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# VITORIA'S UNIVERSALISM AND THE WORLD RULE OF LAW<sup>†</sup>

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TWO CLUSTERS OF MEANING now attach to the term, "the world rule of law." One may use the expression to indicate the concern and the movement which had its origin in the work of *The International Commission of Jurists*.<sup>1</sup> In this sense, the movement aims to promote the recognition of each person's right to full and equal treatment under law in his own country and within that country's boundaries. The correction of legal disqualifications is the explicit purpose of this movement. A second, and older, aim is indicated by the same phrase, and turns upon the creation or improvement of a juridical order among nations. To some extent, all movements for some type of "world organization" belong to the second sense of the term.<sup>2</sup>

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<sup>†</sup>This essay is an extension of remarks made in a luncheon address before members of the Saint Thomas More Society on the occasion of its meeting in Saint Louis, Missouri, on December 29, 1959.

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<sup>1</sup> The specialized mission of the International Commission of Jurists is evident in their publications. See BULL. INT'L COMM'N OF JURISTS No. 7 (1957). "[O]n the whole lawyers who are concerned to defend the Rule of Law think in terms of national systems of law rather than in terms of international law. But in fact the struggle for human rights is necessarily conducted simultaneously on two levels. . . ." *Id.* at 3.

<sup>2</sup> See VON SCHUSCHNIGG, INTERNATIONAL LAW 335-423 (1959) for a recent survey of various plans for "world organization."

With the first meaning, this paper will not deal except tangentially. So far as the second is concerned, an effort will be made to show that the theologico-philosophical legal theory of Francisco de Vitoria has much to suggest to all who are interested in re-conceiving and rebuilding the structure of international law.<sup>3</sup> Implied, of course, is the notion that however old or however embryonic the Vitorian position may be, it may still serve as a sharp knife to cut through the historical and legal jungle of the past four hundred years.

The wheel of history is a cruel laboratory. In it are worked out the harshest implications of once proud ideas. What the human intelligence cannot foresee at the birth of a system of thought becomes clear as time involves human beings, their welfare, and their sorrow. And so it is with political and legal thinking. The stretch of centuries makes clearer than any speculation the primal truth of international jurisprudence as we have known it. A review of Vitoria's thought will lend proof to these generalizations.

With respect to our problem, it may be well to remember that writers as profoundly schooled in political and legal history as the Brothers Carlyle took time to point out that much of modern legal thought is an imitation and representative of some of the worst features of antecedent theory. In particular, they direct attention to concepts of law, law-making, and of sovereignty. As

a matter of fact, they have little admiration for the reflections of Hobbes.<sup>4</sup> And when it is recalled that much Anglo-American jurisprudence derives from Austin, the importance of their observation takes on additional significance. Austin explicitly looked to Hobbes, Locke, and Paley<sup>5</sup> for much of his inspiration. At least on a practical level, a great deal of thinking about international law stems from the kind of mentality which Austin represented.

Most of the fundamental problems associated with the general question of international society and international law have been high lighted for the American public by the recent effort of the Eisenhower administration to secure repeal of the Connally Amendment.<sup>6</sup> As late as December of last year (1959), the President emphasized his own position when he stated that "the time has come for mankind to make the role of law in international affairs as normal as it is now in domestic affairs." Still stressing his affirmative stand, he remarked that "one foundation stone in this structure is the International Court of Justice," and he pointed out that a world

<sup>3</sup> Vitoria was a Spanish Dominican who spent the most fruitful period of his life as a professor of theology at the University of Salamanca. It is well known that many consider him as one of the founders, if not the founder, of international law. He was born in 1483 (?) and died in 1546. For selections from his works, see CLASSICS OF INTERNATIONAL LAW No. 7 (Carnegie Endowment, 1917).

<sup>4</sup> 6 CARLYLE & CARLYLE, A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST (1936): "We have seen in earlier volumes that the political principles of the Middle Ages were clear and intelligible. . . . It is very different when we come to some of the political ideas of the seventeenth century; it is difficult to say which seems to us most irrational: the absurdity of the theory of the divine right of the monarch, or the absurdity of the theory of the absolute sovereignty of the State as represented by Hobbes." *Id.* at 1.

<sup>5</sup> See Hart, *Introduction to AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED* xvi-xvii (1954).

