxxvi.
25. *Id.* at lxxxvii.
26. *Id.* at lxxxv.
27. *Id.*
28. *Id.* at lxxxv–vi.

Divine law is known through Scripture and revelation. It is administered primarily by the ecclesiastic authorities. The Pope exercises spiritual, not temporal power[29] except in his own properties. Human law is known through the acts of sovereigns who exercise temporal power. These divisions of power are not always clean. What needs explaining, therefore, are the instances in which the Pope exercises temporal, or the Prince, spiritual power, not the hierarchical relationship between them or any difference in their normative power.

In Vitoria's work, the spiritual power is clearly superior to the civil power, just as the divine law is antecedent to the human law.[30] But these are differences of jurisdiction between the state and the church, not differences in authority or binding force.[31]

2. The Conflation of International and Natural or Divine Law

Just as Vitoria does not distinguish the moral and legal orders, he does not differentiate international law from divine or natural law. As a result, conflict among sovereigns which might implicate the foundations of the normative order does not seem possible. To shake the moral order, conflict would have to concern the authoritative content of the moral order—sovereignty would need to be an alternative source of normative power. Not only is the sovereign not the source of an independent legal order, his authority is limited by the moral/legal order as it renders his promulgations authoritative.

In one surviving three page fragment of a lecture commenting on St. Thomas Aquinas' *Summa Theologica Secunda Secundae*, Question 57, Article E, Vitoria discusses "under which law the *jus gentium* is contained: whether under positive law or under natural law."[32] The modern reader might misunderstand this distinction, imagining Vitoria's categories as "legal systems" which are independent in their ultimate source. To moderns who imagine natural law to be a matter of moral law, binding on us as a matter of faith, tested by the techniques we use to challenge faith, and positive law to be a matter of civil authority, binding on us as citizens, tested by the techniques with which we

29. *De Potestate Ecclesiae*, *supra* note 16, at xciv–ix.

30. *Id.* at xciv.

31. *De Potestate Civili*, *supra* note 16, at xci–ii. Similarly, the laws of parents and husbands can be distinguished from law generated by civil or ecclesiastical authorities on the ground that they concern different topics, are exercised by different individuals, and are known in different ways. But all these laws are binding in exactly the same way. *Id.*

32. Vitoria, *De Jure Gentium et Naturali* (On the *Jus Gentium* and the Natural Law) (Madrid & Valencia 1628) (F. Macken trans.), in J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at app. E. This fragment was entitled by the translator "for convenience" in a way which underscores the confusion about Vitoria's categories. Vitoria's discussion opposes positive and natural law, in each of which we might locate the *jus gentium*, not natural law and *jus gentium*, as the title suggests.

challenge the state, the question "which is it—natural or positive law?" seems substantive and quite important. But Vitoria does not imagine two such legal orders, noting that "the dispute concerns the name more than the thing, for it matters little whether one says this or that."[33]

When Vitoria discusses the difference between natural and positive law, he worries about subject matter and classification errors. For example, if natural law is falsely understood to comprise only norms related to characteristics which God has "extended to all created things," might worshipping God and honoring parents be falsely classified as matters of positive law? Since Scripture clearly commands worship and parental honor, such a principled distinction seems wrong to Vitoria. Natural and positive laws are distinguished by the nature of the authorities creating them. The authoritative revealed texts and the process of reason, on the one hand, command obedience to natural law, while the rules which are found more prosaically in the custom of "the whole world," on the other hand, create a body of positive law. These second rules are not binding as exercises of the power of the secular authorities which promulgate them, since all the rules are of the same order binding as a matter of divine authority. Vitoria just locates some in one place and some in another. He is clear that it is every bit as sinful to violate one as the other,[34] although not because the *jus gentium* would, as positive law, be derived from natural law. Rather, both are binding in the same way as matters of conscience.[35] The *jus gentium* comes from consensus of the whole world, and can be found there. It will look more like custom and less like revelation, but it will not be different in any fundamental way as a result.

Vitoria is not troubled by the overlap of the two systems or the possibility that a single rule might be understood to belong to both, as he might be were he to picture two systems of law. For example, if he supposed custom to be binding as a matter of consensus rather than divinity, he might be troubled by the sovereign's ability to change his mind and thus to abrogate the custom and deny it binding force. Nevertheless, Vitoria's brief discussions of the question leave no doubt that he makes no such distinction.

> International law [*jus gentium*] has not only the force of a pact and agreement among men but also the force of a law for the world as a whole being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules

33. *Id.* at cxi.
34. *Id.* at cxii.
35. *Id.*

> of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.[36]

The fact that the law is found in exercises of sovereign authority does not create a risk of law-threatening conflict among sovereigns. The normative power comes from the divine order, although the rule happens to come from the sovereign. Responding to the question "whether civil laws are binding upon legislators, and in particular, upon kings," Vitoria states: "Nevertheless, the fact that he is bound or not bound, does not depend upon his own will, just as in the case of pacts for he who enters into a pact of his own free will, is nevertheless bound thereby."[37]

3. The Conflation of International and Municipal Law

Unlike later scholars, Vitoria does not differentiate the human law which a single sovereign promulgates within his territory from that which the universe of sovereigns establish to govern intercourse between them. To the traditionalist, although both legal orders may be based in the sovereign will, each sovereign has two faces. One looks out at the world of sovereign nations. The other looks in, at the municipal citizenry. Different laws, tested and promulgated differently, govern sovereign behavior in each realm. For example, international law might be a matter of willed agreement among sovereigns, while municipal law remains a natural law order of reciprocal rights and duties between sovereign and citizenry. Once the corpus of human law is split in this way, it is easier to imagine that conflict among sovereigns could disturb the international legal order while leaving intact the system of natural or divine order which governed municipal social relations. Moreover, once the sovereign is situated as the source of both legal orders, it seems easier to imagine that sovereign conflict could disrupt the international normative order.

The sovereign is not central to Vitoria's legal universe. The sovereign is a source of some law which binds only his municipality, in the sense that one might look to him for the catalog of such laws. He also participates by custom in the enumeration of the general *jus*

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36. *De Potestate Civili*, *supra* note 16, at xc. For a Latin text see: F. Vitoria, *Relectiones Morales*, 180 (Simonis ed. Cologne & Franfurt 1696) photo. reprint in F. Vitoria, *De Indis et de Jure Belli: Relectiones*, *reprinted in* CLASSICS OF INTERNATIONAL LAW (J.B. SCOTT ED. 1917).

37. *De Potestate Civili*, *supra* note 16, at lxxxix.

gentium. But the sovereign is not responsible for the binding force of these laws. He merely participates in a single moral and legal order—albeit a player with certain special capacities and duties.

Some historians have suggested that Vitoria's work distinguishes the municipal and international orders in the traditional sense.[38] They rely on a dubious translation of *jus gentium* as "international law" or "law of nations." In Vitoria's texts, *jus gentium* means a single domestic and international system. One text refers to the Justinian *jus gentium* as binding "*inter gentes*", perhaps indicating that it is a law among "peoples" or "nations" rather than "*inter homines*" or among men; but it does not continue this usage. Indeed, it seems overdrawn to imagine that Vitoria always means *jus gentium* in this narrower sense.[39]

It would also be incorrect to confuse Vitoria's failure to distinguish an international and municipal legal order with the "monism" of some traditional authors. These traditionalists, while imagining the sovereign as a central figure, dividing two legal orders, also maintain that the two are part of a single, "monistic" system which empowers the sovereign to act in both spheres.[40] This monism developed as a reaction to the rigid separation of the two spheres which characterized most of traditional scholarship. It served to resolve certain conceptual problems associated with the source of and boundary between the sovereign's two selves. But traditional monism accepted unquestioningly both the central position of the sovereign and the notion that the binding force of rules in the two spheres arose quite differently. In this sense, Vitoria should not be considered a "monist," because he makes no such assumptions about the sovereign's role or the source of the normative power of law in the two realms. For this reason, I prefer to term his primitive fusion of municipal and international law "holistic" or "universalistic."

Since the Vitorian sovereign does not occupy a central norm legitimating position between the international and municipal legal orders, the integrity of the moral/legal universe cannot be disrupted in one sphere by sovereign authority exercised in the other. Moreover, neither set of norms traces its authority to the sovereign.

4. The Public and Private Sovereign Capacities

Vitoria eludes what later authors sense as a potential conflict between a world-wide moral order and independent sovereign authorities

38. *See, e.g.*, J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at ch. 7; Barthelemy, *supra* note 4, at 22 (quoting Grotius accusing Vitoria of "confusing everything, material law, divine law, *jus gentium*, civil law, canonic law . . . .").

39. *De Potestate Civili*, *supra* note 16, at xci–xcii.

40. *See, e.g.*, Scelle, *Règles générales du droit de la paix*, 46 RECUEIL DES COURS (1933); D. O'CONNELL, INTERNATIONAL LAW 38 (2d ed. 1970) (discussing monism); W. SCHIFFER, *supra* note 1, at ch. 16.

in his discussion of the public and private capacities of sovereigns.[41] To the traditionalist, both public and private activities are sovereign acts which have different consequences and are governed by different norms. To Vitoria, on the other hand, the distinction between public and private is the distinction between sovereign and not sovereign. Sovereignty is defined by the extent of public power. A "private sovereign act" would be a contradiction in terms. Later scholarship understands as "private" situations in which the sovereign is bound like a citizen—in the personal commercial dealings of an ambassador, for example. Vitoria uses "private" to indicate non-sovereign acts.

For the traditionalist who split the sovereign into two identities, it was easy to imagine that sovereign will could conflict with the moral international order because the sovereign existed independent of the nature of his behavior or its compliance with norms. Vitoria had an easy time avoiding this problem. He imagined acts which did not comport with the natural order as not sovereign acts. Vitoria's doctrinal scheme makes illegitimate any exercise of sovereign authority which does not comport with the divine order. Such acts are not *prohibited*; rather, they fall outside the realm of sovereign acts, and are excluded from any discussion of sovereignty. The sovereign is sovereign only so long as he stays in line. By equating the distinctions between sovereign/not sovereign, public/private and just/unjust, Vitoria avoids a conflict between sovereign authority and natural law norms.

Thus, for example, the civil public power as granted by God and "Mother Nature" are equated and therefore "it becomes evident that public power is of God and that it cannot be contained within the limits of man's nature or of any positive thing."[42] Monarchs therefore exercise divine authority.[43] The interesting point is that this not only empowers sovereigns but also limits their authority. Since their power is divine, any deviation from divine law must not be an exercise of their sovereign authority: it must be private. Vitoria's "third corollary" to the proposition that "public powers are from God and that they are therefore just and legitimate" illustrates this point.[44] He argues that a war conducted by a sovereign which seems just, but which in fact damages the State or the faith, is not a legitimate exercise of public power.

> The third corollary is as follows: No war is just the conduct of which is manifestly more harmful to the State than it is good and

41. This discussion is ordinarily referred to in the literature on Vitoria and Suárez only in the context of the just-war doctrine, private wars being held unjust, *see infra* text accompanying notes 61–68, 109–114.

42. *De Potestate Civili*, *supra* note 16, at lxxvi.

43. *Id.* at lxxvii–lxxx.

44. *Id.* at lxxxi.

> advantageous and this is true regardless of any other claims or reasons that may be advanced to make of it a just war. The proof is: That if the State has no power to make war except for the purpose of defending itself, and protecting itself and its property, it follows that any war will be unjust, whether it be begun by the king or by the State, through which the latter is not rendered greater, but rather is enfeebled and impaired. Nay more, since one nation is a part of the whole world, and since the Christian province is a part of the whole Christian State, if any war should be advantageous to one province or nation but injurious to the world or to Christendom, it is my belief that, for this very reason, that war is unjust.[45]

C. Vitorian Doctrine

Vitoria's two main extant works consider the law governing relations with American Indians and the law of war.[46] Vitoria organizes his discussion of the treatment of Indians around a system of "legitimate" and "illegitimate" public titles to Indian lands which defines the limits of sovereign consent and authority. His discussion of war revolves around a system of "just" and "unjust" wars. Both systems of "legitimate titles" and "just wars" rely on a notion of absolute "rights" and "wrongs" which determine the capacities of sovereigns and justify exercises of sovereign will. This world-wide system of rights and wrongs is grounded in the divine order rather than in sovereign authority, and defines every sovereign act as either right or wrong.

In Vitoria's work, wars are just and territorial claims are legitimate when they respond to "wrongs" done. If a sovereign act is wrong, it can give another sovereign legitimate title, or entitle him to wage just war. Moreover, whoever is "right" completely extinguishes the capacity of whoever is wrong. As a result, Vitoria's analysis in both areas has an on-off quality to it. When sovereigns come into contact, they are either right or wrong—authoritative or powerless. In this, both doctrinal areas couple fairly abstract descriptions of sovereign authority with brutal enabling provisions should conflict arise.

To Vitoria, Indian tribes are entities with legitimate public title within their territory. This title, or ability to act as a sovereign, is subject to the moral order which requires sovereigns to permit free intercourse and propagation of the faith. Any attempt to violate these divinely revealed "rights" terminates their public title and enables the Spaniards to use whatever force seems necessary to enforce the divine order.

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45. *Id.* at lxxxii.

46. Vitoria, *De Indis* and Vitoria, *De Jure Belli*, *supra* note 4. *See* Trelles, *supra* note 2, at 136; Q. ALBERTINI, *supra* note 4; (for uncritical, but fairly good elaborations of the two works).

1. Indian Titles

Vitoria's consideration of the American Indians is in three parts. In the first part, he addresses the problem "whether the Indian aborigines before the arrival of the Spaniards were true owners in public and in private law and whether there were among them any true princes and overlords."[47] This issue is discussed in terms of general norms covering ownership by heretics and barbarians. Vitoria concludes that "these aborigines were true owners alike in public and in private law before the advent of the Spaniards among them."[48] In the second section, "On the illegitimate titles for the reduction of the aborigines of the New World into the power of the Spaniards," Vitoria considers and rejects claims by the Emperor and the Pope to automatic sovereignty in the New World. He concludes that no right of Spanish overlordship arises from the Indians' stubborn refusal to accept Christianity or from their commission of sins against the "law of nature." Finally, he considers whether their consent has brought the aborigines under Spanish rule. In the third section, "On the lawful titles whereby the aborigines of America could have come into the power of Spain," Vitoria discusses the various acts which can justify exertion of Spanish power, including interference with the Spanish "rights" to travel, trade, proselytize, protect converted Christians, etc., in Indian lands.

Three aspects of this scheme are important. First, Vitoria's analysis depends at each stage on his assumption that the Indians are bound by the divine order from which they derive any public title they may hold. Second, his system allocates justified exercises of power now to one sovereign, now to another, in such a way as to avoid any conflict between competing exercises of authority, both of which are legitimate within the divine order. Third, the mechanisms by which title is allocated serve to hide what we understand to be the potential for conflict between sovereigns.

Vitoria expresses his assumption that the Indians are bound by the divine moral and legal order by grounding the Indians' public title in their rights under divine law as heathens. Moreover, he makes clear that only the Indians' violation of the dictates of this moral order will suffice to extinguish their titles.

Although Vitoria understands the Spanish monarchy as legitimate because it is divine, he goes to great lengths to demonstrate that the

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47. This section opens with a self-justifying elaboration of basic moral principles governing obedience to those, like Vitoria, whose task it is to give advice when a person is in doubt in order to obtain safety of conscience. This discussion, which illustrates his theological self image, is picked up again in his later discussion of a prince's duty to seek advice about the justness of his cause before commencing a war. His analysis of law governing relations with Indians begins at Vitoria, *De Indis*, *supra* note 4, at 115.

48. Vitoria, *De Indis*, *supra* note 4, at 128.

Indians have legitimate public title to their lands. This conclusion is justified by authoritative Scriptural citations covering heathens and barbarians. Nowhere does Vitoria doubt that the Indians are bound by these doctrines.[49] His discussion of illegitimate Spanish claims to dominion reaffirms Indian freedom from coercion in matters of faith.

However, this freedom is not derived from any independent moral authority the Indians possess by virtue of their public titles. Rather, it stems from universal propositions of faith. The Indians are bound to hear the faith; this much is required by the Gospel. Moreover, they must receive it when it is put to them persuasively, on pain of mortal sin.

> If the Christian faith be put before the aborigines with demonstration, that is, with demonstrable and reasonable arguments, and this be accompanied by an upright life, well-ordered according to the law of nature (an argument which weighs much in confirmation of the truth), and this be done not once only and perfunctorily, but diligently and zealously, the aborigines are bound to receive the faith of Christ under penalty of mortal sin. This is proved by the third proposition, for, if they are bound to hear, they are in consequence bound also to acquiesce in what they hear, if it be reasonable. This is abundantly clear from the passage (*St. Mark*, last ch.): "Go ye out into all the world, preach the Gospel to every creature whoso believeth and is baptized shall be saved, but whoso believeth not shall be damned" and by the passage (*Acts*, ch. 4): "No other name is given unto man whereby we can be saved."[50]

Vitoria wonders about the sufficiency of the contemporary demonstration, but not about the basic obligation of non-believers to convert:

> It is not sufficiently clear to me that the Christian faith has yet been so put before the aborigines and announced to them that they are bound to believe it or commit fresh sin. I say this because (as appears from my second proposition) they are not bound to believe unless the faith be put before them with persuasive demonstration. Now, I hear of no miracles or signs or religious patterns of life nay, on the other hand, I hear of many scandals and cruel crimes and acts of impiety. Hence it does not appear that the Christian religion has been preached to them with such sufficient propriety and piety that they are bound to acquiesce in it, although many religious and other ecclesiastics seem both by their lives and example and their diligent preaching to have bestowed sufficient pains and industry in this business, had they

49. *See, e.g., id.* at 121–126.
50. *Id.* at 144.

> not been hindered therein by others who had other matters in their charge.[51]

Should Indians stubbornly resist the Gospel, they may not be beaten into it. This restraint on Spanish authority flows not from any requirement that Indian autonomy be respected, but from propositions of faith.

> Sixth proposition: Although the Christian faith may have been announced to the Indians with adequate demonstration and they have refused to receive it, yet this is not a reason which justifies making war on them and depriving them of their property.[52]

Vitoria distinguishes cases of legitimate Spanish and legitimate Indian titles, thereby defining the sovereignty of both so as to exclude the possibility of conflict. Public title means the authority to exercise public, temporal or sovereign authority. In discussing illegitimate and legitimate justifications for Spanish authority, Vitoria sketches the boundary between Indian authority (to retain their lands and faith)

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51. *Id.*

52. *Id.* at 144–45. Vitoria's elaborate proof of this proposition is worth quoting:

> This conclusion is definitely stated by St. Thomas (*Secunda Secundae*, qu. 10, art. 8), where he says that unbelievers who have never received the faith, like Gentiles and Jews, are in no wise to be compelled to do so. This is the received conclusion of the doctors alike in the canon law and the civil law. The proof lies in the fact that belief is an operation of the will. Now, fear detracts greatly from the voluntary (*Ethics*, bk. 3), and it is a sacrilege to approach under the influence of servile fear as far as the mysteries and sacraments of Christ. Our conclusion is also proved by the *Canon de Judaeis* (can. 5, dist. 45), which says: "The holy synod also enjoins concerning the Jews that thenceforth force be not applied to any of them to make him believe 'for God has compassion on whom He wills, and whom He wills He hardens.'" There is no doubt about the doctrine of the Council of Toledo, that threats and fears should not be employed against the Jews in order to make them receive the faith. And Gregory expressly says the same in the canon qui sincera (can. 3, dist. 45): "Who with sincerity of purpose," says he, "desires to bring into the perfect faith those who are outside the Christian religion should labor in a manner that will attract and not with severity . . . for whosoever does otherwise and under cover of the latter would turn them from their accustomed worship and ritual is demonstrably furthering his own end thereby and not God's end."
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> Our proposition receives further proof from the use and custom of the Church. For never have Christian Emperors, who had as advisors the most holy and wise Pontiffs, made war on unbelievers for their refusal to accept the Christian religion. Further, war is no argument for the truth of the Christian faith. Therefore the Indians can not be induced by war to believe, but rather to feign belief and reception of the Christian faith, which is monstrous and a sacrilege. And although Scotus (bk. 4, dist. 4) calls it a religious act for princes to compel unbelievers by threats and fears to receive the faith, yet he seems to mean this to apply only to unbelievers who in other respects are subjects of Christian princes (with whom we will deal later on). Now, the Indians are not such subjects. Hence, I think that Scotus does not make this assertion applicable to their case. It is clear, then, that the title which we are now discussing is not adequate and lawful for the seizure of the lands of the aborigines.

Id.

and Indian respect for foreign authority (to sojourn, preach, etc.) so as to ensure that only one title at a time is legitimate. His entire organizational scheme separates the spheres of Spanish and Indian authority, preventing a direct clash between these two sovereign authorities within a single divine order.