<sup>6</sup> The Connally Amendment provides that matters which are essentially within the domestic jurisdiction of the United States shall be "determined by the United States." See *United States Declaration of Aug. 16, 1946*, 15 DEP'T STATE BULL. 452 (1946).

body of law must embody "the finest traditions of all the great legal systems of the world."<sup>7</sup>

By now, of course, all effort to repeal the Amendment has been lost, at least for the current session of Congress. But the discussion which has surrounded the effort referred to reveals how deep (and how dangerous) is the sentiment regarding any full-fledged entry of the United States into a universal juridical order.

Negative discussion has called the President's policy an "effort at legal disarmament," and a "sellout to Communism." It is, say the protagonists of this view, "a dangerous time for internationalism." In effect, this camp sticks fast to the notion that the United States cannot and must not "abdicate her sovereignty." More sober opinion has insisted that the United States (or any other state) has protection enough in the Charter of the Court. This latter group has pointed out that the American reservation, as represented in the Connally Amendment, has given the world "bad example." In effect, they claim, the American government has agreed to accept the jurisdiction of the Court, but has nullified its own consent. In so doing, example and precedent have led other countries to do the same thing.

Aside from the prudential aspects of this question, it must be noted that whole batteries of assumptions underlie both sides of the discussion. It appears, in fact, that these assumptions are those which challenge the potential structure of any conception or plan for a "world rule of law."

If one were to assume for a moment that

a non-professional (or non-legal) mind were completely conversant with international law during the period from its rise to the present day, he would find that virtually every aspect of this legal system, as we know it, would be declared open for questioning. This hypothetical "public member" would challenge the term itself. What philosophical and legal value does the principle of nationality have? One that is factual or sociological? Is its value anything more than this? Again, in what sense is international law called "law"? From writings of jurists, one would see that an effort is made to restrict the term merely to man-made or positive law. Worse still, it appears that "law-making" rides along on the analogy of municipal law as it is known in the modern world.<sup>8</sup>

At bottom, it would appear to the "public member" that international law is being victimized by its history and by the mentality which has provided the intellectual environment of its rise and growth. If the fundamental assumption of the "family of nations" is the principle of nationality, then little can be done to create a legal system which transcends this principle. If "law-making" coincides in meaning with legislative law, then it is nothing short of miraculous that there is anything like international law at all. When "law" is restricted to positive law and to this alone, a farewell is said to anything but a juridical structure which ignores the most necessary elements of its purpose: human persons, man-as-found, and inter-personal relationships.

In short, international law as we know it has grown up in a period when state-

<sup>7</sup> These brief quotations from President Eisenhower are taken from various press dispatches, all dating from December, 1959.

<sup>8</sup> See FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 44-45 (1937) for some pertinent remarks on the matter of non-legislative law.

craft is based on national interest (in a very narrow sense), when law has become simply and solely positive law. One may point, of course, to the contributions which "natural law" has allegedly made, but much of this natural law has been vitiated by a voluntarism which rests upon an epistemological theory separated from objective principles. This combination of themes has become manifest in theories of legal sovereignty which view sovereignty, itself, as a kind of subjective attribute of a person, or a body of persons, or of a state. Implied in this view is the further assumption that law-making is a subjective right of the same person, groups of persons, or a state. So conceived, legislation means only one kind of legislation. Inherent in this notion is the further idea that there is necessarily a superior-subject relationship involved in law. Since this is the case, one would find it impossible to have a view where a "sovereign power" could be anything else but supreme. "Supreme power limited by positive law," as Austin said, "is a flat contradiction in terms."<sup>9</sup>

It will be the business of this paper to challenge many of the fundamental suppositions inherent in the historical mentality within which international law has grown up and on which it now depends. This challenge will take the form of an examination of a set of Vitorian themes. These may be stated as follows:

1. Each individual member of the human race is so constituted that he has basic needs and fundamental capacities. None of these may be satisfied or met except within the fellowship of other men.<sup>10</sup>

2. In the sense indicated, each person is not only competent for and inclined to-

ward societal living, but, since he and his fellows are existent, he is, *de facto*, a member of society.

3. Since this society is made up of persons (members) who are so constituted and who really exist, there obtains between and among these persons a complex set of real relationships, which are not brought into being by legislation or any affirmative act of human construction whatever.

4. All existing persons are, ipso facto, members of this society, and their membership is inveterate and unchangeable.

5. Mankind, however, is not, by itself, sufficient for all purposes of human existence. An organized grouping must take place, and both the grouping and the organization are justified, functionally, by the same human purposes which men are expected to achieve in their primitive relationship with other men.