Vitoria imagines that legitimate Spanish title might be obtained either by Indian consent or as a result of some Indian violation of some Spanish "right" which entitled the Spanish to "right" the "wrong" to enforce the precepts of divine law. Vitoria's discussion of Spanish title based on Indian consent is worth repeating at length:

> There remains another, a sixth title, which is put forward, namely, by voluntary choice. For on the arrival of the Spaniards we find them declaring to the aborigines how the King of Spain has sent them for their good and admonishing them to receive and accept him as lord and king and the aborigines replied that they were content to do so. Now, "there is nothing so natural as that the intent of an owner to transfer his property to another should have effect given to it" (*Inst.*, 2, 1, 40). I, however, assert the proposition that this title, too, is insufficient. This appears, in the first place, because fear and ignorance, which vitiate every choice, ought to be absent. But they were markedly operative in the cases of choice and acceptance under consideration, for the Indians did not know what they were doing nay, they may not have understood what the Spaniards were seeking. Further, we find the Spaniards seeking it in armed array from an unwarlike and timid crowd. Further, inasmuch as the aborigines, as said above, had real lords and princes, the populace could not procure new lords without other reasonable cause, this being to the hurt of their former lords. Further, on the other hand, these lords themselves could not appoint a new prince without the assent of the populace. Seeing, then, that in such cases of choice and acceptance as these there are not present all the requisite elements of a valid choice, the title under review is utterly inadequate and unlawful for seizing and retaining the provinces in question.[53]

Vitoria presumes throughout this argument that whatever consensual power the Indians have to alienate their public title is governed by natural law notions of legitimate consent. Their consent must be uncoerced, informed, etc. Moreover, the ability of the Indian lords and people to consent to alienation of Indian lands is governed by the reciprocal responsibilities of sovereigns and citizenry under the natural law that establishes and limits sovereign authority. Were it otherwise,

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53. *Id.* at 148.

were consent purely a subjective matter, at the prerogative of each sovereign, there could arise conflict about whether title has passed.

Vitoria's section on legitimate Spanish titles develops a system of rules governing Indian behavior. These are not externally supplied rules which Indian sovereigns might break and for which they might be punished; they are boundaries to Indian sovereignty. When overstepped, Indian public title is extinguished automatically. The wrongs by which Indian authorities might deprive themselves of their authority are numerous, relating generally to obstructing the Spanish freedom to trade and proslytize. These freedoms are grounded in natural law and justified by citation of numerous Scriptural authorities.

Generally, for each wrong which the Indians might commit, the Spaniards assert some right. As in the case of consent, they must make sure the Indians know what they are doing so as not to elicit a mistaken response. Again, the Indian authority is limited, as it is justified, by Vitoria's sense of natural law, under which unconscious or confused exercises of Indian will are not effective to establish an avengable wrong. Should the Indians persist in violating a Spanish right, they automatically forfeit their public title to the Spanish. The mechanism of enforcement for this transfer is just war, which the Spanish may wage on the now title-less Indians. The Spanish power is limited to instances when a wrong has actually been committed by the Indians. If the Indians did not know what they were doing, for example, the Spanish might be wronging the Indians or upsetting the natural law relationship between Indian sovereigns and citizenry.

This standard pattern is illustrated by Vitoria's treatment of the Spanish rights to trade and proselytize. He begins his discussion of trade by asserting both the existence of these rights and the Spanish obligation to clearly assert them:

> If the Indian natives wish to prevent the Spaniards from enjoying any of their above-named rights under the law of nations, for instance, trade or other abovenamed matter, the Spaniards ought in the first place to use reason and persuasion in order to remove scandal and ought to show in all possible methods that they do not come to the hurt of the natives, but wish to sojourn as peaceful guests and to travel without doing the natives any harm and they ought to show this not only by word, but also by reason, according to the saying, "It behoveth the prudent to make trial of everything by words first."[54]

He then states that should the Indians violate the right to trade, the Spaniards may institute a just war against the Indians to avenge the wrong.

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54. *Id.* at 157.

> But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. And not only so, but, if safety can not otherwise be had, they may build fortresses and defensive works, and, if they have sustained a wrong, they may follow it up with war on the authorization of their sovereign and may avail themselves of the other rights of war. The proof hereof lies in the fact that warding off and avenging a wrong make a good cause of war, as said above, following St. Thomas (*Secunda Secundae*, qu. 40). But when the Indians deny the Spaniards their rights under the law of nations they do them a wrong. Therefore, if it be necessary, in order to preserve their right, that they should go to war, they may lawfuly do so.[55]

Once war is instituted, the Spanish may exercise all public authority over the Indians.

> If, after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and wellbeing of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, then they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies, and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with observance of proportion as regards the nature of the circumstance and of the wrongs done to them. This conclusion is sufficiently apparent from the fact that, if it be lawful to declare the war, it is consequently lawful to pursue the rights of war.[56]

Vitoria's discussion of the Spanish right to proselytize proceeds similarly. He begins by establishing the right through citation of divine authority:

> Another possible title is by way of propogation of Christianity. In this connnection let my first proposition be: Christians have a right to preach and declare the Gospel in barbarian lands.[57]

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55. *Id.*
56. *Id.* at 154.
57. *Id.* This proposition is supported as follows:
> This proposition is manifest from the passage: "Preach the Gospel to every creature," etc., and also, "The word of the Lord is not bound" (2 *Timothy*, ch. 2). Secondly, our proposition is clear from what has been already said, for if the Spaniards have a right to travel and trade among the Indians, they can teach the truth to those willing to hear them, especially as regards matters pertaining to salvation and happiness, much more than as regards matters

He then suggests that the Indians must actually violate the right for their title to be extinguished and distinguishes cases in which they do not violate the Spanish right, such as when they permit preaching but do not receive the faith.[58]

But should the Spanish be wronged at divine law, their authority to right the wrong is absolute.

> Fourth proposition: If the Indians—whether it be their lords or the populace—prevent the Spaniards from freely preaching the Gospel, the Spaniards, after first reasoning with them in order to remove scandal, may preach it despite their unwillingness and devote themselves to the conversion of the people in question, and if need be they may then accept or even make war, until they succeed in obtaining facilities and safety for preaching the Gospel. And the same pronouncement must be made in the case where they allow preaching, but hinder conversion either by killing or otherwise punishing those who have been converted to Christ or by deterring others by threats and fears. This is clear, because herein the Indians would be doing an injury to the Spaniards (as appears from what has already been said) and these would have a just cause of war.[59]

Vitoria grounds this Spanish right in the natural law limits on the relations between Indian sovereign and citizenry.

> *A second reason is that an obstacle would thereby be put in the way of the welfare of the Indians themselves such as their princes have no right to put there.* Therefore, in favor of those who are oppressed and suffer wrong, the Spaniards can make war, especially as such vitally important interests are at stake. This proposition demonstrates that, if there is no other way to carry on the work of religion, this furnishes the Spaniards with another justification

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pertaining to any human subject of instruction. Thirdly, because the natives would otherwise be outside the pale of salvation, if Christians were not allowed to go to them carrying the Gospel message. Fourthly, because brotherly correction is required by the law of nature, just as brotherly love is. Since, then, the Indians are all not only in sin, but outside the pale of salvation, therefore, it concerns Christians to correct and direct them nay, it seems that they are bound to do so. Fifthly and lastly, because they are our neighbors, as said above: "Now the Lord has laid a command on everyone concerning his neighbour" (*Ecclesiasticus*, ch. 17). Therefore it concerns Christians to instruct those who are ignorant of these supremely vital matters. Third proposition: If the Indians allow the Spaniards freely and without hindrance to preach the Gospel, then whether they do or do not receive the faith, this furnishes no lawful ground for making war on them and seizing in any other way their lands. This has been proved above, where we confuted the fourth alleged title, and it is self-evident, seeing that there can not be a just war where no wrong has previously been done. (*Secunda Secundae*, qu. 40, art. 1)

58. *Id.* at 155.

59. *Id.* at 156.

> for seizing the lands and territory of the natives and for setting up new lords there and putting down the old lords and doing in right of war everything which it is permitted in other just wars.[60]

Vitoria's doctrinal analysis of the law regarding treatment of Indians illustrates the reason for what now seems an insensitivity to the potential for conflict between independent sovereigns and a holistic system of natural law. First, he assumes that the Indians and Spanish are bound by the same notions of natural and divine order. Second, he ensures in his doctrinal analysis that whatever independent authority they each have as sovereigns is based on and limited by the natural order. Whenever an exercise of Indian authority does not comply with these notions, it is not a legitimate exercise of authority. At the point where Indian title stops, Spanish title commences.

In Vitoria's work, the first of these two mechanisms (the extension of divine natural law to all sovereigns) seems the most important. As is clear from his treatment of Indian rights, Vitoria's exclusive doctrinal definition of sovereign capacity is derived from this initial assumption. The elaborate system of rights and wrongs which allocate public title between Spanish and Indian authorities seem to reinforce or protect Vitoria's extension of divine law to cover Indians. Without it, disagreement about the content of natural law might generate conflict within his normative order. His treatment of the law of war makes this relationship between the two aspects of his conflict-avoidance mechanism more readily visible.

2. Just War

Relying on an absolute system of rights and wrongs, Vitoria's analysis of the law of war defines sovereign authority so as to equate legitimate public authority with normatively just authority.[61] He

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60. *Id.* (emphasis added).

61. Vitoria's treatment of just war doctrine is discussed in Q. ALBERTINI, *supra* note 4; Barthelemy, *supra* note 4, at 26 (crediting Vitoria for a reasonable attitude in suggesting that war could seem just on both sides through ignorance and emphasizing the resulting self-restraint and moderation which statesmen must show in going to war); *see also* J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at 66–67 (similarly confusing Vitoria's conception of avoiding ignorance with notions of self-restraint by legitimately enabled sovereigns); *cf.* A. NUSSBAUM, *supra* note 1, at 60–63 (emphasizing the potential for conflict within this "judicial" theory of war) and Nussbaum, *supra* note 14 (identifying some techniques Vitoria used to avoid this conflict). *See also* Goyau, *supra* note 2, at 181, 194 (containing an uncritical naturalist treatment of Vitoria's just war scholarship). These typical naturalist treatments of Vitoria's views on just war emphasize the doctrinal exceptions of good faith or ignorance of the sovereign, which somehow allow for a war just on both sides. In such a case, these histories underline Vitoria's "realism" and his call for self-restraint, moderation, etc. A more extreme naturalist attitude suports the just-war-on-a-single-side position, while blaming Vitoria's followers for probabilist theories. *See, e.g.*, Trelles, *supra* note 2, at 293–98 (acknowledging however, that if a just war on both sides is possible,

thereby avoids what we might think of as conflict between legitimate public authorities. He defines just war so as to eliminate any conflict between sovereigns about natural law "justness" and then defines sovereign capacity so as to ensure that it is either absolute or nonexistent, depending on its "justness."

Vitoria's discussion of just war begins with the assumption that no war may be just on both sides.

> This is too well known to need proof, for otherwise each of the two belligerents might have an equally just cause and so both would be innocent. This in its turn would involve the consequence that it would not be lawful to kill them and so imply a contradiction, because it would be a just war.[62]

In other words, were war to be just on both sides, legitimate sovereign authorities would conflict. Like the "legitimacy" of title, the "justness" of war is determined by a system of natural law rights and wrongs. Only a war which rights a "wrong received" is just. A "wrong" is what happens when one sovereign violates a natural law-based norm guaranteeing something to another state. As in the case of Indian title, Vitoria imagines all sovereigns to be bound by a single set of natural law norms. Moreover, because war is either just or unjust and may be just only on one side, a clash between legitimate sovereigns is excluded.

A theory of sovereign capacity supports this general scheme. In three ways, Vitoria treats just war to extinguish sovereign authority

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"the whole legal approach to war automatically changes."). *See also* L.B. WALTERS, JR., FIVE CLASSIC JUST WAR THEORIES: A STUDY IN THE THOUGHT OF THOMAS AQUINAS, VITORIA, SUÁREZ, GENTILI AND GROTIUS (1971) (unpublished manuscript) (available in Yale University Library).

62. Vitoria, *De Jure Belli*, *supra* note 4, at 170. Many historians have misunderstood Vitoria to suggest that war could ultimately be just on both sides because he claims that it might appear so to a prince who was ignorant or had not consulted proper authorities beforehand. *See, e.g.*, Barthelemy, *supra* note 4, at 26. A. NUSSBAUM, *supra* note 1, analyzes Vitoria's approach properly when he emphazies its relationship to uninformed consent, a mitigating factor at divine law:

> To Vitoria it was repugnant that in the war against the American Indians justness should be found solely with the victorious Spanish rulers. This difficulty led him to pose another problem, namely, whether war may be just on both sides. Vitoria's theological starting point made it impossible for him to answer the question simply and plainly in the affirmative. But in a characteristically scholastic fashion, he explains that demonstrable or invincible ignorance excuses the unrighteous party and that in this particular sense the war may be "just" on both sides.

Id. at 61. His analysis misses the sense in which this manipulation of objective criterion of legality and the subjective criterion of good faith hides the conflict within just war theory. Nussbaum rather suggests that Vitoria's method of avoiding conflict between these two tendencies results from his having distinguished using notions of "objective" and "subjective" justness, a distinction which is foreign to Vitoria's approach. *See also* Nussbaum, *supra* note 14.

when it does not conform with these moral/legal norms. First, Vitoria equates the sovereign's public authority with justness. The sovereign's private desires for empire or religious conquest are not just causes. Nor does the violation of a private right legitimate war. Thus a sovereign's authority to wage war is coterminous with the justness of his objectives. Vitoria therefore sharply distinguishes the public and private capacities of the sovereign. In his public role he is the instrument of a universal law enforced by the "agreement of the whole world." In his private role he has desires which are not just causes of war. Vitoria relies here on St. Augustine who responds to the notion that the text

> Put up again thy sword into its place: for all that take the sword shall perish by the sword,

prohibits all war with the notion that:

> He takes the sword who, by no authority or legitimate power either by ordering it or permitting it, arms himself against the blood of any man.[63]

Private war is an impermissible exercise of autonomy. The prince as sovereign has "the authority for and counsel for making war" in accordance with the "natural order."[64]

Second, the special capacity of sovereigns in matters of war is evident in their special responsibility to ensure the justness of their public acts. The sovereign must be sure of the justness of his cause before making war. The sovereign must consult advisors before making war to ensure that the prince's public authority is actually an exercise in justice. In case of doubt about the justness of the cause, the prince must refrain from war, for were he to go forward, a war might be fought which was not just, or both sides might imagine justice to be on their side.

Third, sovereigns have the capacity to exercise extraordinary powers when their cause is just. Once a war is undertaken, the just prince must judge his enemies and the justice of the war itself. This definition of the sovereign's capacity avoids any collision of separate sovereign views about justice: only the views of the just prince are legitimate.

> [A] prince who is carrying on a just war is as it were his own judge in matters touching the war, . . .[65]

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63. St. Augustine, *Contra Faustum* 70.
64. *Id.* at 75.
65. Vitoria, *De Jure Belli*, *supra* note 4, at 171.

After the war, the victor is the judge of his adversary, for the public authority of the vanquished has been fully extinguished.

> [A] prince who has on hand a just war is *ipso jure* the judge of his enemies and can inflict a legal punishment on them, condemning them according to the scale of their wrongdoing.[66]

The sovereign authority of the vanquished has been snuffed out—leaving the victor responsible as sovereign to the defeated citizenry.

> When victory has been won and the war is over, the victory should be utilized with moderation and Christian humility, and the victor ought to deem that he is sitting as judge between two States, the one which has been wronged and the one which has done the wrong, so that it will be as judge and not as accuser that he will deliver the judgement whereby the injured state can obtain satisfaction, and this, so far as possible should involve the offending state in the least degree of calamity and misfortune, the offending individuals being chastised within lawful limits; and an especial reason for this is that in general among Christians all the fault is to be laid at the door of their princes, for subjects when fighting for their princes act in good faith . . . .[67]

Likewise, in just war, any means are permissible, for the unjust prince has lost his claim to the protection of natural law. This on-off approach to authority requires the initial caution about instituting an unjust war. Ignorance could lead to the false impression that a prince's cause was just and lead him to commit such wrongs as to extinguish his own public authority.

> There is no inconsistency, indeed, in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance. For instance, just as the French hold the province of Burgundy with demonstrable ignorance, in the belief that it belongs to them, while our Emperor's right to it is certain, and he may make war to regain it, just as the French may defend it, so it may also befall in the case of the Indians—a point deserving careful attention. For the rights of war which may be invoked against men who are really guilty and lawless differ from those which may be invoked against the innocent and ignorant, just as the scandal of the Pharisees is to

66. Vitoria, *De Indis*, *supra* note 4, at 156.
67. *Id.* at 187.

> be avoided in a different way from that of the self-distrustful and weak.[68]

Like the doctrinal treatment of Indian title, Vitoria's discussion of the law of war illustrates primitive textual practices for avoiding what later would seem to be a possibility of conflict among sovereign authorities which would threaten their holistic system of divine and natural law. He assumes that a single system of normative authority governs all sovereign behavior and defines sovereign capacity in such a way as to preclude sovereign conflict with this single moral order. The on-off quality of his system of rights and wrongs creates a very sharp boundary between the authorities of different sovereigns and rigidly defines the limits of legitimate authority. The heart of his doctrinal scheme is the delimitation of a distinct and exclusive zone for the legitimate exercise of each sovereign's autonomous will. In a sense, Vitoria's system of sovereign capacity is derived from his holistic notion of absolute standards of justice. Without a clear belief that natural law could elaborate a system of rights and wrongs which could ensure that only one side of any conflict was just, the sharp boundary between sovereign authorities would collapse. Nevertheless, Vitoria's theory of sovereign capacity also reinforces his vision of a holistic natural law order. By placing disagreement automatically outside their sovereign capacity, the rigid distinction between sovereign and non-sovereign ensures that sovereigns do not meaningfully disagree about the content of the natural law order.

D. Conclusion

In his style, his methodology, his jurisprudence and his doctrinal system, Vitoria exemplified what I have termed "primitive" international legal scholarship. His style is diffuse, and his methodology is unself-conscious. He connects doctrinal propositions to passages of Scripture with no sense of any internal relationship among the authoritative passages chosen. He does not differentiate norms which bind morally from those which bind legally. To Vitoria, natural, divine and human law are of one force, differing only in their coverage and institutional focus. He does not locate the sovereign between a distinct municipal and international legal order, nor does he distinguish internal and external or private and public sovereign identities.

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68. *Id.* at 155. The key point is that caution about ignorance acts like caution about informed consent. It prevents mistakes from having the dramatic effect of shifting title or legitimating just war. Both are governed by an external moral order, not by the authority of the sovereign concerned. *See also* Nussbaum, *supra* note 14, at 459.

These characteristics of primitive scholarship are related to one another in Vitoria's work. Together, they prevent the text from exhibiting the tensions between his notion of a holistic divine legal and moral order and his treatment of situations involving conflict among independent sovereign authorities which to us seem so close to the surface of his work.

I have identified two aspects of Vitoria's work which make it impossible for one who thinks in the terms and logic of his text to imagine this sort of tension. The first is an assumption about the reach of natural law. This assumption is visible in his style, his methodology and in his fusion of what we imagine to be distinct legal and moral, international and national legal orders. The second is a notion of the sharp limits on sovereign capacity which keep all exercises of legitimate sovereign authority within the holistic order. This notion is visible in his not locating the sovereign centrally between two independent legal orders, one municipal and one international, and his distinction between official private and public sovereign behavior. It forms the core of his doctrinal treatment of Indian titles and the law of war.

Although Vitoria shares these techniques with other primitive scholars, the relationship between them in his work is unusually distinct. In each of his doctrinal analyses, the definition of sovereign capacity is derived from assumptions about divine order. Although he also protects those notions of holistic order by ruling out normative conflict among sovereigns, Vitoria begins with the divine order and elaborates the sovereign capacity which must accompany it. Hence his law of war analysis, for example, begins with the notion that war may only be just on one side. This principle is then used to justify the duties of sovereigns to consult advisors and their powers to judge their adversaries in a just war. Other primitive scholars, as we will see, reverse the relationship between these two textual strategies.

This relationship is indicative of the relationship between doctrine and methodology in Vitoria's work. The first tendency, an assumption about the ambit of natural law, is rooted primarily, though not exclusively, in Vitoria's tone and methodology. The second tendency, an elaboration of sovereign capacity, is at the core of his doctrinal system. In just such a way, doctrine is related to theory in Vitoria's texts. Vitoria's doctrinal systems are secondary to his methodological premises. He begins with his faith and elaborates a doctrinal scheme consistent with it. This dependency of doctrine on jurisprudence helps to explain his relative unself-consciousness about jurisprudential notions. They do not need explaining. Doctrine does. Doctrinal systems reinforced Vitoria's methodology and faith, but in the first instance they depend upon them.

Vitoria's text has often been misunderstood. Historians, even as they laud him, have treated his overall approach as somehow incomplete. The tension between his holism and his treatment of independent sovereigns seems to indicate that he has missed something somewhere. Historians who want to demonstrate the continuity between Vitoria and traditional or modern scholars often fail to grasp the inner structure of Vitoria's work, which hides modern tensions from view, and hence to appreciate the radical difference between primitive and traditional and modern scholarship. Moreover, these efforts follow a pattern. The senses in which various historians imagine Vitoria to miss the point seem directly related to each modern scholar's project.

International legal historians, be they positivist or naturalist, typically engage in a project quite different from that of Vitoria. They try to solve a methodological dilemma, seeking to discover the source of international law's legitimate binding force. This dilemma is rooted in a perceived doctrinal contradiction: sovereigns can not be both autonomous and bound. The doctrinal analyses of these scholars precede and shape their scholarship, which is quite self-consciously methodological. Having begun with a doctrinal assumption about the autonomy of sovereigns, historians are unable to imagine either that autonomy is preserved by the requirement of consent or that community order is preserved by an external normative scheme. The first proposition seems to lead to radical skepticism, the second to idealism. Nor can they imagine that a worldwide law might order and preserve autonomy or that sovereign consensus can support such a community order. The first assumption is associated with oppressive imperium and the latter with destabilizing relativism.

The open spaces in Vitoria's thought that demand analysis and explanation are quite different. His project aims at elaborating a doctrinal structure of power relations consistent with his faith. What needs explaining, in his view, are the detailed entailments of scripture and right reason for princely activity. Although his schemes of just and unjust wars and of legitimate and illegitimate titles present the modern historian with a clash of community order and sovereign autonomy, Vitoria does not think of it this way.

Positivists who examine the content of Vitoria's two major works want to demonstrate that Vitoria's doctrine relies on a moral vision.[69] They want to equate him with modern naturalists, hoping to prove that he is consequently unable to recognize the independence and equality of sovereigns. Such scholars want to render Vitoria's theory

69. *See* A. NUSSBAUM, *supra* note 1, at 79–84; W SCHIFFER, *supra* note 1, at 30–31; von Elbe, *supra* note 3, at 674.

incompatible with modern doctrine. Therefore, they demonstrate the unequal treatment which Vitoria accords Indians and European powers under the guise of a single equal moral order. Positivists concentrate on the work about war, because the idea of "justice" rather than princely perogative for war seems to them to be incompatible with independent sovereign authorities, especially in light of Vitoria's monist approach to municipal and international law. While acknowledging that Vitoria moves away from this position in his treatment of the Indians, the positivists view this as an inconsistency significant as a precursor of later "positivism" which fully develops what in Vitoria is dormant: a vision of international law compatible with independent states and the absence of universalist references.

Modern naturalists, on the other hand, seek support in Vitoria's work for their particular solution to the potential clash of sovereign authorities.[70] Broadly speaking, naturalists avoid the clash of sovereign wills by referring to a higher normative order which may then be the basis for interpretation of sovereign consent or for the division of domestic authority from international cooperation. They emphasize Vitoria's work on Indians and focus on his at least tacit recognition of their independent status within a higher order of universal law, as if to show that doctrines of some sovereign independence can be compatible with a theoretical emphasis on a higher order.

James Scott, a naturalist historian, concludes:

> It is not improper to observe that the world of our day seems not yet to have grasped the full significance and meaning of the Spanish Dominican's doctrine. Modern nations, to be sure, have long been accustomed to act as judges in controversies affecting them; but too often they have insisted, and still insist, on this as their peculiar and exclusive right, stubbornly maintaining that in all disputes which concern their interests they themselves, even if their cause be the most dubious, are the sole judges competent to enter judgment. Victoria's [sic] view was that each and every ruler had the power of a judge only if his cause were just, and that his support of an unjust cause stripped him at once, so far as international law was concerned, of any power to pass on the right or wrong of the controversy. The simple truth is that the Vitorian conception is entirely incompatible with the doctrine of sovereignty, by which, in its baldest form, each so-called sovereign nation claims the absolute right to do as it pleases in so far as its strength permits, without reference to the rights of any other nation or to the international community and its rules.[71]

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70. *See* J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, J.B. SCOTT, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW, *supra* note 4, and other naturalist historians cited *supra* note 4.

71. J.B. SCOTT, SPANISH ORIGIN, *supra* note 2, at 212.

Whether Vitoria experienced this doctrinal contradiction is at least doubtful. It is only apparent in doctrinal writings after 1800.

The text supports both the positivist and modern naturalist readings, but neither appreciates Vitoria's true significance, for they focus on the relationship between the doctrinal content of what he says, their own systems of thought, and those they imputed to Vitoria. The point is that Vitoria presents a complete story about international law. But it is a completely different story.

Given the discontinuity between the language of primitive and later scholars, it is difficult to evaluate the "significance" of primitive works. Later historians want to show how the primitives foreshadow their responses to contemporary problems. This leads them to the conclusion that the primitives are incomplete in their perception and imbues their historiography with a sense of progress. If we focus on the connection between law and behavior, attempting to ascertain which comes first, we might generate a variety of evaluations of Vitoria's work. For example, we might feel that Vitoria's work is far-reaching to notice what it does or medieval not to notice more. Which we select may in part depend on whether we think the social order is fixed or changing. If we think that the social order has always been basically as it now is, but that our understanding has improved, we might be less charitable to a primitive who sees only as far as his dogma permits. If we imagine the social order to have evolved to be as we now see it, his foresight may seem more remarkable. These connections, of course, may be reversed. Their reversal will depend in part on our vision of the relationship between scholarship and life. If scholarship follows life, we will triumph his insight or scorn his blindness. If scholarship is creative of life, he will seem to have "founded" the modern legal order or to have failed to do so. All of these strands of analysis of the value of Vitoria's scholarship, like the doctrinal analysis of naturalists and positivists, are rooted in modern conceptions of the scholastic project. They have nothing to do with the project or text of the primitives themselves, who simply had very different concerns.

Vitoria's scholarship is significant because it illustrates the manner in which primitive scholars are able to analyze problems of order among independent sovereigns. It illustrates that the primitive does not so much resolve as avoid these basic dilemmas. The advantage of distance permits us to recognize his text, with what to our view appears a peculiar arrangement of theory and doctrine, as a technique for avoiding conceptual conflicts. The interesting thing about Vitoria is not the particular mediation mechanism with which he turns our attention from a conflict between two authorities. It is that this conflict structures his entire discussion. The story of the development and

collapse of the primitive mode of discourse is, as we will see, a story of the exposure of these mechanisms of denial. That story simultaneously reveals some aspects of the structure of traditional and modern modes of international legal discourse.

III. FRANCISCO SUÁREZ

A. Introduction

A Spanish Jesuit born two years after Vitoria's death, Suárez published three major works concerning aspects of international law.[72] His texts are written in the primitive style of Vitoria.[73] Although he considers issues raised by the coexistence of separate sovereign authorities, he does not share the later perception that conflicts among independent sovereigns may threaten the international legal order. Like Vitoria, Suárez is blinded to this potential conflict by two aspects of his work: an assumption about the legal force of a world-wide moral order and a definition of sovereign authority which makes conflict with the single universal normative order unimaginable. These two primitive techniques for avoiding confrontation with conflict among sovereigns about the social order or between the principles of sovereign authority and international community are visible in Suárez' tone, methodology and doctrinal analysis. As is true of Vitoria's work, the first technique is more apparent in Suárez' methodology and theoretical work, the second in his doctrinal analysis. Because Suárez devotes a far larger portion of his text to theoretical discussions than does Vitoria, it is easier to discern the first technique than the second.

B. Suárez on Theory

1. The Blend of Morality and Law; the *jus gentium*

The tone of Suárez' text is relentlessly self-confident and methodologically unself-conscious.[74] He uses Scriptural, scholastic and ancient authorities exactly as does Vitoria, unproblematically connecting frag-

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72. *See supra* note 5.

73. *Id.* There is a little disagreement amoung historians that Suárez belongs to a "medieval" school of international law, although for different reasons. *See* Rolland, *supra* note 5 (classifying Suárez with the "theological international law school," and excusing his legal "mistakes" because "Suárez is only a theologian"); Trelles, *supra* note 5 (focusing on the theological nature of Suárez' project). Some go farther in rehabilitating Suárez as an early "modern." *See* Scott, *supra* note 3, at 407 (characterising Suárez as the "philosopher" of the Spanish school but nevertheless as a "founder of the modern law of nations"); *cf.* A. NUSSBAUM, *supra* note 1, at 84–91 (criticizing use of Suárez as a founder of modern international law by modern naturalists).

74. *See* Rolland, *supra* note 5, (connecting his use of scriptural quotations and scholastic method to his theological self-image).

mented quotations to his theoretical and doctrinal conclusions. He never discusses his methodology in selecting and evaluating authoritative passages. His text neither recognizes that these individual authorities might be systematically related nor includes a hint that this fragmented system might not be everywhere binding.

Like Vitoria, Suárez does not distinguish the binding power of the moral or divine and the legal order.[75] This is evident from his own conception of his intellectual project as a theologian and from his organizational scheme. His project is to elaborate the nature of law and to develop what we might think of as a typology of law.[76] He does not imagine himself drafting a system of law that could provide order among autonomous sovereigns, but rather describes the forms of law which are consistent with the divine order of his faith. When he does describe his own role, in the opening paragraphs of *De Legibus*, he speaks as a theologian who finds that "it need not surprise anyone that it should occur to a professional theologian to take up a discussion of laws."[77] Law is an appropriate topic for treatment by a theologian, in his view, because it "flows" from God, even when "ordained by man, acting as God's minister and vicar."[78] Moreover, Suárez explicitly rejects the notion that there might be a "domain of human laws" immune to treatment by the theologian, for all law is derived from God. Not only is h nan law within the scope of divine law, but it is also the inferior of the two. Therefore, we need not fear that an expert in human law could presume to discourse on divine law simply because Suárez, the theologian, claims the prerogative to do the reverse.[79]

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75. *See* Scott, *supra* note 3 (supporting this approach), and other naturalists cite *supra* note 3.

76. *See* Rolland, *supra* note 5; Trelles, *supra* note 5 (elaborating the philosophical premises of Suárez and other sixteenth century theologians).

77. F. Suárez, *De Legibus ac Deo Legislatore* (*On Laws and God the Lawgiver*) (Coimbra 1612), *reprinted in* SELECTIONS, *supra* note 5, at 13 [hereinafter cited as F. Suárez, *De Legibus*].

78. *Id.* at 14.

79. His initial discussion of this theological perspective is as follows:

> It need not surprise anyone that it should occur to a professional theologian to take up the discussion of laws. For the eminence of theology, derived as it is from its most eminent subject-matter, precludes all reason for wonder. Surely, if the question is rightly examined, it will be evident that a treatise on laws is so included within the range of theology, that the theologian cannot exhaust his subject unless he tarries for a time in the study of laws . . . .
>
> All this is very well (someone may argue), if the theologian, keeping within the bounds of divine laws, does not invade the domain of human laws, which both the moral philosophers, and the professors of canon and civil law, may very justly claim as their own province. For if the theologian treats of laws only in so far as they are derived from God as Lawgiver, then surely he will be discharging an alien function, if he turns aside to discuss other legislators. Moreover, since theology is a supernatural science, it should be forbidden to descend to those matters which have their source in nature and in no way rise above her. If this be not true, then the natural philosopher may also study divine laws, in

As a theologian, Suárez seeks to elaborate a legal system which is simultaneously a system of morals and faith.[80] Consequently, he organizes his work around questions raised by his faith. Although this sometimes leads him to discuss issues which would now seem part of international law, one must pull bits and pieces from various sections in order to produce a treatise about international law from his work. For example, his elaboration of the requirements of the virtue of faith concerns proselytizing by force and persuasion. In discussing the limits of force in conversion, he treats topics which we would recognize as rules about the limits of extraterritorial jurisdiction. Likewise,the laws of war are included in a discussion of charity, in which he refutes the argument that war among Christian princes or against heathens contravenes the virtue of charity. In these discussions of what we now recognize as topics of international law he does not discuss the requirements of law so as to suggest that they might be considered outside the fabric of the divine order. He never, for example, suggests that some particular rule of human law is binding for a reason other than conscience or divine authority.

Like Vitoria, Suárez makes a number of distinctions which, at first glance, resemble the traditional separation of *jus gentium* and *jus naturale* or divine law. However, his categorical scheme does not distinguish *jus naturale* and *jus gentium* as mutually exclusive forms of law, each with its own normative foundation.[81] Suárez divides law into divine and natural law, and the *jus gentium* and civil law. The *jus gentium* and civil law differ from divine and natural law in that they are "human" laws. This distinction between the divine natural law, on the one hand, and human law—or more specifically, the *jus gen-*

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addition to natural laws and the professors ollioman, or even of Pontifical law, may usurp for themselves the lessons of the divine laws a supposition which is clearly opposed to an harmonious division of the sciences.

These considerations, however, are not of great moment and may be disposed of almost by a single word, if one reflects that, even as all paternity comes from God, so, too, does [the power of] every legislator, and that the authority of all laws must ultimately be ascribed to Him. For truly, if a law be divine, it flows directly from Him if, on the other hand, it be human, that law is surely ordained by man, acting as God's minister and vicar, in accordance with the testimony of the Apostle in his *Epistle to the Romans* [ch. 13]. Hence, it is not without cause that, from this standpoint, at least, a discussion of all laws should fall within the scope of the faculty of theology.

Id. at 13–14.

80. *See supra* note 78.

81. *See generally* A. NUSSBAUM, *supra* note 1 (viewing Suárez' *jus gentium* as supplemental to natural law); Rolland, *supra* note 5 (emphasizing Suárez' vision of *jus gentium* lying between and yet distinct from natural and civil law); Trelles, *supra* note 5 (containing a good exposition of Suárez' system of *jus gentium*, defined by its contingency and mutability, and concluding, about the relationship between *jus gentium* and natural law, that "when Suárez wants to give a positive character to the *jus gentium*, thus moving away from *jus naturale*, he often finds himself obliged to involve the latter as justification of his thesis").

tium—on the other, seems like the traditional separation of morality and law. But it is not.

To Suárez, the development of a typology of law which accounts for all legal forms requires an explanation of the difference between human and divine law. Because all law is binding in the same way (as a matter of conscience enforced by God acting through the state or the church), this difference does not stem from the source of the law's binding force, but rather from the author of the law and its concreteness.

The *jus gentium* is defined by its difference from *jus naturale* on one hand and from civil law on the other. In enumerating the similarities between natural law and the *jus gentium*,[82] Suárez rejects the notion that the *jus gentium* is not binding in the same way as natural law.[83] If the binding force of the *jus gentium* were not that of the natural law, it would not, to Suárez, be "in the form of a true law [lex]" which is binding as "a rule of reason, either preceptive in the strict sense of the term, or indicating approbation of certain things as righteous."[84] In subsequently discussing the distinction between *jus gentium* and *jus naturale*, he concentrates on three differences. First, natural law comes from God and the *jus gentium* from man. This distinction has nothing to do with the source of their respective normative force, however. Both preclude what is "evil."[85]

Secondly, they differ in their subject matter. The natural law springs from immutable necessity and covers those aspects of life which are so governed. The *jus gentium* covers things which are not so rigidly controlled by human nature and reason, but over which man has some discretion.[86]

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82. F. Suárez, *De Legibus*, *supra* note 77, at 334–41.

83. *Id.*

84. *Id.* at 335.

85. Suárez' discussion of this difference reads as follows:

> On the other hand, the *ius gentium* differs from the natural law, primarily and chiefly, because it does not, in so far as it contains affirmative precepts, derive the necessity for these precepts solely from the nature of the case, by means of a manifest inference drawn from natural principles for everything of this character is [strictly] natural, as we have already demonstrated, [and therefore pertains to natural law]. Hence, such necessity [as may characterize the precepts of the *ius gentium*] must be derived from some other source. Similarly, the negative precepts of the *ius gentium* forbid nothing on the ground that the thing forbidden is evil in itself for such prohibitions are [properly within the province of] the natural law. From the standpoint of human reason, then, the *ius gentium* is not so much indicative of what is [inherently] evil, as it is constitutive of evil. Thus it does not forbid evil acts on the ground that they are evil, but renders [certain] acts evil by prohibiting them.
>
> These differences are, indeed, real and (as it were) essential differences in law and therefore, from this standpoint, a distinction exists between natural law and the *ius gentium*.

Id. at 342.

86. Suárez' text reads:

> Secondly, and consequently, the two systems under discussion differ in that the *ius*

Lastly, they differ in their format or concreteness. The natural law is known through examination of the dictates of reason and the divine order. *Jus gentium* is known primarily through the customs of peoples. Suárez defines the *jus gentium* not only by its distance from natural law, but also by its difference from civil law. It is in making this distinction from civil law, which is treated analogously to the distinction between *jus gentium* and *jus naturale*, that Suárez discusses the relative concreteness of these various legal types.

> The precepts of the *ius gentium* differ from those of the civil law in that they are not established in written form; they are established through the customs not of one or two states or provinces, but of all or nearly all nations. For human law is twofold, that is to say, written and unwritten . . . . It is manifest, moreover, that the *ius gentium* is unwritten, and that it consequently differs in this respect from all written civil law, even from that imperial law which is applicable to all. Furthermore, unwritten law is made up of customs, and if it has been introduced by the custom of one particular nation and is binding upon the conduct of that nation only, it is also called civil if, on the other hand, it has been introduced by the customs of all nations and thus is binding upon all, we believe it to be the *ius gentium* properly so called. The latter system, then, differs from the natural law because it is based upon custom rather than upon nature and it is to be distinguished likewise from civil law, in its origin, basis, and universal application, in the manner explained above.[87]

As in Vitoria's text, Suárez' failure to distinguish moral and legal obligation supports his assumption that sovereigns, whatever their disagreements, are subject to one world-wide combined moral and legal order.[88] The law which sovereigns make, the *jus gentium* or the civil law, is not normative because it is enacted by their authority. If sovereigns had such normative authority, as later scholars imagined, they might disagree about fundamentals in a way which could threaten the world theological order. In the world of Suárez, although we may

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gentium cannot be immutable to the same degree as the natural law. For immutability springs from necessity and therefore, that which is not equally necessary cannot be equally immutable.

Id.

87. *Id.* at 345.

88. Some historians have understood this set of assumptions to resemble a more traditionalist, theoretically self-conscious picture of an international community. Some have gone so far as to suggest that it foreshadowed the League of Nations as an institutional as well as conceptual community from which international law could be deduced. *See, e.g.*, Scott, *supra* note 3, at 458; *cf.* Rolland, *supra* note 5 (more prudently likening Suárez' vision of "international society" to the universal spiritual society of the Catholic Church).

come to know laws in different ways, their *legal* or normative essence is derived from God.

This fusion of moral and legal authority also supported the second technique common to Vitoria and Suárez for avoiding what later came to seem the potential for system-threatening sovereign conflict. Sovereign authoritative acts are derived from the moral order.[89] Because the laws which a sovereign could promulgate are binding not by virtue of his authority, but because what they preclude is "evil," it is easier to imagine that the sovereign can not act authoritatively in any way contrary to the moral order. Although he may create new "evils," in areas not covered by "necessity," he is *by definition* unable to promulgate laws which will be binding that preclude the "good" or require the "evil."

2. The Blend of Municipal and International Law

As is typical of primitive scholarship, Suárez' text does not distinguish municipal and international law.[90] This fusion of international and municipal law supports his assumption that sovereign autonomy can not threaten the moral/legal world order, for it avoids placing the sovereign at the center of two spheres of law, free in intersovereign relations to disagree without upsetting the municipal natural law order.

Suárez discusses the differences among national forms of the *jus gentium* in a way which appears to suggest a traditional distinction between national and international law. This, however, is not the case. In his discussion of the difference between *jus gentium* and civil law, Suárez suggests that he does not find the distinctions between the law common to all nations and the law of one nation crucial. He considers and rejects as not "essential" the view that civil law differs from *jus gentium* in the specificity of its natural application.[91]

89. *See* Rolland, *supra* note 5 (considering Suárez' conception of sovereignty and attributing to it Suárez' "inability" to develop an international tribunal); Trelles, *supra* note 5, at 478–483 (underlining the contradiction between the notions of "international community" and "sovereignty" in Suárez' text, particularly in his discussions of just war concluding that:

> Le critérium de Suárez paraît incompatible avec sa propre conception d'une superstructure internationale, plus ou moins imparfaite. Voici pourquoi nous nous posons cette question sans arriver à lui donner une réponse satisfaisante: étant donné que la souveraineté est absolue, comment expliquer l'existence d'une communauté internationale de nature organique et institutionnelle?

Id. at 483.

90. *See* Rolland, *supra* note 5.

91. Specifically, he said:

> You may say that the *ius gentium* and civil law differ in that the latter is the law of one state or kingdom, while the former is common to all peoples. One objection to this reply is that the difference pointed out is merely a difference between the greater and the less, and far from essential.

F. Suárez, *De Legibus*, *supra* note 77, at 345.

Although he recognizes that the *jus gentium* might also differ in its various national applications, the fact that the *jus gentium* consists of both common and divergent strands seems to him inconsequential. It hardly gives rise to a distinction between municipal and international law, since some common rules might be municipal and some international customs might diverge.[92]

Suárez acknowledges that the *jus gentium* might be adaptable to various historical and geographical differences. He points out, for example, that it has, at various times, supported property in common and the rights of private ownership. Likewise, different peoples in different stages of development will partake of the *jus gentium* differently. These differences, however, do not suggest two legal systems, one common international and the other diverging municipal. If they did, the sovereign would be more easily imaginable as a source of authoritative norms, both municipally, where no one might interfere, and internationally, where failure of consent precluded a common *jus gentium*. This is not Suárez' perspective, however. He explains differences not as exercises of decentralized sovereign authority, but as the various forms a single order takes. The possibility of divergence, he explains, is due to the difference between natural law and the *jus gentium*.[93] Suárez imagines that *jus gentium* might be of two types: common laws, which are usually between nations and the divergent laws of various national jurisdictions or groups of nations. Both of these spring from the moral order. Nothing about their difference is related to the authority of sovereigns or the universality of the world order.[94] Likewise, Suárez discusses the fact that the *jus gentium* might

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92. *Id.* at 344.

93. Quoting Isidore, Suárez argues:

> Later on . . . , after giving examples of the *ius gentium*, he accordingly concludes: "Therefore, this system of law is called the *ius gentium* because almost all nations make use of it." In making this assertion Isidore by implication defines the *ius gentium*, indicating that it is a system of law common to all nations, and constituted not through natural instinct alone but through the usage of those nations. Neither should the participle "almost" be lightly passed over for it shows that there is no altogether intrinsic and natural necessity inherent in this law, and that it need not be absolutely common to all peoples, even apart from cases of ignorance or error, but that, on the contrary, it suffices if nearly all well-ordered nations shall adopt the said law. St. Thomas appears to me to be of the same opinion . . . .
>
> The validity of this view may be proved, first, by an adequate enumeration of the various parts involved for such an explanation of the *ius gentium* involves no inconsistency whatever, but is, on the contrary, manifestly credible, . . . and, furthermore, one could not distinguish the *ius gentium*, by any mode more satisfactory, from the other two extremes, [that is, from natural and civil law], a fact that is sufficiently proved by all we have said above . . . .