6. In effect, the "state" is necessary in the same sense that human fellowship and participation (consortium) is, except that it fulfills purposes which man alone or mankind simply as an existent society cannot fulfill.<sup>10</sup>

7. In point of fact, however, what one finds in the world is not the "state" as such. What one finds is a plurality or a multiplicity of states.

8. Admittedly, each individual state has its own functional role to fulfill. Yet, this function or purpose is not isolated from the good or the welfare of human society itself. If this is so, then the good of each individual state and of all its members are,

<sup>9</sup> AUSTIN, *op. cit. supra* note 5, at 254.

<sup>10</sup> It is difficult to convey an exact meaning for the word consortium. Basically, it has the notion of a common sharing of fate, destiny, or condition. The word can mean many things: fellowship, mutual commerce between and among persons, a living together. Every meaning conveys the idea of a mutual sharing.

in some ways, subordinated to the good of the whole human race.

9. If these major theses are true, then one is in the presence of a situation where human society as such is interrelated and, even, organic. The power and the rights of individual states are related and subordinate to the functional role of human society as a whole. And just as the necessary governmental structure of a state serves as the organ for securing that state's own good, so in like manner, the "family of states" serve and must serve the same role for all of mankind.<sup>11</sup>

10. If these general theorems are admitted, a role may be found for a *jus gentium* which will be the law of mankind. It will be a positive law, but brought into being by the consent of the greater part of the human race (expressed, ordinarily, through its organs).

This list of themes will appear to be quite formidable, as indeed it is. Patience will be required, as well as an effort to keep Vitorian terms from sliding easily into categories of thought with which we have become all too familiar.<sup>12</sup>

### The Universal Society of Mankind

The starting point of any fresh look at Vitoria's thought must be his early work

<sup>11</sup> For many suggestions on the organic nature of the state, I am indebted to the section on Vitoria in DELOS, LA SOCIETE INTERNATIONALE ET LES PRINCIPES DU DROIT (Paris, 1929).

<sup>12</sup> In general, I do not intend to burden this essay with extensive notes. Brief citations will refer the reader to various places in Vitoria's works. The interested student will find authoritative treatments of Vitoria's thought in CASASSA, THE POLITICAL THOUGHT OF FRANCISCO DE VITORIA (1946) (unpublished doctoral dissertation in University of Toronto Library); DELOS, LA SOCIETE INTERNATIONALE ET LES PRINCIPES DU DROIT (1929); SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW (1934).

*On the Civil Power (De potestate civili)*.<sup>13</sup> Here he is not occupied primarily with any philosophical theory of the state as such. He is interested in the public and private power (*potestas*) by which a state governs itself. As did practically every man of his time, Vitoria takes the position that the nature and kind of power must be derived from an examination of the purpose which the power in question is expected to subserve. In effect, then, Vitoria first approaches his topic from the point of view of finality, a notion which he breaks down into the subsidiary ideas of utility and usefulness.<sup>14</sup>

So posed, the Spaniard's problem then becomes: which are the purposes or what is the purpose because of which the civil power exists at all? What necessity does it serve? To reply to these generic questions, he proceeds to move his thought through four steps or moments: (a) a statement of the natural condition of all animal existence, except man; (b) an examination of the natural and inveterate condition of humankind; (c) the need which each person has of the fellowship of other human beings; (d) the conclusion that from the considerations at hand, there is a society which exists among all human beings.<sup>15</sup>

Men in particular and mankind in general are superior to all other animals. This superiority arises because of man's reason,

<sup>13</sup> *On the Civil Power (De potestate civili)* in II GETINO, RELECCIONES TEOLÓGICAS DEL MAESTRO FRAY FRANCISCO DE VITORIA 169-210 (Madrid, 1933) (edición crítica y versión castellana) [hereinafter cited as GETINO]. All textual references will be given to this edition.

<sup>14</sup> See GETINO 175-79 for Vitoria's treatment of finality in relation to the civil power.

<sup>15</sup> The reader will recognize here the familiar general movement of the Aristotelian theory of the basis of the Greek city-state.

wisdom, and power of speech. Yet, despite this evidence of superiority, man has been denied many things which nature and Providence have conceded to the beast.

The animals have natural means of safety and protection; natural coverings to ward off frost and cold; natural armor to forestall and prevent attack by their ferocious competitors. In one sense, the animal has a natural community with others of his kind. But first and foremost, the animal is self-sufficient and an aid to himself.