Id. at 346.

94. Suárez said:

> A particular matter (as I infer from Isidore and other jurists and authorities) can be subject to the *ius gentium* in either one of two ways: first, on the ground that this is the law which

differ more in its national applications than the *jus naturale* but treats this as the result of the differing subject matter of the *jus gentium* and the *jus naturale*, not their differing relationship to sovereign authority.[95]

Suárez does note that there is a tendency for the differences within the *jus gentium* more often to concern municipal matters than the relations between sovereigns. This observation, however, is not meant to distinguish the *jus gentium*, which is binding among sovereigns, from that which is binding municipally. It is merely Suárez' best explanation for the differences which exist. Issues which affect all sovereigns alike are more appropriately matters for common rules than those issues which affect only one sovereign and which may result from specific historical circumstances.

Historians, in attempting to explain the possibility of order among authoritative sovereigns, define only those things which are common as internationally normative. Other, divergent rules, are municipal. This permits sovereign authority without destroying order. In reading a distinction between the municipal and the international legal order into Suárez' text, they focus on two paragraphs in which he mentions the differences between the *jus gentium* among sovereigns (*inter se*) and municipally (*intra se*). As we have seen, to Suárez, these are explanations of differences which are completely compatible with his vision of a single order of morality and law both internally and internationally. It is only in speculating on how a *jus gentium inter se* could have developed that the much quoted sections on interdependence occur.

> The rational basis, moreover, of this phase of law consists in the fact that the human race, into howsoever many different

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all the various peoples and nations ought to observe in their relations with each other secondly, on the ground that it is a body of laws which individual states or kingdoms observe within their own borders, but which is called *ius gentium* [i.e. civil law] because the said laws are similar [in each instance] and are commonly accepted.

The first interpretation seems, in my opinion, to correspond most properly to the actual *ius gentium* (law of nations) as distinct from the civil law, in accordance with our exposition of the former.

Id. at 347.

95. Suárez' text reads:

[I]t follows from the above that even in those respects in which they seem to agree, these two systems of law are not entirely alike. For, in its universality and its general acceptance by all peoples, the natural law is common to all, and only through error can it fail of observance in any place whereas the *ius gentium* is not observed always, and by all nations, but [only] as a general rule, and by almost all, as Isidore states [ibid.]. Hence, that which is held among some peoples to be *ius gentium*, may elsewhere and without fault fail to be observed. Furthermore, although the *ius gentium* is regularly concerned with subject-matter peculiar to mankind, it may upon occasion make some disposition regarding matters that pertain to brutes also for example, in the permitting of promiscuous sexual intercourse or fornication and in connexion with the repelling of violence, in so far as such acts may in some manner be encouraged or restricted through the *ius gentium*.

Id. at 342–43.

> peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy a precept which applies to all, even to strangers of every nation.
>
> Therefore although a given sovereign state, commonwealth, or kingdom may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.
>
> Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was the more feasible because the matters comprised within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that, while this derivation [of the law of nations from the natural law] may not be self-evident-that is, not essentially and absolutely required for moral rectitude—it is nevertheless quite in accord with nature, and universally acceptable for its own sake.[96]

Modernists, however, see a potential conflict between a world order and the type of sovereign authority which they think is generated by a differentiation of international and national law. Thus, they focus on these paragraphs as signs of an awakening modern consciousness in Suárez. They suggest that, to the extent he understood this distinction, he was confused about its place in his conceptual framework. The following excerpt from James Brown Scott's introduction to the standard English translation of Suárez' major works illustrates this modernist error:

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96. *Id.* at 348–49.

> Viewing human society with a clear and dispassionate eye, he saw that it was made up of many political communities, each independent of the other. Yet in all this political diversity he also perceived a certain unity. It was not organic or artificial, not imposed by force of arms, but natural in the sense that it was a unity growing out of human nature itself. This perception lies at the core of his philosophy of international law and of the international community, a philosophy summed up in classic terms in the second book of his *De Legibus* . . . . [T]he unity he had in mind was not merely that of "a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy . . . ."
>
> But could such a conception of unity be harmonized with the facts of political sovereignty and nationalism? In the opinion of Suárez it could be, for he immediately points out that although each state may be "a perfect community in itself," and therefore "sovereign" and independent, it is in another sense, when "viewed in relation to the human race, a member of that universal society"—which in modern terminology is known as the international community. For all their sovereignty and independence, "these states when standing alone," he maintains, "are never so self-sufficient that they do not require some mutual assistance, association, and intercourse." This feeling of interdependence may in part result from the material "welfare and advantage" produced by international co-operation, but it is likewise due to a recognition of "some moral necessity or need."[97]

This reading misses the point. Suárez' assumptions about the holistic nature of the legal order and the derivative nature of sovereign authority permitted him to elaborate the distinction between *jus gentium inter se* and *intra se* with no sense of confusion or contradiction. He was merely explaining variations of content within a uniformly normative order.

Suárez' failure to distinguish international and municipal law both permits and is reinforced by the two techniques he uses to avoid the potential clash between sovereign authorities and his theological notion of a single world-wide moral and legal order. Because the sovereign is not centrally placed between the international and municipal realms, Suárez does not imagine that the sovereign's authority to promulgate differing laws can conflict with the universal order because sovereign authority remains derivative of the universal order. Suárez' lack of differentiation between municipal and international law both reinforces his assumption about the holistic nature of the *jus gentium* and under-

97. Scott, *Introduction*, SELECTIONS, *supra* note 5, at 36a–37a.

scores his sense that sovereign authority can be defined so as to avoid any conflict with the universal order in exactly the same fashion.

C. Suárez on Doctrine

1. Custom

Suárez expresses his participation in the primitive lexicon in his doctrinal analysis as well as in his theoretical typology. An assumption about a single universal legal and moral order is evident in his lengthy treatment of customary law.[98] To Suárez, the *jus gentium* is composed of customary law and, to a lesser extent, of treaties. Although traditional scholars also devote a great deal of attention to the law of treaty and custom, they do so differently.

To the traditional scholar, international (as opposed to national) law (as opposed to morality) is authoritative because it expresses either sovereign consent (positivism) or principles of justice either necessary to or inherent in an inter-sovereign social order (naturalism). Treaties and custom are the principle forms in which consent and principles of justice manifest themselves. It is therefore crucial to understand when custom or treaty express consent or justice and when they do not, for this is the boundary of binding law. Much traditional doctrinal analysis about treaty and custom considers the extent to which each can be understood to reflect either consent or justice. Thus, for example, traditionalists treat treaties entered into under duress, or concluded absent the "full powers" of plenipotentiaries as of questionable authority to bind their sovereign because they worry that such treaties do not actually express consent. They also consider the conditions under which custom reflects consensus and worry about the effect of customary law on states not involved in the creation of customary rule. Likewise, traditional scholars develop doctrines to address situations in which treaties deviate from principles of natural justice (*rebus sic stantibus*) or in which custom is more likely than treaty law to reflect such principles (*jus cogens*). Their concentration on custom and treaty as *sources* of the normative force of international law often leads them to develop a hierarchy of one sort or another among treaty and customary law. None of these issues trouble Suárez and he devotes no attention to their resolution. He is concerned about custom and treaty as types of law, not as sources of legal authority. This doctrinal focus

98. *See* Sherwood, *supra* note 5, at 26 (analyzing Suárez' notion of customary law and responding to the criticism that Suárez did not "notice" the possibility of bad or unjust customs by elaborating Suárez' technique for avoiding this contradiction by assuming, like St. Augustine, that "a bad custom is no custom").

results from his assumption that both are binding as part of a moral/legal order.

To Suárez, treaty and custom are essentially similar: one is merely more formal. Both are made binding by natural law. They provide the *content*, not the foundation, of the international legal order. When discussing the relationship between written and customary law, the text never considers their relative force. The reason for separate treatment is that the one is "more definitely fixed and its field more thoroughly explored."[99]

Like traditional scholars, Suárez considers both the force of customary law and its tangibility. Considerations of the first sort consume the attention of traditional scholars. Indeed, any discussion of customary law's tangibility is subsumed within a consideration of its force. For example, if custom is sufficiently inchoate, it may not be a useful guide to sovereign consent. To Suárez, on the other hand, considerations of tangibility are far more important, and are not in any way derived from his analysis of the force of customary law. Suárez defines customary law in two ways: first, by its distance from written law and by its divergent national and unified international forms, and second, by its distance from divine, natural and human law. The first inquiries concern the tangibility of custom and are both very important and quite intricate. The second inquiries are about the force of custom and are both unproblematic and dependent upon his investigation of tangibility.

Suárez considers the nature and effects of custom. In his initial discussion of its nature, he considers its tangibility (which in his mind distinguishes it from written law). He admits that custom is difficult to classify because it is of both natural law and the *jus gentium*. It can be defined, he says, by its relation to written law. Like written law, it may be either *jus gentium* or *jus naturale*. Its distinguishing feature is its intangible form, for it is known by factual repetition.[100] Suárez begins his discussion of custom, then, by focusing on it as a form of law less tangible than written law.[101]

This intangible aspect of customary law determines the subjects which it covers. There is no category of things which must be addressed by custom. Some specific forms of customary behavior which create rights relating to persons or things through prescription are too narrow to account for custom as a whole. These rules, moreover, might be written down. Since the essence of custom is its unwritten character, not its special relationship to sovereign authority or binding force, Suárez cannot catalog the things which might be subject to it.

99. F. Suárez, *De Legibus*, *supra* note 77, at 441.
100. *Id.* at 445.
101. *Id.* at 441–50.

The force of custom results from its partaking of the *jus naturale* and *jus gentium*. Custom is a category, not a source of natural and human law. This relationship is explicated in the following passage, where Suárez considers the relationships among divine, natural, human and customary law:

> A third principal division of custom is made under the following heads: that which is according to law that which is outside the law that which is contrary to law. [Citations omitted] This triple comparison may be made in respect of the natural law, of positive divine law, and of human law: thus, in respect of these three kinds of law, there arises a threefold division, each consisting of three members. Of each of these, we shall speak briefly. We shall touch upon them all, in order that, having set aside those matters that are irrelevant to our discussion, and having briefly treated of those *points which are of less difficulty*, we may pass on to matters that are germane to the subject and present greater difficulty. (Emphasis added)[102]

The "points of less difficulty" are those relating to the source of custom's binding force, which, in turn, depend on custom's relationship to *naturale* and divine law. The tougher issues which needed explaining and are "germane to the subject" reintroduce what to Suárez is the main distinguishing feature of custom: its tangibility as revealed in its relationship to "human law."

Suárez starts by precluding any role for custom which is not of natural law. He argues that custom cannot be law and be outside *jus naturale*.[103] It also cannot be opposed to natural law.[104] Moreover, custom is uninteresting if it is in accord with natural law.[105]

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102. *Id.* at 463.

103. Suárez said:

> With respect, then, to the natural law, it would seem that no moral act can be outside it, at least, in the concrete for every concrete moral act is—according to the more probable opinion—either good or bad. Such an act must, then, be either in conformity or at variance with the natural law since the natural law is a rule for all human acts. But custom is constituted by concrete human acts. Therefore, every such act must be either in conformity or at variance with the natural law. No custom, then, can be outside that law.

Id. at 464.

104. Suárez said:

> A custom contrary to the law of nature is not worthy of the name of custom it rather merits that given it in the language of the laws—a corruption. It can, therefore, have no effect as law, either by abrogating or introducing law.

Id.

105. Suárez said:

> The first sort of custom, then, namely, that according to the natural law, although it may, as is obvious, be excellent, has not that moral effect which is the subject of our present treatment. For it does not introduce new positive law in respect of the same acts, since those acts are done not with such intention or will [of introducing custom] but rather with the intention of fulfilling the natural law . . . .

Id.

This analysis leaves no room for a separate customary law. Custom is useful for strengthening the natural law when in accord with it or for setting it out when it permits or proscribes some act generally, but not specifically.[106]

The hierarchical superiority of natural law to custom is clear in Suárez' subsequent elaboration of the relationship between *jus gentium* and custom. If the *jus gentium* is natural law, as others argued, Suárez admits that custom obviously could not overrule it. If, however, the *jus gentium* is only partly natural law, as he argues, custom might overrule it or derogate from it, just as a single prince might suspend a part of the *jus gentium* in his territory which arose not from necessity or human reason but from convenience. Finally, Suárez considers divine law and repeats his argument that custom may not derogate from it, but might interpret it and might render it tangible.

These discussions of the relationship between custom, on the one hand, and *jus naturale*, *jus gentium* and divine law, on the other, concern the force of custom and treat it as dependent upon its grounding in these other world-wide types of law. His discussion of the relationship between human law and custom is quite different. Although the format is similar, he does not develop any hierarchy among custom and human law, except as exists between custom as *jus naturale* and as human law. Moreover, human law might manifest itself as either customary or written law. His discussion of the relationship between custom and human law turns entirely on the tangibility of the law. It is a hierarchical issue of force only to the extent that it concerns the relationship between natural and human law.

Custom can be in harmony with human law—extending or interpreting it. It might also be outside of and contrary to human law.[107] The cases of noncompatibility between customary and human law only

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106. Suárez said:

> Custom will be outside the natural law when it consists of actions that are, according to a probable opinion, indifferent in the concrete or of good actions, which, although they are approved by the natural law or enjoined by it as to mode or precise character—that is, if they are done, they should be done in this or that way—are not absolutely enjoined as to performance: they are performed without the command of the natural law . . . .
>
> Such custom is, of course, useful for adding strength (so to speak) as far as we are concerned, to the natural law, by keeping fresh its memory, and by facilitating its observance on the part of the whole community. Such a custom may at times—if it be approved by prudent, wise, and virtuous men—serve to interpret the law of nature.

Id.

107. Suárez said:

> It remains for us to apply . . . [custom] to human law, for it is with that law we have chiefly to deal, and because in such law it happens more commonly that a custom may be in harmony with, outside of, or contrary to law. Indeed, there is no dispute concerning these two latter groups nor need we add any special remarks about them here, since the main discussion regarding them will be found in the following chapter.

Id. at 471–72.

suggest the superiority of custom because, as subsequent discussion shows, they are really cases raising the distinction between *jus naturale* and human law, not custom and human law. The cases of compatibility, on the other hand, return us to the distinction between tangible and intangible human law. Custom is binding like other law, as an expression of the natural or divine order. Consequently, a "bad" custom, despite its apparent basis in the "authority of the whole world" establishes no law, and is only a factual custom.[108]

This doctrinal treatment of customary law illustrates Suárez' assumption that a uniform world wide legal order is hierarchically superior to human laws as well as a conception of sovereign power which renders illegitimate exercises of sovereign will which could derogate from the moral and legal order. Suárez defines the sovereign so that his consent creates customary law but is not the source of the binding force of that law. Custom is a category of human and divine law which is distinctive in the form it takes, not in its force.

2. Just War and Territorial Jurisdiction

This tendency to define sovereign power in terms of the moral order and thereby limit its ability to threaten that order is illustrated by two other doctrinal discussions within Suárez' text: his consideration of just war and of territorial jurisdiction. In these two areas, the concepts of "justness" and "jurisdiction" operate to limit the sovereign authority to prevent clashes with the moral order or with other sovereigns.

Suárez treats just war as Vitoria does.[109] In a world-wide moral order, it seems "entirely absurd" that a war can be just on both sides.

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108. *Id.* at 484; *see also* Sherwood, *supra* note 5, at 26 (discussing Suárez on bad custom).

109. For considerations of Suárez' just war doctrine, see Nussbaum, *supra* note 14; Rolland, *supra* note 5, at 105–117 (explaining that Suárez "does not seem to imagine that the outcome of the war could be favorable to the wrong party" without analyzing the mechanisms which prevented this imagination, and concluding that the whole foundation of Suárez' theory on the law of war is not very solid). For an excellent study of the precursors of primitive just war theory see F. RUSSELL, THE JUST WAR IN THE MIDDLE AGES (1975), which points to the early conflicting tendencies of sovereign authority and international community. Russell imagined this conflict to have been resolved once canon law was overthrown and views this as the only basis for just war doctrine. He concludes that

> the theology of the just war [was] deficient until the theologians were emancipated from their dependence on canon law by the reception of Aristotle, whose definition of the just war as a means of promoting the common good of a society arrived at just the right moment to be applied to contemporary societies. The canonists' dependence on Roman law led them to concentrate on the criterion of authority for a just war, while the theological debate attached more importance to the abstract justice of war. Thus while canonistic analyses of the just war and the crusade became more specific the theology of the just war by contrast became increasingly abstract.

Id. at 293.

Only just war is permissible, for unjustified force contravenes charity. He states:

> war is not opposed to the love of one's enemies for whoever wages war honourably hates, not individuals, but the actions which he justly punishes. And the same reasoning is true of the forgiveness of injuries, . . . for punishment may sometimes be exacted, by legitimate means, without injustice.[110]

The system of rights and wrongs which distinguishes just from unjust wars is world wide and binding as a matter of morality and law.[111] It is not theoretically possible that two incompatible causes would be just in such a system.

Moreover, such a system requires a clear mechanism for identifying the just cause. To Suárez, the power rests with the victorious prince who exercises "punitive justice."[112] While it does not occur to Suárez that the unjust party might win,[113] this is not the result of insufficient imagination. It is the logical extension of his notion that an unjust act delegitimizes a sovereign. All unjust acts are outside of his authority and unseat him, leaving the other party sovereign. In this way, sovereign clashes cannot and do not occur. The illegitimate prince may fight on, but his authority is extinguished when the war commences. Should the power be abused—should the wrong prince win—this will simply be another wrong waiting to be avenged, by another prince or by the people. Thus, the sovereign's legitimate desires and his jurisdiction are parallel. War for private gain is, for Suárez as for Vitoria, unjust. Where Vitoria imagines that cases of doubt about the just cause might lead to ignorant mistakes, Suárez suggests that cases of doubt be resolved in favor of the side most probably just.[114] This probabalistic approach underscores the notion that justice was either present or absent, without any intermediate stages. Without this exclusive quality, the concept of justice could not efficiently protect the system from inter-sovereign conflict by extinguishing one sovereignty in cases of conflict.

Suárez' discussion of territoriality suppresses what we might see as the possible clash of sovereign authorities in a similar fashion. As with just war, he limits public authority with automatically triggered

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110. F. Suárez, *De Triplici Virtute Theologica: Fide, Spe, Et Charitate* (A Work on the Three Theological Virtues Faith, Hope, and Charity) (Coimbra 1613), *reprinted in* SELECTIONS, *supra* note 5, at 802.

111. *Id.* at 815–17.

112. *Id.* at 806.

113. *See* Rolland, *supra* note 5.

114. *See* Trelles, *supra* note 5.

world-wide standards of behavior. While modern considerations of jurisdiction over foreign acts and persons seek in diverse ways to balance and choose between the legitimate interests of two sovereigns in a single incident, to Suárez, this is not the problem. In discussing jurisdiction over foreigners elsewhere, Suárez, like Vitoria, permits exercise of extraterritorial jurisdiction when a wrong has gone unavenged. Since the system of wrongs and rights—of justice—is synonymous with the private will and legitimate public character of sovereignty, one prince's jurisdiction only arises when that of another has lapsed. Consequently, there can be no conflict between jurisdictions which are in need of balancing. What does need explaining, as in the case of war, are the wrongs which can be avenged and the consulting procedure by which a prince can be sure that his cause is just and his exercise of public jurisdiction as avenger possible.

D. Conclusion

As was true of Vitoria, two related aspects of Suárez' conceptual and doctrinal work leave his text devoid of the potential conflict between his notion of a worldwide normative order and his treatment of issues involving sovereign authority and conflict. The first, his assumption about the holistic normative order, is demonstrated by his self image and methodology as well as by his conceptual failure to distinguish law and morality or *jus naturale* and *jus gentium* as later authors do. The second, a definition of sovereignty which limits as it enables, is visible in his conceptual fusion of international and municipal law and in his doctrinal analyses of custom, just war and territoriality. These aspects of Suárez' texts mark him as a primitive scholar.[115]

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115. Some modern historians read their own justification agenda into these primitive texts. This allows them to find foreshadowing of everything from the British Commonwealth to the League Mandate system. Scott's introduction to Suárez' work is illustrative:

> In 1528, more than eighty years before Suárez wrote his famous passage on the international community and its law, Victoria set forth a somewhat different conception in a briefer but equally memorable passage:
>
> > International law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.
>
> This statement looks to an organized community with legislative powers supported, in the words of Victoria, "by the authority of the whole world." It is, in other words, an international community possessing the power to "create" its own laws, and these laws are

Among the primitives considered here, his text is most similar to that of Vitoria. The most fundamental similarity between Suárez and Vitoria is the common relationship between the two techniques of conflict avoidance. For both scholars, the second is dependent upon the first. Sovereign authority is limited by the worldwide normative order so as not to come into conflict with it. The first only avoids conflict among authoritative sovereigns as it is enshrined in the second. Although the idea about the natural limits of sovereign capacity is derived from and dependent upon his idea of a single normative order, it also carries out and supports that order by conceptually preventing conflicts which might threaten it and challenges to it by autonomous sovereigns. It is this relationship between these two mechanisms of conflict avoidance which is reversed in the work of later primitives.

IV. ALBERICO GENTILI

A. Introduction

Francisco Suárez and Francisco Vitoria, Spanish Catholic scholars of the sixteenth and early seventeenth centuries; had Protestant equivalents in Alberico Gentili (1552–1608),[116] an Italian professor at Oxford, and Hugo Grotius (1583–1645),[117] a Dutch Calvinist scholar and statesman. All are primitive scholars whose approach to and treatment of international law issues differ radically from the works of traditional and modern scholars. Gentili's texts share what I have

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binding upon each and every nation because they have the force not only of a pact or agreement but of law, and because they are backed by international authority.