Man, on the other hand, is completely different. He alone is fragile, weak, needy, ill, destitute of help, bare, and possesses a life filled with miseries. Men are not wanderers; neither can they live in solitude. If they do, they do so at their peril. The imperatives of bare necessity would appear to counsel that men, so similarly situated, should band together into some form of community experience. This tentative conclusion is further re-enforced by recalling that man, though possessed of intelligence, is not competent to know what is necessary for his well-being. He needs both instruction and experience. Man's power of speech is the vehicle of both and can be exercised only in the fellowship of other men. Furthermore, the human intelligence itself cannot be developed in solitude or in a vagrant life. Even granting that it could and that the highest quality of intelligence, wisdom, could be gained by man alone, this perfection would be unpleasing and unsociable.

It was, remarks Vitoria, for all these reasons that Aristotle had said that man is naturally civil, inclined to and competent for societal living (*sociabilis*). But still other considerations may and must be brought to bear upon any examination of the condition of mankind. Man's will is perfected

when it attains justice and friendship. Neither of these could be achieved outside of the *consortium* of other men. Human virtue, itself, develops only in a climate of friendship. Hence, where there is no communication of man with man, human life perishes. And if it did not die, it would not and could not develop.

If now one pauses to reflect on the thread of Vitoria's argument, he will note that the discussion is carried on at several levels of inquiry. Vitoria first compares two sets of stubborn facts: the natural condition of animals and men, and the needs and capacities of mankind. His survey takes into account what may be necessary to preserve and guarantee the bare existence of human beings, and proceeds to take account of what may be necessary for the exercise of powers which are native and specific to human beings as such. At each level, he finds that neither existence nor perfection can take place except in *consortium* with others of his kind. In effect, neither a wandering life nor a solitary existence is conducive to man's welfare.

The line of discourse so far examined leads to the conclusion that individual men and mankind taken as a whole have the need, capacity, and inclination to band together. By their condition, by their competencies, and by their nature, men are capable of entering into the fellowship of others. Given, further, the necessity each one has of preserving himself and perfecting himself, it is necessary to seek the most primitive means at hand to accomplish these fundamental purposes.

Again, it should be noticed that Vitoria's argument implies that men really exist.<sup>16</sup>

<sup>16</sup> This paragraph represents an interpretation of Vitoria's thought which I believe to be implicit in the text.

They are actual. Since this fact is present and ineluctable, a transposition takes place in the meaning of his discourse. Given the need and given the capacity, the fact of real existence brings into existence also a multiple set of real relationships between every living human being. Each man is related to others insofar as his existence is concerned. They and they alone can assist him in preserving it. The store of human knowledge and experience which other men possess is related to man's intelligence and his need to know. And the bare fact that other men exist in the company of their kind provides an objective situation wherein the development of human intelligence and human virtue can occur.

These relationships are real in the sense that no mind constructs them. They are given precisely as real owing to the capacities and the fact of existing persons.

Since this is so, there appears before us the spectacle of a rudimentary society of mankind which is brought into existence owing to objective facts. No agreement has occurred; no legislation has taken place; no consent has been given or received. The basic ingredients of society are there, and need only be brought to the point of exercise for further developments to take place.<sup>17</sup>

### The Function and Meaning of Public Power

Some time has been spent in developing the preceding section in order to emphasize Vitoria's view that there *is* a universal *society* of mankind. Yet, his own preoccupa-

tion with the evidence adduced was to arrive at a point where he could deal with the meaning and legitimacy of the public power of the state.<sup>18</sup>

Granted that a battery of human needs and capacities exist, he proceeds to consider how the state itself is justified. This justification Vitoria finds quite easily in the fact that the human race cannot, if left in a kind of embryonic form of society, preserve and protect itself. Complete security cannot always be had by the individual or, even, by the family unit.<sup>19</sup> Assuming, then, that the composite end can be achieved only in a stable, organized group, it is necessarily concluded that "the state" is needed for the attainment of specific human ends.