There is thus an important difference between the international community of Suárez and that of Victoria. The former contemplated, as we have seen, an inorganic community of states existing because of the mere coexistence of states which needed "mutual assistance, association, and intercourse." This was not a closely organized community with the power to legislate and to enforce the laws which it had created. It was a community of states whose international relations were to be governed by laws gradually evolved, in Suárez' own words, "by the habitual conduct of nations."

May it not be said that fundamentally these two great conceptions of Victoria and Suárez are the modern conceptions of the international community? Some twenty years ago many statesmen of the world were busy with plans for an organized community, for which they optimistically created the complex machinery at Geneva. At The Hague in 1899 and 1907 and in the Americas during the past half century the other conception, that of an inorganic community gradually evolving out of the coexistence and increasing interdependence of states, has found expression in a simpler and apparently more adequate international machinery. Which of these two conceptions will prevail? It may be that the choice of the future will be a combination of the best features of each.

Scott, *supra* note 97, at 37a–38a.

116. Major works: *Hispanicae Advocationis*, *supra* note 6; *De Legationibus*, *supra* note 6; A. Gentili, *De Jure Belli*, *supra* note 2. For major secondary sources on Gentili *see supra* note 6.

117. *See infra* text accompanying notes 153–195.

described as a "holistic" approach with those of other primitives.[118] While in style, methodology, theory and doctrine clearly a primitive legal scholar, Gentili, like Grotius, departed from the analysis of Vitoria and Suárez. In many ways Gentili reversed the relationship between the sovereign state and the worldwide normative order which characterized the work of the Spanish scholastics. Although his text avoids in the same ways awareness of what later came to seem the conflict among autonomous sovereigns or between sovereign authority and a world order, the hierarchical relationship among these textual strategies is different in Gentili's work. This reversal, which changes

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118. Gentili has been considered both an early modern and a late medieval scholar by historians who focus exclusively on the content of his doctrinal analysis or his theological ties. *See* Phillipson, *supra* note 2 (demonstrating that Gentili is the "real" father of "modern international law" by emphasizing his differences with the theologians Suárez and Vitoria). Interestingly, in so doing, Phillipson undermines Gentili's modernity by emphasizing his reliance on ancient authorities, "confusion" of civil law and the *jus gentium*, etc. Although his concluding paragraphs provide a good summary of the primitive mode of discourse, they do not distinguish Gentili's work from the same paradigm. Such distinctions as are emphasized confuse *theological* methodology with primitiveness of which it is only one manifestation.

> Notwithstanding various shortcomings, inevitable indeed, at the time he wrote, the entire work of Gentili is manifestly superior to all previous or contemporary productions, such as, for example, those of Ayala, Victoria, Soto, Belli, or Suárez. To a greater or lesser extent these either confused civil law with rules regulating international relations or failed to grasp the difference in inherent character and practical applicability between philosophical principles, theological dogmas, and juridical rules; or, again, they confounded the regulations of interstate war with the municipal or local prescriptions of military discipline, or identified the "*societas gentium*" with an exclusive Christian commonwealth. The theological basis of the subject, which was generally affirmed or assumed by his predecessors, was once for all undermined by Gentili, and a more acceptable foundation was substituted. The dogmatic procedure of the theologians was unreservedly impugned; they were roundly advised not to meddle with matters that did not concern them: "*silete theologi in munere alieno*". Similarly the *a priori* methods of the philosophers were rejected. The abstract principles and metaphysical assumptions associated with the investigation into the intrinsic nature of God, mankind, and the State he disregarded on the ground that such doctrine contemplated the establishment of a purely ideal system, which could not meet the demand or minister to the growth of an actual society of nations, existing here and now, and possessing an essentially organic and dynamic character.
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> . . . Gentili had already maintained to be the proper method of international law . . . , the examination of actual phenomena, of concrete facts, and then, by a process of induction, the inferring therefrom of general rules, which, however, were still subject to subsequent modification or even cancellation in the light of newly discovered facts. Thus it was already becoming clear in his work that for the understanding of any system of law in general, and more particularly in the construction or adaptation of a law of nations for the existing society of states, the all-important considerations of time, place, and circumstances must never be lost sight of, the force of treaties and usage with their express or implied consent, when manifesting acceptance of common rules, must be duly recognized.

Id. at 18a–19a. *See also* Nézard, *supra* note 2, at 37 (representing Gentili as the triumph of the "historical" rather than the "theological" school). *Cf.* G. VAN DER MOLEN, *supra* note 6, at 113 (supporting the view that Gentili writes in the primitive mode of discourse despite being the "principal predecessor of Grotius" and "the first writer, who tried to treat systematically the problem of international law"); and A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 80 (1947) (underlining the lack of "theoretical foundation" in Gentili's work).

many of the doctrinal analyses of Spanish primitivism, marked the beginning of the end of primitive scholarship.

Two of Gentili's numerous works are devoted almost exclusively to issues which now seem quintessential aspects of international law: his 1585 monograph *On Embassies* and his 1598 treatise *On The Law of War.*[119] These two works seem to define their topic in terms of issues which we see as being raised by confrontation among autonomous sovereigns.[120] We need not look, as we did in Suárez' text, for brief analyses scattered throughout a text organized as an elaboration of a single normative typology. He seems to begin by recognizing the problems raised by the existence of independent sovereigns. As a result of this organization, the potential tension between the topics he considers and his primitive approach, based on an assumption that a single normative order governs intercourse on a worldwide basis, seems even more apparent than it did in the texts of either Vitoria or Suárez.

The same two techniques which hide this clash from view in the works of the Spanish scholastics also operate in Gentili's works. His texts do not seem contradictory because he assumes the holism or universality of his somewhat more secular and historical normative order, and because he defines sovereignty in a way that prevents meaningful conflict between them. One sovereignty simply ends where another begins or where it departs from the worldwide normative order. Although these two techniques are, as we have seen, interdependent in primitive scholarship, for Gentili this second technique, demonstrated in his doctrinal analyses, is primary and supported by the first. The first, exhibited foremost in his theoretical work, is secondary, and derived from the second.

B. Gentilian Theory

1. Style and Method

At first glance, Gentili's style and tone seem to differ from that of the Spanish Catholics.[121] He tries to describe the normative aspects of two specific problems of intersovereign conflict, war and diplomatic relations. He is not a theologian elaborating his faith, but a student of diplomacy and statecraft, elaborating their terms. Thus he gives the sense that he begins with the problems of sovereign intercourse,

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119. *See De Legationibus, supra* note 6; A. Gentili, *De Jure Belli, supra* note 2.

120. *See supra* note 118, for descriptions of Gentili's systematic and untheological project.

121. *See* Phillipson, *supra* note 2, at 12a and 24a (describing Gentili's methodology and reliance on authorities similar to those used by Suárez and Vitoria); G. VAN DER MOLEN, *supra* note 6, at 114–15 (on use of Scriptural and Justinian sources for the content of *jus gentium* in Gentili's work).

elaborating their normative aspects rather than vice versa. Rather than referring to Scripture and Canon law, Gentili prefers to describe historical precedents and to cite classic jurists, Roman civil law, ancient philosophers, or, on occasion, such contemporary analysts of statecraft as Bodin or Machievelli. The rigid and mechanical logic of the scholastics has been replaced by a more discursive style.

Some traditional and modern scholars have suggested that these changes signal the arrival of a postmedieval "realistic" scholarship.[122] This misunderstands the features which unify primitive scholarship and distinguish it from its traditional successors. Although not self-consciously theological, Gentili's work shares the characteristic primitive conceptions about the relationships among norms and faith in a single normative order. Although he does not use Scriptural authority as frequently, he treats his preferred authoritative texts exactly as the Catholics treat Scripture, citing individual propositions from various sources as needed, without discussing their consistency or the self-conscious methodological system governing their selection. His self-conscious preference for the "scientific method", which he associated with his contemporary Francis Bacon, leads him to treat historical instances and contemporary conditions as the Spanish treated Scriptural or scholastic texts. He does not look to sovereign practice with the traditionalist view that authoritative sovereign practice provides the source of law's binding force. But sovereign practice is relevant to Gentili's inquiry since in it we can find the rules which are binding because of their place in the worldwide normative order.

In the introduction to his treatise *On The Law of War*, Gentili lists the various sources to which he will turn for evidence of natural law. None of these are the source of authority for the norms he finds, but rather are sources of their content. Neither does he suggest any way to predict which sources will "make their appearance" where in the text which follows. His text gives the flavor of his haphazard system of authority:

> [The *jus gentium*] will also be supported in many cases by the utterances of great authorities, which will find a place in our treatise, as they do in all the other arts and disciplines. In fact, it is the habit of philosophers and other wise men to speak according to the promptings of nature. And hence there will be found here the examples of those who are regarded as honourable and of good repute. For they too appear to have acted in accordance with nature. For although one ought not to judge from examples, and that principle is called Justinian's golden rule, yet

122. *See supra* note 120, and sources cited there.

it is clear that a plausible conjecture may be deduced from examples. Indeed, in cases of doubt one is obliged to judge from examples, and also when anything has become a custom. For it is not fitting to change things which have always had a fixed observance, and a decision has greater weight which is supported by the opinions of a large number of men.

What am I to say of the actions of great and good men? These are always to be emulated for it is foolish and treasonable not to desire to imitate those who were rated so high, again to quote Justinian. "What the world approves, I do not venture to disapprove", declares Baldus.

Arguments too and reasoning will play a part here, as we have observed them to do elsewhere. And why not? "Reason too is an imitation of nature." I shall not qive you demonstrations, such as you may get from a mathematician, but the persuasive arguments which this kind of treatise allows. For as Aristotle writes at the beginning of his Ethics, "It is the part of a philosopher to seek an exact explanation in each case, so far as the nature of the subject itself permits."

There will be not a few things from the civil law of Justinian which it will be possible to adapt to our uses, or scattered references found there to this military law of nations. And most properly, for natural reason varies constantly according to men's intelligence and many are led not so much by that reason as by fantasy. But the laws which were laid down by the philosophers and approved by the judgement of every age undoubtedly possess natural reason, as the wise Alciati declares.

The words which are written in the Sacred Books of God will properly be given special weight, since it is evident that they were uttered not merely for the Hebrews, but for all men for all nations and for all times. For that these words are of a true nature, that is to say, one which is blameless and just is most certain. "These testimonies are forthwith divine they do not need the successive steps which the rest require. They are as simple as they are true, as widespread as they are simple, as popular as they are widespread, as natural as they are popular, as divine as they are natural."

Come then, since we do not lack material for formulating definitions of this law of war, let us at once begin the discussion itself.[123]

The shift from a divine conception of the single normative order to a focus on a single natural reason revealed historically does not alter primitive methodology. In one sense, Gentili has reversed the Spanish method by commencing with problems of sovereign conflict and his-

123. A. Gentili, *De Jure Belli*, *supra* note 2, at 10–11.

torical authorities rather than problems of theology. Nevertheless, he continues to write out of an implicit sense that one holistic system governs the transactions he discusses. This system lacks conceptual unity in that it contains no sense of the relations among its parts and provides no way of discussing the hierarchy among its provisions. It does not flow from a single explicit conception of the normative order in the fashion, for example, of later traditionalist analyses which commence with an elaborately self-conscious vision of the "state of nature." And although based more in practice than the Spanish primitives, Gentili's approach also lacks a self-conscious set of methodological principles of induction in the manner of later traditional positivists. Despite his discursive style, Gentili has not replaced the ad hoc logic of the scholastics with discourse about the way propositions of authority should be connected to situations. As a result, Gentili's style and methodology participate in the primitive vocabulary despite their reversal of the relationship between faith in authority and doctrinal elaboration. Gentili's elaboration uses sovereign behavior as the guide to natural reason: he just treats it as the scholastics treated the theological premises with which they sought to shield sovereign behavior.

2. Moral/Legal Authority, Natural and International Law

Although not theologically motivated, Gentili's theoretical analysis retains the primitive fusion of moral and legal authority which characterized the work of Suárez and Vitoria.[124] Although he wants to

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124. On the fusion of moral and legal norms see Nézard, *supra* note 2,; G. VAN DER MOLEN, *supra* note 6, at 240–45 (suggesting that Gentili *tried* to distinguish law and morality but that "the accumulated material rather overpowers him, and he does not succeed in doing more than ordering it by sketching a few rough lines," *id.* at 245, thus emphasizing the confusion, rather than the denial mechanisms of Gentili's work). Gentili devotes one chapter to the question: "When There is a Conflict Between What is Honourable and What is Expedient," A. Gentili, *De Jure Belli*, *supra* note 2, at 349. This distinction, however, in his view is either the distinction between what is binding (law as honor) and what is not (personal advantage, outside the authority of sovereigns), or between two forms of moral/legal norm ("equity" as honour and "the letter of the law" as "just"). It is not the distinction between two forms of authority.

> Let us in general consider the question whether our victor ought rather to follow what is expedient or what is honourable, when honour points one way and personal advantage another. This inquiry is made with the proviso that justice be observed, which has so far been my contention . . . . But as I do not discuss expediency which is separated from honour, either because the two cannot be separated (as Socrates said and Cicero maintained), or because the interpreter of the law utterly condemns expediency under that condition; so I do not raise the question whether anything can be expedient which is not honourable, as Cicero does, answering the question in the negative, in his books *On Duties*. Periander, too, and others say the same thing, declaring that expediency never deviates from what is right.
>
> But I treat the question less subtly after the manner of the jurists and I make the distinction which Aristotle makes more than once, as does Cicero himself at times, as well as others. The Roman Pope Innocent, in his treatise *On the Vow*, proposes for consideraton

focus on the law, not on the requirements of faith, he does not distinguish two normative orders. There is only one normative order. The laws which Gentili elaborates bind as a matter of natural reason, itself the gift of God after the Fall. The fusion of law and morality prevents Gentili from imagining that the legal realm of sovereign authority could conflict with the divine or natural moral order.

Nor does Gentili distinguish natural and international law.[125] He assumes that natural law is binding everywhere and that the *jus gentium*, also a universal law, is binding because it partakes of the natural law. Although he uses divine law, natural law, *jus gentium*, and at times *jus civile* interchangeably, he focuses on elaboration of the *jus gentium* which then subsumes or correlates with these other legal forms. He does not elaborate the *jus naturale*.

> And although international law is a portion of the divine law, which God left with us after our sin, yet we behold that light amid great darkness and hence through error, bad habits, obstinacy, and other affections due to darkness we often cannot recognize it.
>
> But truth exists, even though it be hidden in a well and when it is diligently and faithfully sought, it can be brought forth and as a rule is brought forth. Abundant light is afforded us by the definitions which the authors and founders of our laws are unanimous in giving to this law of nations which we are investigating.

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the questions: what is lawful from the point of view of equity; what is fitting from that of honourable conduct; and what is expedient from the standpoint of utility. This we also desire to do, understanding with Bartolus that equity consists in a certain appropriateness of action, not in any written law or in any strictly interpreted rule, in order that the discussion may always proceed in accordance with justice.

I believe that justice should be preferred to the letter of the law, and honour to advantage. And with regard to justice this is the general view of the jurists. Innocent also places honour before advantage, and the Romans in that purer age thought better of Collatinus, who counselled what was honourable, than of Brutus, who advised what was advantageous.

A. Gentili, *De Jure Belli*, *supra* note 2, at 349.

125. On the distinction between *jus naturale* and *jus gentium* in Gentili's work, *see* A. NUSSBAUM, *supra* note 1, at 80–81 (confusing traditional concepts of international community with Gentili's primitive assumptions of a world normative order, but concluding "his idea of *jus gentium* is apparently that of a universal law" which is "the moral society . . . in the medieval sense"). *See also* G. VAN DER MOLEN, *supra* note 6, at 114–15, 200–06, 240–45 (a very cogent analysis of the conepts of *jus gentium*, *jus civile* and *jus naturale* in Gentili's text). Van der Molen concludes that Gentili's "ratio naturalis" is of divine origin. He gives numerous examples of the reliance on divine law within each legal category and analyzes his treatment of slavery at some length to demonstrate Gentili's solution to the dilemma he describes:

> This "ratio naturalis", which is God's gift of grace after the fall, and manifests itself in the voice of our conscience, according to Gentili, forms the basis of international law, but at the same time that of natural law. Cannot then the one come into conflict with the other?

Id. at 204. Nevertheless, he persists in viewing the "close relationship between the *ius naturale* and the *ius gentium*" in Gentili's works as a "confusion" manifested in his failure to clarify terminology. *Id.*

> For they say that the law of nations is that which is in use among all the nations of men, which native reason has established among all human beings, and which is equally observed by all mankind. Such a law is natural law. "The agreement of all nations about a matter must be regarded as a law of nature." This statement, however, must not be understood to mean that all nations actually came together at a given time and that thus the law of nations was established.[126]

The Spanish primitives, by contrast, elaborate divine and natural law, which they hardly distinguish. Gentili's *jus gentium* seems a particular form of a worldwide order which is either divine or natural. When natural law is the basis of the *jus gentium*, moreover, it is divinely inspired, even if humanly revealed. Although the *jus gentium* may be more specific than natural or divine law on some points, it cannot contradict natural law; and the norms which Gentili elaborates are binding in the way they manifest themselves in our conscience—as natural law.[127] This fusion of natural law and *jus gentium* operates in Gentili's text as it did in those of the Spaniards: to render impossible any tension between the provisions of the *jus gentium* (found, if not yet grounded in sovereign authority) and the single worldwide normative order.

3. International Law, Municipal Law and the *Jus Gentium*

Like other primitives, Gentili does not distinguish municipal and international law.[128] Like the Spaniards, Gentili imagines a single system of law applicable to all transactions, including those among sovereigns, which coincides with his assumption that a single normative order governs the behavior of sovereigns. He supports that assumption by making unthinkable the development of a separate internal or external sphere of law normatively grounded in sovereign authority which can conflict with the natural order. But Gentili's failure to distinguish the normative foundations of international and municipal law is more significant for its impact on the second primitive technique of conflict avoidance—the holistic conception of sovereignty.

The primitives define sovereignty so that intersovereign conflict cannot threaten the normative order.[129] To the primitives, the bound-

126. A. Gentili, *De Jure Belli*, *supra* note 2, at 7–8.

127. *See* G. VAN DER MOLEN, *supra* note 6, at 201–05.

128. *Id.* at 72–73. Van der Molen describes the relationship between the Justinian civil code as a source of international law and as a separate sphere of law and answers other scholars who maintain that Gentili was "confused" about the meaning and use of *jus civile* or does not fully distinguish them.

129. *Cf. id.* at 226–40 (describing Gentili's supposed shift from a doctrine of "restricted sovereignty" in *De Jure Belli* to one of "absolute sovereignty" in later works).

aries of sovereignty are absolute: where one sovereign authority begins, another ends, and where the world normative order begins, sovereignty ends. Vitoria and Suárez derive this vision from their assumptions about the divine order. Since the divine order is absolute, all-inclusive, and the source of all worldly authority, doctrines about sovereignty will be elaborated which extinguish authority incompatible with the divine order. Naturally, this scheme of absolute sovereign boundaries corresponding to the divine order of rights and wrongs, especially when extended to intersovereign conflicts in doctrines about just war or public title, reinforces the notion of a single normative order. In Gentili's work, which begins with problems of intersovereign conflict, this reinforcing aspect is more important. It is because he retains a primitive scheme of sovereign boundaries that Gentili can imagine the existence of a single normative order and still address issues of intersovereign conflict.

Although some historians have read his distinction between *jus gentium* and the Roman *jus civile* as if it were a nascent traditional distinction between international and municipal law, Gentili does not think of the sovereign as the boundary between international and municipal law.[130] While Gentili often takes guidance from the corresponding Roman rule in developing general norms about such topics as embassy inviolability, he also distinguishes the two, admonishing his readers not to rely excessively on the *jus civile*. These have been understood to represent conflicting tendencies within Gentili's work, or simply to be an early attempt to distinguish municipal and international law which does not quite succeed.[131] This view misunderstands Gentili. He sees the *jus civile* and the *jus gentium* as overlapping sources of norms, but not of normative authority. Some rules of the *jus civile* can be integrated well into the general *jus gentium*, and some can not. This poses no problem because both are binding, not as a matter of sovereign authority, but rather as a matter of natural reason.

C. Gentilian Doctrine

1. Just War

As developed in his doctrinal analysis, Gentili's image of the sovereign differs sharply from the later vision of the sovereign as the source of normative authority between the municipal and international orders. Gentili's sovereign is itself bounded so that authoritative sovereign conflict with or about the natural order is impossible. In

130. *See id.* at 72–73.
131. *See* Nézard, *supra* note 2, at 78–91.

discussing the law of war, Gentili develops a system which conceptually limits the conflicts among sovereigns to those which do not threaten the moral order.[132] His treatment of war is divided into three sections or books. The first defines the "war" as a "just and public contest of arms"[133] to which subsequent specific rules apply. He then considers the various just causes of war and the nature of "public" authority. The text defines sovereign authority to be coterminous with the prescriptions of the natural order. The second book elaborates the rules for the just conduct of war in such a way as to make legitimate sovereign conflicts unthreatening to the natural order. The third book defines the rights of victor and vanquished so as to insure that the conflict legitimated by the second book will not lead to conflict among legitimate sovereign authorities as defined in the first book.

Chapter II of the first book opens with his definition of war: "War is a just and public contest of arms."[134] By "public" Gentili means that the violence of war must be that of a sovereign, not of an individual.