The purposes enumerated justify the formation of the state. Indeed, they make it necessary. Since the primitive condition of men and of mankind is the result of man's nature and capacities, and since these in turn are the result of the work of nature, it must be concluded that the "state" is naturally necessary. Viewing the logic of Vitoria's doctrine at this point from a dynamic outlook, one may conclude that the formation of the state represents an obligation upon the human race as such and upon each person individually. In this case, the obligation arises for the state as

<sup>18</sup> Our word "state" does not really translate Vitoria's usual term for the civil-political community, *respublica*. The latter for him would mean any community whether independent or dependent, perfect or imperfect. "Public power" is defined as "the moral faculty, authority, or right to govern a civil state." See GETINO 189.

<sup>19</sup> In his purely political writings, Vitoria does not appear to make much of the position of the family. *But see Matrimony*, in GETINO, where he cites with approval the statement of Aristotle that man is a "conjugal animal" before he is a political animal.

<sup>17</sup> It will be noted that the general situation described above obtains everywhere and among all men whatever. In this sense, the fellowship of man with man, human consortium as such, is absolutely universal. It is also real in the sense described.



a means to an end.

Passing now from this step, Vitoria discusses further the need which any state has of central administration and direction.<sup>20</sup> Since, obviously, each such state would consist of individual persons, it would ordinarily happen that each one would seek his own good or his own interest. If, by hypothesis, every person in the state were to do this, there would be no one at all who would continuously see to the common purpose or good of the organized community.

Clearly, such a situation would make the state totally ineffective and would even negate the very idea of an organized community. Since, then, the state is needed for the attainment of certain human ends otherwise unattainable, and since the state by definition is an organized human group, it possesses of itself the power to govern and administer itself in view of the ends which are at once its cause and justification.

Again, assuming a dynamic point of view, it must be remembered that the power of the state (however made concrete) will have to deal with human beings, all of whom are possessed of intelligence and will, each having his own private ideas and his personal power of choice. It is these human beings who privately and in common are to be directed toward securing the purposes which called the state into existence in the first place. For these reasons, public power cannot remain simple physical compulsion, though this may be involved. It must mean, essentially, an act of direction toward a goal. Implied in this notion is the further idea that public power

must represent a moral power which is sufficient to compel the adherence of human beings. Public power, for Vitoria, is not solely a physical force (though this is included); it is an active capacity which can direct, manage, and administer the community with a view to the community's fundamental purposes.

Public power, in this sense, is a property of the human community as organized into a state. It does not come from "outside" so to speak. It is not the personal and subjective attribute of any individual person or group of persons. Further, this power exists and is justified solely for certain purposes, all of which may be inferred from the human need of community living and from the necessary characteristics of the bare idea of an organized society of human beings who are organized to achieve human purposes.

The "locus" of public power is, therefore, the state itself.<sup>21</sup> It belongs to all the members precisely because they are organized, and only in so far as they are organized. Or, to be yet more exact, public power inheres in the human community in so far as it is organized to obtain the common good of the community as such. Looking at the situation this way, one tends naturally to think of the next step which would be the relationship and place of forms of government or the person or persons who head the state.

<sup>20</sup> Vitoria treats the question of the origin of public power and its locus in GETINO 179, 181-82, 185.

<sup>21</sup> It may be noted that the "place" where the civil power resides is discussed under the heading of the material cause of the state. "The material cause wherein this power [*i.e.*, the public power] resides by the natural and divine law is the state itself. For to it naturally belongs the prerogative of governing itself, administering itself, and directing all its powers to the common good. *On the Civil Power* in GETINO 181-82 (transl. by the author).

In Vitoria's time, of course, he was most familiar with monarchical forms and with dynasties which had obtained their position by the exercise of hereditary rights, war, marriage, etc. He was acquainted, too, with republican forms of government, such as obtained in the Venice of his time. One cannot help noting, however, that forms of government did not represent any specialized problem for him. All that were legitimate held and exercised the public power of their respective states.

Fundamentally, then, the problem of a community's choice of a form of government and the selection of the governing persons is self-identical irrespective of form. Later political theory saw this question as one of the delegation, translation of power and authority, or designation. Vitoria's handling of it deserves special attention.