> Furthermore, the strife must be public; for war is not a broil, a fight, the hostility of individuals. And the arms on both sides should be public, for *bellum*, "war," derives its name from the fact that there is a contest for victory between two equal parties . . . .
>
> Therefore, that definition which appeared after ours, "war is armed force against a foreign prince or people" is shown to be incorrect by the fact that it applies the term "war" also to the violence of private individuals and of brigands.[135]

The major portion of Book I is devoted to a definition of the "just" causes of war. He considers divine, natural and human causes. Just causes are rooted in Divine command, the instinctive dictates of natural law (such as self-defense), or the violation of a sovereign's rights. Those "rights" are derived, directly or indirectly through the human law, from natural reason. War, then, must be both conducted by sovereigns and justly caused. Although they differ, both conditions are based in the natural order. Selfish motives for violence are simultaneously unjust and private and are consequently disqualified as "war."

> We must now look further into the reasons for war. "There is but one cause for making war, and that an old one; namely, an

132. For consideration of Gentili's just war doctrine see A. NUSSBAUM, *supra* note 1; Nussbaum, *supra* note 14, at 676–77; Nezard, *supra* note 2, at 49–69, 79–87.

133. A. Gentili, *De Jure Belli*, *supra* note 2, at 12.

134. *Id.*

135. *Id.*

unbounded thirst for power and riches," as Sallust wrote. "This is the fault of precious gold," one poet sings, and another says: "Since gold is even more harmful than the steel." Tacitus reports Cerealis as saying: "Gold and riches are special causes of war." Philosophers say the same thing, as who does not?

But this is not a legitimate reason for war. Hear the words of Augustine: "To make war upon one's neighbours and thence to proceed to other wars, and merely from a lust for power to trample under foot nations which have done one no harm, what else should this be called than brigandage on a grand scale?"[136] The barbarian in Tacitus expresses himself like a barbarian when he says: "If men have great power, might makes right; merely to retain one's own is the part of a private household, to contend for the possessions of another is glory worthy of a king." Now this explains the taunt aimed at Alexander, that he was the plunderer of the world, since merely from that lust for dominion he hunted out quiet nations which were removed from his ken and harassed them with strife. Attila too, who did not concern himself to find reasons for war, is said to have incurred the hatred of all men, and justly, since his conduct made him the general enemy of mankind. We have already spoken of pirates. Even the very Turks sought for good reasons when planning to make war; and therefore Soliman, when he wished to take the Cypriote kingdom from the Venetians, "began to consider by what methods he might cause it to appear that he had made war legitimately; since it is not the usage of the Ottomans to undertake war upon a mere impulse."

It is brutal to proceed to murder and devastation when one has suffered no injury, as the same historians well say. It is fitting for fish and wild beasts and the birds of the air to devour one another, since they are entirely devoid of a sense of justice, as Hesiod sang. As a result of all this, we find that princes always allege some plausible reason for beginning their wars; although frequently they have no reason at all.

So far all is clear. The only question is what be restored to its former owners if the things which are returned are ours, but should become the property of the state or of those who took them. In this instance the authority belongs to the sovereigns alone and no other definition of justice is looked for. Yet Alciati maintains that among Christians regard should be had especially to the justice of other considerations. As to the justice of the efficient cause we shall have something to say in connexion with dependents, who serve their sovereign justly even when he is making war unjustly.

After the efficient cause other causes must be considered. Some raise the question whether or not it is necessary for the justice of

136. *Id.* at 34.

> a war that the leader have a good motive, which is a problem for theologians. The formal cause we must consider, and we shall do so in the Second Book, where we take up everything connected with the conduct of a war.
>
> We must also consider the final cause, and this will be done in the Third Book, where the rights of victor and vanquished, the result of victory, and the methods of ending a war are discussed. Now we must take up the material causes, that is to say, those which furnish the material for war. These are of three kinds: for they may be divine, natural, or of human origin.[137]

Gentili's analysis of just war is similar to that of Vitoria and Suárez. The public authority of sovereigns is extinguished when used for aims not permitted by the natural order. But his analysis also differs from that of the Spaniards, for whom a single system of "justice" simply defined the scope of public authority, thereby allowing the rule that war must be just automatically to rule out the possibility of private war. Gentili, by contrast, suggests two limits: public and just, both of which are independently and distinctly rooted in the natural order.

The Spanish primitives focused on the definition of "just," Gentili on a definition of "war." "War" to Gentili marked the boundary between legitimate and illegitimate conflict. The rights and privileges of belligerence are available to those engaged in "war." To the Spanish primitives this boundary is provided by the concept of "justness." The legal belligerent is he who was "just."

Gentili is able to extend the rights of belligerence to *both* combatants, assuming they were "public" authorities who had a reasonable claim to "justice." Gentili struggles to imagine that both sides might be legitimate combatants without permitting conflict among sovereigns which could threaten the worldwide system of natural justice. He suggests that one party might be ignorant, or mistaken:

> It is the nature of wars for both sides to maintain that they are supporting a just cause. In general, it may be true in nearly every kind of dispute, that neither of the two disputants is unjust. Aristotle makes an exception only when the inquiry is "whether the act took place." And indeed in the case of one's own act our jurists are not in the habit of admitting ignorance as a defence. But they do admit it in the case of another's act, because that happens under different conditions. We are driven to this distinction by the weakness of our human nature, because of which we see everything dimly and are not cognizant of that purest and truest form of justice, which cannot conceive of both parties to a

137. *Id.* at 35.

> dispute being in the right . . . . But we for the most part are unacquainted with the truth. Therefore we aim at justice as it appears from man's standpoint. In this way we avoid the objection of Baldus, that when war arises among contending parties, it is absolutely inevitable that one side or the other is in the wrong. Accordingly we say that if it is evident that one party is contending without any adequate reason, that party is surely practicing brigandage and not waging war. All agree on this point and rightly.[138]

He suggests that one cause might be more just than the others,

> And it is quite true that the cause of the party which is in the right receives additional justification from that fact. "The injustice of an adversary makes wars just," writes Augustine, and referring to the Romans he says: "The injustice of others furnished them with adversaries with whom they could wage just wars."
>
> But if it is doubtful on which side justice is and if each side aims at justice, neither can be called unjust . . . .
>
> This will, moreover, give rise to a third variety of the question, when the war is just on one side, but on the other is still more just. Such a case is of course possible, inasmuch as one man does not cease to be in the right because his opponent has a juster cause. The virtues admit of greater or less degrees, is not limited to a point.[139]

To Gentili, the rights of belligerence should, therefore, be extended to both parties, although this might advance injustice in specific cases.

> Of all our laws, however, that one seems to me the clearest which grants the rights of war to both contestants, makes what is taken on each side the property of the captors, and regards the prisoners of both parties as slaves.
>
> But although it may sometimes happen (it will not occur very often, as you will learn forthwith) that injustice is clearly evident on one of the two sides, nevertheless this ought not to affect the general principle, and prevent the laws of war from applying to both parties. For laws are not based upon rare instances and adapted to them that is to say, on events which are rare in their own class, and which take place only occasionally contrary to the general nature of the case.
>
> But if the unjust man gain the victory, neither in a contention in arms nor in the strife carried on the garb of peace is there any help for it. Yet it is not the law which is at fault, but the

138. *Id.* at 31–32.
139. *Id.* at 32–33.

> execution of the law. As Paulus says: "The law is not to blame, but its application."[140]

Once Gentili acknowleges the possibility that war might appear just on both sides, his accomodations become more complex than those of the Spanish primitives: the rule remains intact despite the exception; the law is pure despite errors of application; the principle is true even if seen dimly. The public nature of the struggle is not only independent of the idea of "just," it is also more crucial to the legitimation of conflict. At times he even seems to suggest that justice is derivative of the public nature of the authority.

> Thus Baldus himself maintains that war between kings is just whenever the aim on both sides is to retain majesty and justice. Those who contend in the litigation of the Forum justly, that is to say, on a plausible ground, either as defendants or plaintiffs, and lose their case and the verdict, are not judged guilty of injustice. And yet the oath regarding false accusation is taken by both parties. Why should the decision be different in this kind of dispute and in a contest of arms?[141]

Gentili's definition of "war," therefore, acts like Vitoria's and Suárez' definitions of "just war," legitimizing only those conflicts which do not threaten the holistic normative order. Both conditions of "public" and "just" are defined and limited by natural law. Nevertheless, his analysis proceeded from the assumption that the public nature of activity is logically independent of its justness. Consequently, both parties may be legitimately in conflict. Nevertheless, they are not struggling over the terms of the natural order. Both causes are just, or are just to differing degrees, or one party is ignorant, but there is no conflict within the worldwide scheme of justice.

That this elevation of the sovereign authority in Gentili's work remains within a primitive rather than a traditional framework is demonstrated by his discussion in Book II of the ways in which a just war may and must be waged. To the traditionalists, the legal, although perhaps not the moral, legitimacy of the struggle and cause of war flows from the exercise of sovereign authority, not from the world normative order. Consequently, many traditionalists would view war as legally legitimate if publicly declared, regardless of its ultimate moral justification. To Gentili, by contrast, doctrine about public declaration is not included as a cause of war, or as part of its definition,

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140. *Id.* at 33.
141. *Id.* at 32.

but as a requirement of the conduct of just war. Justice requires that war be declared.

> Now, just as you ought to observe justice in beginning a war, so you should wage it and carry it on justly. For it is not enough to have a just cause for beginning a war unless it is also waged with justice, as Augustine says. "In war an enemy retains his religion and his rights," says Cicero. And in this way he distinguishes enemies from brigands . . . . "Wars must be waged with no less justice than bravery," was the reply of Camillus. And God thus ordained in his law.
>
> And this justice of which we speak seems in the first place to consist in this: that we should inform of our deliberations the one against whom we have decided to make war. That indeed is commanded by the divine law, a law which related to all men and not to the Jews alone, for it is a law not confined to their commonwealth, but extending beyond it.
>
> Others, too, have come to the same conclusion, Greeks, Barbarians, and especially the Romans. "It seems that no war can be regarded as just unless it has been announced and declared and unless satisfaction has been demanded," as Cicero writes and this opinion has been embodied in the canon law. The civil law, too, maintains the same principle and, therefore, the interpreters of that law write that one acts treacherously who makes war without a formal declaration and those who have done so are branded as traitors.[142]
>
> But if war is not declared when it ought to be declared, then war is said to be carried on treacherously; and such a war is unjust, detestable, and savage. Namely, because it is waged according to none of the laws of war, but according to caprice, and in it all the laws of war justly seem to be set aside.[143]

The catalog of rules about such aspects of the conduct of war as brutality, truce, safe conduct, hostages and captives, like his requirement that war be declared, share this absolute and exclusive quality. When war is not declared the violence done is not "war," and hence not the legitimate clash of sovereigns, but automatically a struggle among private "brigands." This structure is typically primitive: extinguishing legitimate authority which contravenes natural or divine norms.

Likewise, Gentili's Third Book, which considers the just resolution of war, follows the primitive scheme of extinguishing fully the authority of the vanquished. While, to the Spanish primitives, the *unjust*

142. *Id.* at 131.
143. *Id.* at 140.

authority is eliminated, Gentili imagines that the unjust power might win, yet the public authority of the *vanquished* is fully terminated. The victor's vengeance can be complete. Although guided by principles of natural justice, these derive not from any lingering authority that must be respected in the vanquished, but rather from natural reason. The point is that Gentili's system, like that, of his Spanish predecessors, organizes conflicts among sovereigns so as to prevent erosion of the moral order. Erosion is prevented not by reliance upon vengeance against the *unjust*, but rather by reliance on vengeance against the unsuccessful public authority. Everything turns here on the boundary of public authority, not of justice, and yet the single normative order remains unthreatened. The victor still acts as the arm of natural justice.

> And indeed, as it has been handed down by our jurists that it is not fitting for a judge to give his attention to establishing peace until the faults which led to war are punished so in this subject we must first provide for a just penalty in order that when all the roots of war have, so to say, been cut away, peace may acquire greater firmness.[144]

But this does not unleash sovereign authority from the commands of natural justice:

> There would never be peace, and war would be to the death and contrary to nature, if the will of the victor controlled everything and the vanquished could lose everything.[145]

Instead, the victor acts in two roles; public successor to and natural law judge of the vanquished.

> But we must add this, that in our argument on warlike strife it is the victor who has the power to decide which is the just cause, and also his own reason for entering the contest. Accordingly, he can hardly pronounce the cause of the vanquished just without pronouncing his own victorious cause unjust; and therefore he will not do it. Moreover, although a war may be undertaken justly by both sides, it cannot, however, appear so to both parties. Yet since the victor in this case assumes the character of a just judge and is not merely a partisan, he ought, so far as is possible, to have regard to the principles of justice and along with his own rights to maintain those of the other party. In the

144. *Id.* at 291.
145. *Id.*

> judgement, too, which he passes as to the punishment to be inflicted upon the vanquished, he ought to show the moderation appropriate to his twofold character.[146]

Gentili is clear, however, that, regardless of the justice of the two causes, the public authority of the vanquished is fully transferred to the victor. Where Vitoria and Suárez were more concerned that justice should extinguish injustice, Gentili leaves this unsettled, but devotes a chapter to the proposition that "The Acquisition of the Victor is Universal."[147]

> The question now arises whether the law of victory is universal or whether it affects only the things which the victor presses with his foot or holds in his hand.[148]

After considering some cases in which the victory was not complete and the transfer of authority thus not absolute, he concludes:

> However, it is clear that states may cease to exist, and that through the demolition of walls and buildings brought about by the authority of the sovereign all the rights of the state are destroyed. Alexander was the sovereign and master, not only of the city but of the state; which he had reduced wholly under his sway. The state which was reconstructed afterwards was not the same as it had been. And although it is believed to have retained its former rights to a higher degree, it obtained this privilege rather as it were by substitution in place of the former city which was destroyed. And even so the citizens did not recover the rights which had passed to others.
>
> Therefore, since Alexander took everything belonging to the Thebans, he was their universal and not their individual successor.[149]

For Gentili, sovereign authority of the vanquished is extinguished automatically by victory. This principle underlies his discussion of the proper treatment of captive leaders as well. He holds that the defeat or sin of one leader subjugates him to the authority of the victor or the just.

> This being so you will now perhaps not criticize the sentence of Charles, King of Naples, in accordance with which Conrad

146. *Id.* at 299.
147. *Id.* at 307.
148. *Id.*
149. *Id.* at 307–308.

> was put to death. And the latter was not justified in crying out that equal did not have power over equal. For even the Pope of Rome, lord of that domain, wrote in reply to Charles that he would not prevent him from executing the law upon Conrad. Moreover, one who is conquered and captive is not the equal of his conqueror. Our jurists write that if there are two lords of one castle and one commits an offence, the offender may be punished by the other, and that he cannot say "equal against equal" because by sinning he deprives himself of his equality.[150]

Moreover, the public authority has the same on-off quality in Gentili's work that justice has in the work of the Spanish primitives.

> Therefore that same Pope of Rome, when consulted by Charles replied very briefly, but with true wisdom, "The death of Conrad is the life of Charles. The life of Conrad, the death of Charles."[151]

Thus, in Gentili's work on the law of war, the definition of "war" operates as the concept of "just" did in the work of the Spanish scholars. It legitimates conflict among sovereigns which do not conflict with the primitive notion of a single natural order. Sovereignty is both defined and limited by the doctrines governing war in such a way that no conflict over the content of the natural order can be imagined. Nevertheless, Gentili emphasizes the public authority of sovereigns where the Spanish primitives emphasize worldwide principles of justice. The results are quite different. To the Spanish primitives, only one belligerent may be legitimate. To Gentili, both are if they are public authorities. The primitive conception of a single moral and legal order defining and limiting sovereignty is compatible with and reinforced by two divergent doctrinal systems.

2. Treaty Law and Ambassadorial Immunity

This emphasis on public authority rather than justice as the defining characteristic and limitation on sovereignty animates Gentili's other doctrinal schemes as well. In considering treaties, for example, Gentili distinguishes the agreements of sovereigns from those of individuals. A public agreement or treaty (which he calls variously "alliances", "pacts", "peace treaties" and "agreements") is binding if signed under duress while private agreements are not. The binding quality of private agreements comes from consent which might be mitigated by duress, but the binding force of public agreements, however, does not turn

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150. *Id.* at 323.
151. *Id.*

on consent. Consequently, a defeated prince must abide by a coerced peace treaty. Moreover, while a private individual is under no obligation to do more than he has consented to, a sovereign "uninvolved" in war should aid his ally beyond the terms of the alliance when required to counter injustice.

That the public authority is limited by the natural order is demonstrated in Gentili's discussion of ambassadorial immunity from criminal jurisdiction. Ambassadorial immunity seems to present a classic conflict between the authority of two sovereigns, the host and the sending state. To Gentili, this conflict is not apparent. The ambassador is immune in his public role. When acting publicly, he acts in accordance with natural law, and cannot be punished for acts which are not criminal under natural law. But, should he violate natural law, the host state has the authority to punish him. The host state's authority is created by the act which extinguishes that of the sending state, thus preventing any conflict. For example, a prince's authority to punish a visiting ambassador does not extend to conspiracies which are not carried out, for attempt is not a crime at natural law. Ambassadors who have official instructions to commit crimes are "spurious embassies." Their tasks, violative of natural law, end the ambassador's public character, and with it, his immunity from expulsion.

Gentili also imagines that an ambassador who violates his orders and acts criminally may be punished by his own sovereign after expulsion. This is a different matter: a "false embassy." Ambassadors who are spies or who represent a sovereign acting unjustly (a rebel, or criminal, for example) may be treated likewise. These doctrines prevent any conflict of legitimate authorities or of authority and respect in the role of a single sovereign. So influential is this system of right and wrong that Gentili divides his treatment of ambassadorial conduct into two books. The first treats those offenses which strip him of his public nature. The second treats characteristics which enhance his public performance but whose absence do not lead to a loss of authority because they are not compelled by natural law: courage, prudence, sincerity, etc.

D. Conclusion

It seems odd that Gentili should reinforce his primitive vision of a single natural order by emphasizing the unique role of the public sovereign authority in this way. Previous primitives had emphasized rather the universal nature of justice and hence, the *limits* of sovereign authority rather than its power. The traditionalists, moreover, would emphasize the difference between the public and private acts of the sovereign as a way of building precisely the distinctions between law

and morality, international and natural law, and, most importantly, municipal and international law which Gentili does not make. Some modern historians have concluded from this apparent contradiction that Gentili was confused—part medieval, part modern.[152]

This misunderstands Gentili. He did not emphasize the public authority of sovereigns as the boundary between international and municipal law or the source of legal norms, as the traditionalists would. Rather he emphasized the separation of public sovereign and private capacities as a way of defining sovereign authority so that it might remain compatible with the natural order. Gentili separates notions of "just" and of "public" as other primitives fuse them, so that both remain dependent upon a holistic system of normative authority.

Considered as a whole, therefore, Gentili's work is primitive. Like the Spanish scholars, he considers questions of international law involving conflict between sovereigns within the framework of a worldwide normative order without imagining there to be any tension between these two aspects of his work. He is unaware of the potential for conflict primarily because he defines sovereign authority in such a way that legitimate conflict about the content of the normative order cannot be imagined. This approach reinforces and is supported by his assumption about the universality of the natural order. Gentili differs from earlier primitives because his text is structured primarily around his assumption about sovereignty, as revealed in his doctrinal analyses and organization, and only secondarily around the assumption of a holistic normative order. The second assumption primarily structures the texts of the scholastics. As in the Spanish texts, however, these two devices for avoiding the contradictions of international legal theory and doctrine are necessarily intertwined. Without a notion of universal justice, the equation of justice and public activity required for the second mediation technique is not possible. But while Gentili develops doctrines in a different way than Suárez, it does not alter the consistency of his primitive mode of discourse. He still participates in the coherent and unified vocabulary of primitive assumptions and textual characteristics.

V. HUGO GROTIUS

A. Introduction

Most historians agree that Hugo Grotius, a Dutch Calvinist scholar and statesman, wrote in the "scholastic" or "medieval" tradition and

152. *See* G. VAN DER MOLEN, *supra* note 6; Nézard, *supra* note 2; *see also supra* note 118 and accompanying text.

was heavily "influenced" by the works of Vitoria, Suárez and Gentili. Nevertheless, Grotius is also widely regarded as the founder of modern international law.[153] Grotius seems to foreshadow "modern" international legal scholarship in part because he continues Gentili's tendency to address directly problems which now seem to involve conflicting sovereignties. Moreover, in secularizing the primitive vision of a world-wide normative order, he emphasizes those aspects of doctrine which define and limit sovereign authority rather than developing theoretical elaborations of the international divine and natural order.