Public power, as we observed, is a property of the state as such. It resides in the state. In a sense, it is totally immanent, since this power is possessed by the community as a community for the attainment of the community's indigenous purpose. In quite another sense, public power transcends the community, because the community exists for the sole purpose of obtaining personal, human goods of individual human beings. Now, no single individual possesses this public or community power in his own right. There is no evidence that he does or can. He does not possess it as a native right before entering into the community or apart therefrom. Hence, there is no reason to suppose that a prescribed individual would obtain it as a subjective right merely because he enters into or belongs to the community. Furthermore, each individual person possesses the right of legitimate self-defense. This right

would preclude anyone's obtaining public power in a lawful way by force. By inference, then, it is held by Vitoria that the consent of the community is necessary for the constitution of public power in a specified form or in a specific person (or groups of persons).<sup>22</sup>

Vitoria's language, at this point, implies that the community as a whole "commits" its power to a particular kind of government or to a particular person. A ruler is "created" by the community.<sup>23</sup> In other words, when one arrives at the point where he questions the exercise of the inherent power of the community, Vitoria states that the community commits the authority to exercise its power to a government. This "commitment" or "commission" is not a delegation so much as the creation of an organ for the exercise of power. The community delegates its *authority* to the government. Once this delegation has taken place, the government possesses the authority of the state, and through this authority may be said to possess the power itself. Since, however, the power of the state is natural in its end and origin, it is of God. And for this reason, it may be said that the power of a government (for example, a king) is from God, and that the government is the representative of God.

Two important notes may be added to this section. First, Vitoria holds that the king is subject to the laws of the state even though he, himself, stands in the position of approving them. It appears to him unthinkable that he should not be, since he — like all others — is a member of the state.<sup>24</sup>

<sup>22</sup> GETINO 182.

<sup>23</sup> GETINO 187.

<sup>24</sup> For a more extended treatment of the ruler as as member of the state, see text accompanying note 35 *infra*.

Second, every person in the state retains the right to choose the form of government desired and the person desired, and this right may be exercised by the greater part (*major pars*) of the community.<sup>25</sup>

Vitoria's majoritarian principle is important not only for the use made of it within the state, but, as shall be noted later, within the world community. In his eyes, the common good of the state must be seen to in a consistent, orderly way. This need implies that a political principle must be at hand to resolve differences which may exist. Since this is so, he argues that the "greater part" should prevail over the "lesser part." It is impractical to assume that all persons in a given community will agree on everything. Hence, it is necessary — given the need for preserving and forwarding the common good — that the many should triumph over the few. Or, in any case, why hold that a smaller number is more necessary for the adoption of a public measure than a larger number?

In effect, then, the Vitorian state is an institution, the necessity of which is justified by the common necessities of mankind. Its function is to subserve common ends. In structure, it will be composed of persons (members or citizens) and a government. Its power is institutional in the sense that the community as such possesses it. A specific form of government is chosen by the members. This choice amounts to a "commission" of authority to exercise the public

power. Hence, government is an organ of the state. A king, though chosen by a majority, is king of the whole community, and not simply of those who chose him. In functioning, the ruler or government acts for the state, and his single purpose is the administration and direction of the community and of all powers within the community to the common good.

### The Fact and Origin of a Multiplicity of States

It must be emphasized that "the state," as Vitoria discusses it, nowhere exists. Or rather, it existed in a multiple form. There was a plurality of states, some of them independent, some of them dependent on others. With this fact, we have now to deal.

At the outset, one may notice that Vitoria dismissed any possible pretensions of the Holy Roman Emperor as "lord of the world." This position was not Vitoria's alone; it may be found in most theological writers of the century. With this emotional and political myth dispelled, he is free to come to terms with the political organization of Europe as he knew it.

Throughout his writings, there are three types of questions discussed, all of which show his final appraisal of the validity of the multiple system of states. First, in his examination of the questions of war, he is called upon to say which European states have the right to carry on offensive warfare. Second, his confrontation with the moral question of Spanish rights in the New World brings to bear his judgment upon the relationship of European governments and peoples with the "barbaric" peoples and governments of the newly discovered Americas. Third, now and again in his writing, he expresses his attitude toward the "infidels," that is, all of those peoples labelled in his

<sup>25</sup> It does not appear that Vitoria looked upon the "greater part" (*major pars*) as anything more than a numerically greater part of any given group. There is no hint that it is the "better" part. See CASASSA, *THE POLITICAL THOUGHT OF FRANCISCO DE VITORIA* 115-16 (1946) (unpublished doctoral dissertation in University of Toronto Library).

time as Saracens or Mohammedans. These cases may be examined singly.