This emphasis, however, while different from that of Vitoria and Suárez, does not lessen the primitive nature of Grotius' work. To find in the Grotian secular system of sovereignty a traditional notion of international law based upon autonomous and authoritative sovereigns

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153. The voluminous secondary literature analyzing the content of the Grotian texts differ in their assessment of his place in their progressive histories. Those who emphasize his secular reversal of the doctrines and methods of the scholastics laud him as the "founder" of "modern" international law. Those who appreciate his holistic approach, tend to view him as "medieval" or "confused." *See* Lauterpacht, *supra* note 2 (Grotius as "founder" of "modern international law"); Schwartzenberger, *Jus Pacis ac Belli: Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460 (1943) (treating Grotius as a "naturalist" and hence not "modern"); von Elbe, *supra* note 3 (Grotius as "early" scholar following Suárez and Vitoria); Von der Heydte, *supra* note 4, (uniting Grotius with Suárez and Vitoria in the same medieval "school"); Balogh, *supra* note 7 (demonstrating by emphasizing "method" over "doctrine" that Grotius is a "traditionalist," *i.e.*, on the side of antiquity and scholasticism); Le Fur, *supra* note 1, at 263, 290 (a long and valuable study distinguishing a "religious" and "state" phase in international legal scholarship and emphasizing Grotius as a holdover, trying to rescue a sinking past from the rising tide of state absolutism). He concludes: "Chose curieuse, il est bien plus exact de présenter Grotius comme un des derniers tenants de cette théorie traditionnelle, que comme un précurseur de la théorie de la souveraineté absolue qui allait prévaloir dans les relations entre États peu-après lui." Other historians, perceiving the growing contradiction within Grotian primitivism prefer to credit him with "synthesizing" these tendencies. *See, e.g.*, Van der Vlugt, *supra* note 7, at 420 (crediting Grotius with successfully synthesizing a "double role" between Vitoria and Machiavelli); Basdevant, *supra* note 7, at 264 (Grotius as "the synthesis of the elements provided by his predecessors"); Moreau-Reibel, *Le Droit de Société Interhumaine et le "jus gentium": Essai sur les Origines et le Développement des Notions jusqu'à Grotius*, 77 RECUEIL DES COURS 485 (1950) (developing the "Grotian synthesis," concluding that Grotius was the synthesis of past work *and* threshold of new); K. KALTENBORN VON STACHAU, *supra* note 1, at 39 (Grotius as the "father" of modern international law, who was "ambivalent" about many crucial matters). Kaltenborn writes:

> Zugleich muss es als ein Mangel ersheinen, dass sich Grotius nicht darüber ausgesprochen hat, ob er das philosophische oder positive Völkerrecht darstellen wolle. Ja, Grotius ist überhaupt noch sehr schwach in Unterscheidung der positiven and philosophischen Rechtssphäre und hat kaum eine Ahnung von den beiden wesentlich verschiedenen Seiten des Völkerrechts, nämlich einmal des positiven und dann des sogenannten natürlichen.

Id. By reimagining the medieval/modern split as the dichotomy of naturalism and positivism, Grotius can also be rehabilitated as an "eclectic." The tendency of historians to concentrate on explaining the content of Grotius' works leads them to reproduce and repair his own methods of denying the contradiction which themselves no longer work. Most therefore rely on the idea that thesis and antithesis produce synthesis rather than transformation and denial. *See* KNIGHT, THE LIFE AND WORKS OF HUGO GROTIUS (1925); Bourquin, *Grotius et les Tendances Actuelles du Droit International*, in 7 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 86 (1926).

is to distort the integrity of his elaborate system. In doing so, historians customarily emphasize some aspects of his work at the expense of others, leaving the impression that his text is either incomplete or confused. Understood as a whole, however, the Grotian system coherently avoids conflicts between sovereign autonomy and an international legal order by deploying the same avoidance mechanisms, vocabulary of assumptions and textual characteristics used by other primitive scholars.

Unlike Suárez, Grotius seeks to analyze directly issues which we now visualize as problems of international law.[154] We need not collect fragments of various works to find Grotius' treatment of the law of war or of the seas. He devotes a book to each.[155] As a statesman, his project was to consider problems raised by contact and conflict among sovereigns in light of the natural law order. But his treatment of these issues of intersovereign conflict precludes any possibility that these conflicts can threaten the natural law order. Like other primitives, Grotius does not distinguish on a theoretical level the binding force of law and morality, natural and international law (*jus gentium*), or international and municipal law. His doctrinal scheme, particularly the consideration of just war, is structured primarily to define the boundaries of sovereignty. As in Gentili's text, this definition relies in turn upon a typically primitive vision of a holistic natural normative order.

B. Grotian Legal Theory

1. Method and a Typology of Divine and Natural Law

Grotius uses authorities in the same way as Gentili.[156] If anything, his argument from authoritative text to conclusion is more rigidly logical than Gentili's, allowing less room for internal criticism or the development of a hierarchy among cited norms. He cites classical texts more frequently than Gentili and historical examples somewhat less

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154. *See supra* note 7; *see also* H. Grotius, *Mare Liberum* (1609).

155. *See* Lauterpacht, *supra* note 2 (identifying Grotius's project with the basic problem of freedom and order among sovereigns). Nussbaum, *supra* note 14, at 464, illustrates how focusing on Grotius' traditional rather than primitive dimensions can create misunderstandings about his organizational scheme: "the Grotian elaboration of a natural law of contracts, of partnerships, insurance, and other purely civil law matters is a kind of foreign substance within the study of the 'Law of War and Peace.'"

156. *See* Balogh, *supra* note 7 (emphasizing Grotius's methodology in classifying him as a medieval scholar); Basdevant, *supra* note 7, at ch. 2 (devoting a chapter to Grotian methodology distinguishing an *a priori* method for "proving" natural law from the *a posteriori* method for establishing "volitional" law); Le Fur, *supra* note 1, at 310–319 (emphasizing the unself-consciousness of Grotian methodology which was abandoned in the doctrinal controversies which followed).

frequently. Like Gentili, he uses these citations as the Spanish use Scripture or Aquinas: as an enormous catalog of binding rules which can be unproblematically asserted and attached to one or another preferred outcome. He seems unselfconscious about his methodology, presuming rather than arguing for a universally binding set of natural norms.

Despite these indicia of primitivism, several aspects of his method and theoretical typology of the law have led historians to suggest that Grotius began the reorientation of international law from theology to sovereign authority, thereby signaling the arrival of international legal positivism and ushering in the traditionalist era. Particularly crucial to such a reading are his distinction between divine and natural law[157] and what seems his willingness to find natural law in the practices of sovereigns.[158] Grotius does seem to distinguish himself from Suárez and Vitoria by secularizing natural law, thereby distinguishing it from divine will. His resulting search for norms in state practice would seem positivist were his secularization a relocation of normative authority from divine to sovereign will. This, however, does not seem to be the case.

Grotius thinks of natural law as a rule of reason which

> would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of man are of no concern to Him.[159]

Natural law is derived from an Aristotelian drive towards sociability which manifests itself in rules necessary for the fulfillment of this human condition. Although manifested by sovereign practice, natural law accords with and is binding as a matter of divine law.[160]

As a result, Grotius examines practice in order to prove the content of natural law, not to demonstrate or ground its binding force. The sovereign is the source, in a technical sense, but not the origin, of natural law. In this sense, the practice of sovereigns is like a statute book in which the precepts of sociability can be read.

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157. See *supra* note 155, and especially Van der Vlugt, *supra* note 7, at 416–417 (supporting the "close link" between Grotius and the Spanish school by evidence that Grotius remains with the realm of religion and morals); and Le Fur, *supra* note 1, at 298–309.

158. H. Grotius, *De Jure Belli*, *supra* note 7, at 13.

159. *Id.* at 14.

160. *See* Basedevant, *supra* note 7, at ch. 6 (an interesting study of "théorie générale de l'État de Grotius" which is used to conclude that Grotius's failure to produce a "consistent" theory of just war results from his establishment of a system based on sovereign authority which does not produce a "consistent" theory of the state.); Lauterpacht, *supra* note 2, at 28 (emphasizing Grotius's sense of the identity of states and individuals subject to the same moral and legal norms).

XII.—*In what way the existence of the law of nature is proved.*

I. In two ways men are wont to prove that something is according to the law of nature, from that which is antecedent and from that which is consequent. Of the two lines of proof the former is more subtle, the latter more familiar.

Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such . . . among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling which is called the common sense of mankind.[161]

In secularizing natural law, Grotius does not create a legal sphere either grounded in sovereign authority or which is not also binding as a matter of morality. This is apparent from his treatment of sovereign promises. To the traditional positivist, sovereign consent provides the origin of international law's binding force. To Grotius, the obligation to fulfill the terms of a sovereign promise arises from the conformity of natural law with the principles of right reason upon which sovereign authority rests. Although the sovereign may bind himself in matters not touched by the divine or natural law, these obligations, based in his authority, neither derogate from natural and divine law nor limit the sovereignty which he exercises as a matter of natural and divine law. These promises, moreover, are themselves binding only as a matter of natural and divine practice expressive of the "law itself":

XVI.—It is shown that sovereignty is not limited even by a promise of that which lies outside the sphere of the law of nature or of divine law.

1. A third comment is, that sovereignty does not cease to be such even if he who is going to exercise it makes promises—even promises touching matters of government—to his subjects or to

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Hesiod has a saying which has been quoted by many: "Not wholly void of truth the opinion is which many peoples hold."

"Those things which appear true to men generally are worthy of credence," Heraclitus used to say, judging that common acceptance is the best criterion of truth. Says Aristotle: "The strongest proof is, if all men agree upon what we say;" Cicero, "The agreement of all nations upon a matter ought to be considered a law of nature;" Seneca, "The proof of truth is the fact that all hold the same view upon something;" and Quintilian, "We consider those things certain upon which there is agreement in the common opinion of men."

H. Grotius, *De Jure Belli*, *supra* note 7, at 42–43.

> God. I am not now speaking of the observance of the law of nature and of divine law, or of the law of nations; observance of these is binding upon all kings, even though they have made no promise. I am speaking of certain rules, to which kings would not be bound without a promise.
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> That what I say is true becomes clear from the similarity of the case under consideration to that of the head of a household. If the head of a household promises that he will do for it something which affects the government of it, he will not on that account cease to have full authority over his household, so far as matters of the household are concerned. A husband, furthermore, is not deprived of the power conferred on him by marriage because he has promised something to his wife.
>
> 2. Nevertheless it must be admitted that when such a promise is made, the sovereign power is in a way limited, whether the obligation affects only the exercise of the power, or even the power itself directly. In the former case an act performed contrary to the promise will be unjust, for the reason that, as we shall show elsewhere, a true promise confers a legal right upon the promisee; in the latter case, the act will be void on account of lack of power. From this, nevertheless, it does not follow that the promisor is subject to some superior; the nullification of the act in this case results not from the interposition of a superior power but from the law itself.[162]

Thus Grotius' distinction between divine and natural law exemplifies rather than undercuts the primitive notion that law and morality are one and that the normative force of the legal order is derived from outside the will or authority of sovereigns.

2. The *Jus Gentium*

Grotius' distinctive treatment of the *jus gentium* and his notion that the *jus gentium* is composed of both natural and "volitional" law have also seemed to suggest a traditional replacement of a holistic divine order with an order based in sovereignty.[163] He does indicate on occasion that an activity may be governed by rules of natural law and by *jus gentium* which differ. For example, the law of *jus gentium* forbids the use of poison, while the natural law does not.[164] Especially when

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162. *Id.* at 121–22 (footnotes omitted).

163. *See* Basdevant, *supra* note 7, at ch. 5 (developing a Grotian "general theory of law" in the style of selfconscious traditionalists which allows for the "coexistence" of natural and volitional law); Le Fur, *supra* note 1, at 298–309, 318–20; Lauterpacht, *supra* note 2, at 21 (emphasizing the connections among the binding authority of natural law and *jus gentium* while recognizing their differences); H. MAINE, ANCIENT LAW 103 (1920) (claiming that Grotius identified *jus gentium* and *jus naturale*).

164. H. Grotius, *De Jure Belli*, *supra* note 7, at bk. 3, ch. 4, xvi.

he is emphasizing that the natural law is confined to rules made necessary by the nature of man, Grotius suggests that the *jus gentium* may contain broader prohibitions. But the Grotian *jus gentium* is not a system of law with a distinctive normative structure. It too is binding as a matter of natural and divine law although its rules are not directly located there. The distinction between *jus gentium* and natural law concerns the source or location of certain rules, not their normative power.

This distinction, however, leads Grotius to consider the *jus gentium* to be composed of both natural and "volitional" norms.[165] After discussing natural law, Grotius indicates that "another kind of law is volitional which has its origins in the will."[166] Volitional law can be divine or human. The human volitional law includes municipal civil law and other "law which has received its obligatory force from the will of all nations, or of many nations."[167]

In a traditional text, this would indicate a positive notion of international law whose normative force springs from its connection with sovereign will and would suggest the possibility of a conflict of authority between sovereign volitional will and the divine or natural will which could threaten any holistic order. Grotius remains unaware of this conflict because he, like other primitive scholars, imagines that volitional law derives its normative force from the natural and divine order, not the authority of sovereigns. The volitional law merely fleshes out what the natural law has left unclear and can exist only in the interstices of divine and natural law.

> According to the diversity of the matter, that which we call moral goodness at times consists of a point, so to speak, so that if you depart from it even the least possible distance you turn aside in the direction of wrong-doing; at times it has a wider range, so that an act may be praiseworthy if performed, in some other way no blame would attach, the distinction begin generally without an intermediate stage, like the transition from being to not-being. Between things opposed in a different way, however, as white and black, a mean may be found either by effecting a combination of the two or by finding an intermediate between them.

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165. *See also* Lauterpacht, *supra* note 2, at 21–22 (emphasizing that "in a wider sense, the binding force even of that part of . . . [the law of nature] that originates in consent is based on the law of nature as expressive of the social nature of man" and demonstrating that the separation of volitional and natural *jus gentium* is not a traditional distinction between either *jus gentium* and *jus naturale* or municipal and international law).

166. H. Grotius, *De Jure Belli*, *supra* note 7, at 44.

167. *Id.*

> It is with this latter class of actions that both divine and human laws are wont to concern themselves, in order that those acts which were in themselves merely praiseworthy might become also obligatory. But we said above, in discussing the law of nature, that the question is this, whether an act can be performed without injustice; and injustice is understood to be that which is utterly repugnant to a rational and social nature.[168]

Natural law remains the normative foundation for the binding force of volitional obligations. As a result, Grotius can suggest quite offhandedly that the consent of the "wisest" nations is sufficient to establish a norm of volitional law. For traditional scholars who imagine the origin of the binding force of the volitional *jus gentium* to be the consent of sovereign authority, it is difficult to justify binding nations who do not participate in creating the volitional norm in question. Because Grotius uses volition only to "prove" the existence of volitional rules, the consent of the wisest nations is sufficient.[169]

3. Municipal and International Law

Similarly, Grotius' sense that the voluntary *jus gentium* consists of both municipal and more general norms suggests a traditional distinction between municipal and international law.[170] Unlike traditionalists, however, Grotius does not imagine this distinction to arise from the situation of the sovereign as the origin of law in both spheres. Grotius acknowledges that some rules of the *jus gentium* are common to many nations while some are the specific municipal law rules of a single state. Generally, he uses the term *jus gentium* only to refer to the broader common rules of a *jus inter gentes*. Nevertheless, the rules *inter gentes* might be either *jus naturale* or *jus gentium*. Moreover, municipal law is not a law different in its binding force from the law *inter gentes*. It is merely to be found in the civil code of sovereigns. Within the single system of law, sovereigns and individuals might, in certain cases, locate the rules which govern their behavior in dif-

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168. *Id.* at 52.

169.

> The law which is broader in scope than municipal law is the law of nations that is the law which has received its obligatory force from the will of all nations, or of many nations. I added "of many nations" for the reason that, outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations. Not infrequently, in fact, in one part of the world there is a law of nations which is not such elsewhere, as we shall at the proper time set forth in connexion with captivity and postliminy. The proof for the law of nations is similar to that for unwritten municipal law; it is found in unbroken custom and the testimony of those who are skilled in it.

Id. at 44.

170. *See supra* notes 165, 169.

ferent places. Both are bound because the norms are part of the natural order. The municipal law is law because it is the product of civil power, which in turn is authoritative and normatively binding because it accords with natural law.[171]

Thus, although the theoretical system which Grotius constructs differs greatly from that of Vitoria and Suárez, it is still primitive. He distinguishes the various forms of law which bind the sovereign from the perspective of the sovereign. This is consistent with his conception of his task: to elaborate the rules governing specific cases of sovereign conflict, rather than to develop a general theological system which sometimes concerns sovereigns. He secularizes the natural law of the Spanish primitive scholars and makes it compatible with the secular behavior of sovereigns with diverse religious beliefs. But he does not alter the primitive assumption that a single normative order governs sovereigns. Even while focusing on sovereign behavior and consent he continues the primitive technique of defining the ambit of that volitional authority, so that it is an expression of and therefore limited by natural law. He contrasts municipal, civil and international law, but does not do so in a way that will give the sovereign an authoritative status between these two realms which might threaten the holistic normative order.

C. Grotian Doctrine

1. The Organization of Doctrine

As the title of his most important and expansive treatise, *On the Law of War and Peace* (1646) suggests, Grotius, like Gentili, contrasts "war" and "peace". His concept of "war" legitimates conflicts which do not threaten the natural order and delegitimates conflicts which could. The on-off quality of war operates simultaneously as a boundary between legitimate and illegitimate conflicts and between acts of sovereignty. The support which this vision of sovereignty gives his notion of a single worldwide natural order can be seen in the organization of his work, as well as in his doctrinal treatment of the concept "war," of the just causes of war and the permissable acts in and after war.

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171. Municipal law is that which emanates from the civil power. The civil power is that which bears sway over the state. The state is a complete association of free men, joined together for the enjoyment of rights and for their common interest. The law which is narrower in scope than municipal law, and does not come from the civil power, although subject to it, is of varied character. It comprises the commands of a father, of a master, and all other commands of a similar character.
H. Grotius, *De Jure Belli*, *supra* note 7, at 44.

Grotius divides his treatise *On the Law of War and Peace* into three books. The first short book, in the process of defining war, considers the possibility of a war that is just on both sides, the distinction between public and private war, and the nature of sovereignty. The second, longer book elaborates the just causes of war, developing a theory of rights and wrongs similar to that of other primitive scholars. The third book considers what conduct is permissible in and after a war. The content and organizational scheme of the latter two books depend upon Grotius' initial definition of the concept of "war." That definition depends in turn upon a theory of sovereignty, as Grotius indicates in his Prolegomena.

> In the first book, having by way of introduction spoken of the origin of law, we have examined the general question, whether there is any such thing as a just war; then, in order to determine the differences between public war and private war, we found it necessary to explain the nature of sovereignty—what nations, what kings possess complete sovereignty; who possess sovereignty only in part, who with right of alienation, who otherwise; then it was necessary to speak also concerning the duty of subjects to their superiors.[172]

Unlike his theory of sovereignty, Grotius' theory of justice is never systematically outlined, except to suggest that it is the fulfillment of the rights outlined in Book II. This organizational scheme differs strongly from that of the earlier primitives who begin with a concept of "justice" comprised of "rights" and "wrongs" which separates legitimate and illegitimate sovereign acts and delegitimates war which might conflict with the holistic order. Although Grotius begins with the idea of "war," he too conflates legitimate sovereignty and natural justice. As a result, Grotius is able to discuss permissible war without setting loose a clash of authoritative sovereigns. In this, his conception of sovereignty and the doctrinal elaborations of the second two books redeem his primitivism from what seems a more traditional starting point.

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172. On Grotius' just war doctrine, see Lauterpacht, *supra* note 2, at 35–59; A. NUSSBAUM, *supra* note 1, at 106 (arguing that the secularization of Book I indicated that "the just-war doctrine had become meaningless"); Nussbaum, *supra* note 14, at 464 (arguing that Grotius' approach "ejected . . . [just war doctrine] from international law,"); Le Fur, *supra* note 1, at 309–17, 310–12 (Grotius's attempt to transpose the just war doctrine from the religious to the judicial domain accelerated the demise of the doctrine, and describing the use of "official public" as a legitimizer of conflict); Van der Vlugt, *supra* note 7, at chs. 3, 4 (summarizing *De Jure Belli*).

2. The Concept of "War"

Like Gentili, Grotius opens his first book with a discussion of the meaning of "war," which he defines as the condition of "contending by force." Gentili maintains that to be war, the conflict must also be "just" and "public." Grotius does not agree. There are also "private wars," and as to the concept of "justice," he says:

> I do not include justice in my definition because this very question forms a part of our investigation, whether there can be a just war, and what kind of a war is just; and a subject which is under investigation ought to be distinguished from the object towards which the investigation is directed.[173]

This appears to depart sharply from previous primitive approaches. For the earlier primitives, "justice" defines the limits of legitimate action and such conflict as is still possible is "war." Even Gentili uses both "justice" and "public" to demarcate legitimate conflicts. For Grotius, all belligerents appear legitimate. Despite this departure from the pattern of primitive reasoning, however, Grotius reintroduces the "justice" of earlier primitives in his definition of sovereignty and of permissible wars and in his discussion of acts in and following war.

The Grotian conception of a war just on both sides demonstrates that "war," not notions of "justice," is the key to legitimate conflict. The Spanish primitives, who begin with a notion of "justice," can not imagine a war just on both sides. Gentili, who begins with the notion of "war," can imagine at least that it might seem just from the point of view of both sovereigns. Gentili can therefore apply the rules of war to both sides, regardless of the ultimate justice of their positions. Since Grotius thinks of war, in the first instance, as separate from justice, it is easier for him to imagine granting both parties the rights of belligerents. He argues that in wars declared by public authority each party may legitimately injure the other. In this sense, the actions of each are just, and war is not "at variance with the law of nature", with the *jus gentium*, or with the "volitional *jus gentium*".[174]

Although some have argued that this "amounts practically almost to ejecting the 'justa causa' from international law,"[175] Grotius' will-

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173. H. Grotius, *De Jure Belli*, *supra* note 7, at 21.

174. *Id.* at 34.

175. *Id.* at 57. It is interesting to note at this point how this textual analysis can be part of a more general history. Grotius in vocabulary of assumptions and textual characteristics is primitive. He is the only one of our primitives to write during the period of the Thirty Years' War, and the only one to accomodate in the primitive vocabulary a scheme in which justice can be found in the adversarial conflict of sovereigns, a scheme in which there can be social order even in a time of conflict.

ingness to imagine justice on both sides is more complicated. Grotius does not imagine that both sides might actually be just in their cause. He means only that each may legitimately pursue his claim to justice. In a much quoted passage, Grotius compares armed struggle to court advocacy:

> It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlement fails, war begins.[176]

Thus, although "[i]n the particular sense and with reference to the thing itself, a war cannot be just on both sides, just as a legal claim cannot,"[177] each side may "justly plead his case."[178]

> [T]he reason is that by the very nature of the case a moral quality cannot be given to opposites as to doing and restraining. Yet it may actually happen that neither of the warring parties does wrong. No one acts unjustly without knowing that he is doing an unjust thing, but in this respect many are ignorant. Thus either party may justly, that is in good faith, plead his case. For both in law and in fact many things out of which a right arises ordinarily escape the notice of men.[179]

Although this seems to imagine conflict about the meaning of "justice" among sovereigns which could threaten the holistic order, such conflict is avoided by his definition of sovereignty, his doctrinal reintroduction of the idea of justice in Book II and the exclusive on-off quality of legitimate behavior during and following war laid out in Book III which relies on his notion of sovereignty. His notion of sovereignty is revealed in Book One in his discussions of justice and rights, of public and private war (Chapter III) and of the "war of subjects against superiors" (Chapter IV).[180]

3. The Concept of Sovereignty

a. Justice and Rights

Grotius' concept of rights and justice reintroduces a limit on the ability of legitimate sovereign conflict to threaten the natural order. In one sense, justice is absolute and speaks unequivocally to one side

176. Nussbaum, *supra* note 14, at 464.
177. H. Grotius, *De Jure Belli*, *supra* note 7, at 171.
178. *Id.* at 565.
179. *Id.*
180. *Id.*

only. Law creates rights which, when perfect, may be maintained by force in private and public affairs. While private rights arise from natural law directly or from the laws and statutes of human law which themselves are authoritative as expressions of natural law, public rights are defined by the natural prerogatives of sovereign power. In this sense, justice and public authority are linked so that the ultimate just nature of one or another claim, while defended and defined by sovereign authority, is grounded in natural law and therefore does not threaten the natural order. In another sense, justice flows from the exercise of public authority. It is just, for example, to assert claims, even claims whose justice will not ultimately be vindicated. Waging war, then, can be legitimate for both parties without threatening the view that in the end only one party turns out to be just.

> From what we have said it is possible to reach a decision regarding the question, which has been discussed by many, whether . . . a war may be considered just from the point of view of each of the opposing sides.
>
> We must distinguish various interpretations of the word "just". Now a thing is called just either from its cause, or because of its effects; and again, if from its cause, either in the particular sense of justice, or in the general sense in which all right conduct comes under this name. Further, the particular sense may cover either that which concerns the deed, or that which concerns the doer; for sometimes the doer himself is said to act justly so long as he does not act unjustly, even if that which he does is not just.
>
> This distinction between "acting wrongly" and "doing that which is unjust" is rightly made by Aristotle . . . .
>
> In the general sense that is usually called just which is free from all blame on the part of the doer. However, many things are done without right and yet without guilt . . . [i]f we interpret the word "just" in relation to certain legal effects, in this sense surely it must be admitted that a war may be just from the point of view of either side; this will appear from what we shall have to say later regarding a formal public war. So, in fact, a judgment not rendered according to law, and possession without right, have certain legal effects.[181]

b. Public and Private Wars

It is not only this dual conception of justice which prevents Grotius' broad legitimation of inter-sovereign war from threatening the natural order. This conception reinforces and is supported by his notion of a legitimate sovereign authority which conflates "public" and "just." His initial discussion of public and private wars is organized to develop a

181. *Id.* at 91, 138.

conception of the sovereign personality that permits Grotius to remain blind to the potential in his holistic approach for a clash of independently legitimate authorities.

Grotius' distinction between public and private war depends upon a notion of legitimate authority which initially seems to be a source of power which could threaten natural limitations.

> I. —*Division of war into public and private*
>
> I. The first and most essential division of war is that into public war, private war, and mixed war.
>
> A public war is that which is waged by him who has lawful authority to wage it; a private war, that which is waged by one who has not the lawful authority; and a mixed war is that which is on one side public, on the other side private.[182]

Private wars are those for the righting of an injustice between private individuals who do not have recourse to state adjudication. Public war may therefore be "formal" (directed against a sovereign who has acted unjustly) or "less formal" (directed against a private party). The civil power is the power directed to public or general interests, including the termination of private controversies.[183] The "sovereign" he describes as

> [t]hat power . . . whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will.[184]

Although this sounds like a source of authority independent of the natural order, when Grotius seeks to describe who has the authority to wage public war he is not justifying the actions of sovereigns, but describing who within the natural order exercises certain powers. He dismisses the idea that sovereignty is known by the basis of its authority, in the people, or elsewhere. It is known by its conformity to natural law and its position in the natural order.

> Many think that the distinction between sovereign power, and power that is less than sovereign, ought to be made according to the mode of conferring such power, whether by election or by succession. They maintain that that alone is sovereign power which is conferred by succession, that that is not sovereign power which is conferred by election. But surely this cannot be univer-

182. *Id.* at 565–66.
183. *Id.* at 91.
184. *Id.* at 102.

> sally true. For succession is not a title of power, which gives character to the power, but a continuation of a power previously existing.[185]

To Grotius, sovereignty is a type of power within the natural order, not a source of moral force. He finds it so obvious that sovereignty is limited by divine and natural law that he remarks offhandedly in discussing the promises of kings:

> I am not now speaking of the observance of the law of nature and of divine law, or of the law of nations; observance of these is binding upon all kings, even though they have made no promise.[186]

c. Wars of Subjects Against Sovereigns

The conflation of just and public authority results partly from the notion that God is the source of sovereign authority.

> Furthermore there is nothing in the objection, which some may urge, that a guardian, in case he administers his trust badly, can be removed, and that, therefore, the same right ought to hold in the case of a king. In the case of a guardian, who has a superior, such procedure is obviously valid; but in the case of a government, because the series does not extend to infinity, it is absolutely necessary to stop with some person, or assembly, whose sins, because it has no judge superior to it, God takes into special consideration, as He himself bears witness. He either metes out punishment for them, if He deems punishment necessary, or tolerates them, for the chastisement or the testing of a people . . . .
>
> Among the dogmas of the Essenes, Porphyry relates, was this: "The power of governing falls to the lot of no one without the special care of God." Irenaeus very aptly remarks: "Kings, too, receive authority at the bidding of Him at whose bidding men are born; and they are fitted to rule over those who in their time are ruled by them." The same thought appears in the "*Constitutions*" called Clementine: "You will fear the king, knowing that he was chosen by the Lord."[187]

Grotius's entire treatment of the relationship between man and king relies on this notion of the justness of public authority.

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185. *Id.*
186. *Id.* at 113.
187. *Id.* at 121.

> If it had been the purpose of any people to divide the sovereign power with a king, . . . surely such limits ought to have been assigned to the power of each as could easily be discerned from a difference in places, persons, or affairs.
>
> The moral goodness or badness of an action, especially in matters relating to the state, is not suited to a division into parts; such qualities frequently are obscure, and difficult to analyse. In consequence the utmost confusion would prevail in case the king on the one side, and the people on the other, under the pretext that an act is good or bad, should be trying to take cognizance of the same matter, each by virtue of its power. To introduce so complete disorder into its affairs has not, so far as I know, occurred to any people.[188]

As a result, exercises of sovereign authority are legitimate because just, not because the sovereign has given authority. When the sovereign's capacity freely to consent is limited (in cases of unequal alliances, client status, paying a tribute, or feudal bonds) his acts still bind him, for they continue to be his acts, binding as a matter of natural law. This approach to sovereignty, as a description of one source of manifestations of natural justice, is consistent with his sense that sovereigns and individuals are similarly bound by natural law. This has led some commentators to suggest that Grotius had no developed notion of the State.[189] It would be more correct to say that his vision of the sovereign is compatible with his primitive notion of a holistic natural law normative order.

The structure of his first book, then, taken as a whole, is to grant a sense of legitimacy to a wide variety of sovereign conflicts at the start, in sharp contrast to the Spanish scholastics, and then to recapture the natural normative order in his notion of the sovereignty and justice which such a grant automatically entails. Although he develops a theory of war which legitimates sovereign conflict, he combines this with a notion of justice and sovereignty which prevents his vision of a holistic normative order from being upset. This structure is repeated in his work as a whole. The first book, focusing on war, conflict and sovereignty rather than "justice" or "charity" organizes his treatment of the entire subject around a notion of the legitimacy of intersovereign struggle which at first seems incompatible with the holism of primitive scholarship as reflected in the work of Vitoria and Suárez. Grotius recaptures that holism in the notion of justice presented in Book II concerning the causes of war and in the notion of sovereign authority developed in Book III concerning permissable acts during and following war. Where his overall scheme of organization and initial treatment

188. *Id.* at 110–11.
189. *Id.* at 111.

of the concepts of war depart considerably from earlier primitives, particularly the Spanish scholastics, the last two books do not.

4. Just Causes of War and Permissible Acts in and After Battle

The second book considers the just causes of war. Where the first book had been willing to extend the concept of war to hostilities among legitimate sovereigns regardless of their justness, the second book reintroduces the requirement of justice.

> Wars that are undertaken by public authority have, it is true, in some respects a legal effect, as do judicial decisions, . . . but they are not on that account more free from wrong if they are undertaken without cause. Thus Alexander, if he commenced war on the Persians and other peoples without cause, was deservedly called a brigand by the Scythians, according to Curtius, as also by Seneca likewise by Lucan he was styled a robber, and by the sages of India "a man given over to wickedness," while a pirate once put Alexander in the same class with himself. Similarly, Justin tells how two kings of Thrace were deprived of their royal power by Alexander's father, Philip, who exemplified the deceit and wickedness of a brigand. In this connexion belongs the saying of Augustine: "If you take away justice, what are empires if not vast robberies?" In full accord with such expressions is the statement of Lactantius: "Ensnared by the appearance of empty glory, men give to their crimes the name of virtue."[190]

Like the other primitives, Grotius argues that public authority is extinguished when it derogates from natural law. War must be just and the justice of the cause depends upon a natural law system of rights and wrongs, for:

> No other just cause for undertaking war can there be except injury received.[191]

Consequently, the second book is devoted to the rights whose violation would be a just cause for war. This collection of rights, which combine rights of municipal, international, positive and natural law, derive their binding force from the natural order. They define the natural limits on the autonomy of one sovereign which give rise to a power of enforcement in a foreign sovereign. As Grotius describes in his Prolegomena:

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190. *See* Basdevant, *supra* note 7.
191. H. Grotius, *De Jure Belli*, *supra* note 7, at 170.

> The second book, having for its object to set forth all the causes from which war can arise, undertakes to explain fully what things are held in common, what may be owned in severalty; what rights persons have over persons, what obligation arises from ownership; what is the rule governing royal successions; what right is established by a pact or a contract; what is the force of treaties of alliance; what of an oath private or public, and how it is necessary to interpret these; what is due in reparation for damage done; in what the inviolability of ambassadors consists; what law controls the burial of the dead, and what is the nature of punishments.[192]

Where the second book moderates the recognition of sovereign conflict suggested in the first book by elaborating the natural law limits on legitimate public sovereign authority to make war, the third book develops doctrines about what is permissible in war and at peace which reinforce the on-off quality of sovereign authority characteristic of primitive scholarship. Like Gentili, Grotius extends these prerogatives to all legitimate belligerants and hence separates discussions of the practice of war from his discussion in Book II of the just causes of war. Doctrines about princely prerogative during and following a war are elaborations of his notion of an exclusive and absolute public authority which expresses natural justice. Doctrines about just causes of war on the other hand are elaborations of a natural justice which implicitly limit sovereign power.

In the third book, Grotius indicates that, regardless of the justness of the cause, a sovereign may take revenge up to the limits of natural law in a war declared by a public authority. Although he has reversed Vitoria's approach, in which the elaboration of Christian virtues limited the acts permissable in war, Grotius retains the notion that the limits which do exist are those of natural law, like those which govern the justness of the cause.

> Least of all should that be admitted which some people imagine, that in war all laws are in abeyance. On the contrary war ought not to be undertaken except for the enforcement of rights when once undertaken, it should be carried on only within the bounds of law and good faith. Demosthenes well said that war is directed against those who cannot be held in check by judicial processes. For judgements are efficacious against those who feel that they are too weak to resist; against those who are equally strong, or think that they are, wars are undertaken. But in order that wars may be justified, they must be carried on with not less scrupulousness than judicial processes are wont to be.

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192. *Id.*

> Let the laws be silent, then, in the midst of arms, but only the laws of the State, those that the courts are concerned with.[193]

D. Grotian Doctrine and Positivism

Grotius is interesting not because he abandoned primitivism and "founded" an international legal scholarship which placed the sovereign at center stage. His texts are interesting because they reverse the emphasis, both theoretical and doctrinal, of Vitoria, Suárez, and to a certain extent, Gentili, *without* abandoning the primitive lexicon. The doctrinal two-thirds (Books II and III) of the Grotian treatise, like the doctrinal discussion of Gentili, Suárez, or Vitoria, proceeds without awareness of the possibility of logical clash between autonomous authorities. Yet Grotius' doctrinal solutions differ on occasion from those of his predecessors despite his reliance on a similar mediating structure. For example, Grotius believed that treaties, unlike private contracts, bind successor sovereigns because, as expressions of public authority, they declare conditions of justice. Other primitives felt that the act of succession, by extinguishing the public sovereignty of one party, ended the obligations undertaken. Such obligations no longer expressed natural justice, the defeated state having been shown to be unjust. To Grotius, however, a sovereign is bound, not by his own promise to a private person, that being incompatible with his sovereignty, but by his oath as required by God.[194]

The potential for contradiction within the primitive system is demonstrated by Grotius' analysis of ambassadorial immunity. Grotius considers ambassadors, as public sovereign figures, to be legally outside the authority of their host state, subject only to natural law. This means that they are exempt from the domestic criminal jurisdiction of the host state since, as public authorities, they are bound only by natural law. They are, however, bound by civil jurisdiction, for that regulates their private, nonsovereign affairs.

Gentili elaborated the same premise to reach the opposite conclusion. To Gentili, the criminal jurisdiction of the host state expresses natural law and therefore binds the ambassador, while the civil jurisdiction does not. Despite the effectiveness of the primitive techniques for avoiding awareness of the conflict between public sovereignties posed by the presence of an ambassador in the territory of another, this clash can be seen by placing the doctrinal systems of the primitives side by side. The growing difficulty of deriving determinate content for the principles of natural reason was demonstrated by John Seldon's

193. *Id.* at 21.
194. *Id.* at 18.

refutation of Grotius' defense of freedom of the seas in *Mare Clausum* (1635) which developed the opening principles of Grotius's *Mare Liberum* (1609) into a theory of sovereignty over the oceans.[195]

The changing relationship among textual mechanisms employed in the works of Vitoria and Suárez on the one hand and in those of Gentili and Grotius on the other is significant reveals the ambiguity within the core of the primitive approach to the treatment of sovereign conflict within a holistic normative order.[196] Historians aware of these contradictions, however, misunderstand the primitive scholarship if they imagine that it was incomplete or confused in some sense.[197] That primitive scholarship remained blind to these contradictions and methodologically unselfconscious is a tribute to the coherence of its system of textual denial which structured the organization of issues to be addressed as well as the doctrinal and theoretical content of primitive scholarship.

VI. CONCLUSION

In this article, I have argued thst primitive international legal scholarship is unique, special, coherent and complete, but that the importance individual writers ascribe to the characteristic assumptions, methodologies and doctrinal mechanisms within the common primitive lexicon varies. To the contemporary reader, primitive scholars seem to have responded to questions and issues familiar to traditional and modern scholars alike. As a result, we think that they took part in the discipline of international legal scholarship, even if their consciousness about it differed radically from that of their immediate successors. Reading these texts into the tradition, however, tempts us to misunderstand them and leaves us surprised by their coherence.

The unselfconscious tone and apparently unsystematic methodology of primitive texts appears quaint when compared to the rigorous analytic debate which divided the discipline for two centuries after the Westphalian settlement. We find the primitives' evident faith in a universal moral order hopelessly dated—even our nostalgia seems

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195. *Id.* at 383. *See also* J. Bodin, *Six Livres de la République* (Lyon 1576). Jean Bodin is credited with the development of a concept of national sovereignty in the early seventeenth century. On Bodin, see Gardot, *Jean Bodin, Sa Place Parmi les Fondateurs de Droit International*, 50 RECUEIL DES COURS 549 (1934).

196. J. Selden, *Mare Clausum: Seu de Dominio Maris* (London 1635).

197. *See supra* note 155 & accompanying text. As noted there, various historians have seen the tension in the Grotian texts, but have interpreted it as "synthesis." *See* A. NUSSBAUM, *supra* note 1, at 107; Onuf, *supra* note 1, at 252 ("Standing halfway between the concepts of divine order and international anarchy was Grotius, who found in reason the way to loosen the link between the two orders while retaining the mundane order in its own right.").

unable to recapture a universalism which is not defined by its opposition to the realms of national law and politics. At best we seem able to assimilate the primitive mind to our naturalist and positivist predecessors, for we take the distinctions of legal and moral, natural and positive, municipal and international norms for granted as surely as the primitive did their conflation. Finally, the primitive reminds us of the traditional scholar, for both worry too much, albeit for different reasons, about doctrinal distinctions between public and private or just and unjust.

Reading the work of primitive scholars to highlight their participation in a coherent pre-traditional lexicon places them in opposition to the modern discipline of international law. This opposition results not only from their actual differences in doctrine and method, but more importantly from their ability to place the claims of our own lexicon in sharp relief. The primitive scholar, even while acquiescing in the integration of his work to our discipline, challenges our self-assurance and our claim to have identified in inter-sovereign conflict a problem of transcendent historical importance. His very methodological complacency mocks our more ponderous eclecticism. Here are scholars who simply do not make the sorts of distinctions which the modern feels compelled to disown and deny.

As the coherence of the primitive lexicon parodies our eclectic confidence, so the diversity of primitive texts mocks the pretenses of our progress. Primitives elaborated a coherent vision of authority in radically diverse theoretical and doctrinal texts. Some defined the consequences of justice for sovereignty. Others described the problems of sovereignty in a world of justice and injustice. In broad emphasis and doctrinal detail, primitive scholars developed texts which were dramatically inconsistent, thereby tempting us to underrate the coherence of primitive consciousness, situating each scholar as originating a particular doctrine or theory of the traditional era.

Indeed, this inconsistency may have been responsible in part for a self-conscious preoccupation with consistency that became the accepted hallmark of scholarly credibility in the field of international law. As scholars "identified" the distinctiveness of law and morality, natural and positive international law in the ruins of primitivism, they sought methods and doctrines that might resolve what became the riddle of simultaneous sovereign autonomy and cooperation. Naturalism and positivism, public and private, form and substance, act and intention, inter-sovereign and intra-sovereign: the list of traditional rhetorical mechanisms responding to the dilemmas of a sovereign-centered normative universe is familiar. As the problem of intersovereign conflict came to seem unsusceptible to primitive holism, two broad strategies

of denial emerged: naturalism, as represented by Samuel Pufendorf, and positivism, as formulated by Richard Zouche. Samuel Rachel opened a breach between these two positions, thus introducing methodological self-consciousness about the two.

Traditional scholarship can be seen as a new response to international life. Rather than assuming social order, it allows for disorder and conflict. It sprang from the ruins of primitive scholarship—ruins stemming from the fragile tensions of Grotius and his difficulty in maintaining the assumption of social order which his primitive mode of discourse demands. The traditional scholarship which resulted survived until the early part of the 20th century when its vocabulary and vision likewise became unable to obscure the tension between social order and sovereign autonomy.

It is difficult to speculate about the causes of the shift from primitivism. The general scheme of Suárez, Vitoria, Gentili and Grotius had become unsatisfactory for various reasons. On the one hand, their holistic language did not seem able to remain compatible with the political diversification which followed the religious wars of the 16th and early 17th century. The rise of nationalism over the next two centuries may have driven scholars from the rhetoric of holism in international law. On the other hand, the primitive system itself seemed to have become conceptually incoherent. The primitive denial relied upon two assumptions which both reinforced and contradicted each other, namely, their conceptual sense of a holistic normative order and their absolute sense of the boundaries of sovereign authority which could be equated with the limits of the holistic order. As we have seen, these two strands reinforced each other in the work of each primitive scholar. But they were related in incompatible ways. In one view, a holistic order limits sovereign autonomy automatically by equating "public" and "just." This approach, used by Suárez and Vitoria, deemphasizes the boundaries of jurisdiction and authority. Gentili and Grotius, on the other hand, mediated the potential conflict of autonomies or of autonomy and respect by emphasizing these boundaries. In this way, holism could be protected, for it consisted of that which the boundaries defined as shared.

This violent shift between the two primitive schools had doctrinal consequences. Once these two approaches to the relationship between the two strands of primitive mediation had been elaborated it became more difficult to ignore the conflict between them. In this sense, the abandonment of primitive scholarship may have resulted from its internal disintegration as much as from its inability to assimilate developing trends towards international political decentralization.

But the primitive texts do not allow for any complacency about our progress over their inconsistency. They are too subtly coherent and

too little concerned with consistency as such. The works of Vitoria, Suárez, Gentili and Grotius relied on a vision no less complete or contradictory as that of the traditionals and moderns. It was just different. This difference winks at the modern as he struggles to weave a coherent normative fabric from doctrinal and theoretical yarn he has made it his business to unravel.