When discussing warfare, Vitoria holds, along with most of his contemporaries, that only the head of a perfect and independent society may justly declare and carry on offensive warfare.<sup>26</sup> This right he would concede without cavil to his native Spain, to France, the Holy Roman Empire, England, Portugal, the Republic of Venice, and to certain independent Italian communes, such as Ferrara. With respect, however, to the same general question, he would in ordinary circumstances deny this right to dependent states, etc., like Flanders, the Duchy of Alba, etc. Yet, in grave necessity (when serious danger exists and if the lord of these subordinate states is delinquent), Vitoria would not and did not hesitate to say that even these "imperfect" communities could and should undertake offensive war.<sup>27</sup> And the reason he gives is that their subjection to other princes is the result of some positive law or due to the *jus gentium*. In other words, the vassal states retain a right which positive law cannot take away.

So far, then, as this point is concerned, we may conclude that every organized community of Vitoria's time possessed in some measure or other the character, powers, and prerogatives of "the state."

When we pass to an examination of the Spanish question, an entirely different problem is raised. Though the Spaniards had "discovered" the Americas in 1492 and through the ensuing years had conquered native rulers, such as the princes of Mexico and Peru, the moral protests against the activity of the Spanish State had not died down

even by Vitoria's time. For his part, Vitoria was to carry on one of the most celebrated protests against it.<sup>28</sup>

He viewed the situation in moral terms, as he explicitly says. But it is important to notice briefly the general framework within which the controversy was carried on. On the one side was a highly civilized people organized under a capable and efficient government. On the other was a conglomeration of native peoples and races, organized in varying degrees of political efficiency and sophistication. Furthermore, the "Indians" were infidels. Much was made in the controversy of all the elements in this picture.

Thus, it was said that the native did not and could not own property; or it was claimed that, owing to their lack of development, they were natural slaves. Again, the argument was advanced that their unbelief meant that they could neither own property nor possess legitimate political power. Finally, some of the protagonists of the Spanish cause argued that for humanitarian reasons the barbarians should be brought under the hegemony of a civilized power, by arms if necessary.

To all of these arguments, Vitoria replied with a stern and unrelenting denial. Irrespective of faith, spiritual condition, or degree of civilization, the natives were true owners of their possessions and their princes were legitimate rulers. He dismissed the Spanish claims as immoral, erroneous, or mere subterfuges.<sup>29</sup> By so doing, Vitoria

<sup>28</sup> The Spanish Dominican wrote two famous works on the "Indies" question: (1) *First Relection on the Indians (De Indis)*, and (2) *On the Right of War (De jure belli Hispanorum in barbaros)*. It is these two treatises which are translated in CLASSICS OF INTERNATIONAL LAW No. 7 (Carnegie Endowment, 1917). Both are contained in GETINO.

<sup>29</sup> See *On the Indians (De Indis)* in GETINO 311-54, for a discussion of illegitimate titles for Spanish claims.

<sup>26</sup> See *On the Right of War (De jure belli)* in GETINO 394 *et. seq.*

<sup>27</sup> See GETINO 396-97, where Vitoria discusses the right of the vassal states.

established the important point that non-European and non-Christian peoples may be true owners of property and may enjoy a valid political organization. His stand meant, in short, that the possessions and political power of the natives had been unjustly and unlawfully expropriated by the Spanish.

Still in connection with the New World question, Vitoria proceeds to examine the legal relationship which did obtain between all of them and the Spanish crown. No common legal system, he remarks, governed the natives and the Europeans. Hence, all relationships must be governed by the divine law, the natural law, and the *jus gentium*.<sup>30</sup> In a famous passage, he proceeds to state those affirmative relationships which do exist and in violation of which a state of war might be justified.<sup>31</sup>

The primary and governing relationship is called "a title of natural society and communication." Under this head, says Vitoria, the Spanish have the right to travel to those distant lands and to dwell there, provided, of course, no harm is intended or brought upon the natives. Nor may the Indians prohibit them in these forms of intercourse. This prime title and the inferred right are justified by an imposing array of fourteen distinct arguments.

Though these lines of thought have their own interest, they may be summarized in briefer form here. First, the right of travel and dwelling arises from the *jus gentium*. Among all nations (*nationes*), it has been regarded as inhuman to refuse to receive guests and travelers without some

special cause. Again, from the very beginning of the world (when all things were common), it was permissible for a person to go to any region he wished. Nor, says Vitoria, does it appear that this basic right was removed by the subsequent division of the human race into different groups living in different parts of the world. In fact, to prohibit such journeying in the time of the division would have been inhuman. It could not have been the intention of the primitive peoples to prohibit friendly travel by the division of the peoples. Exclusion amounts to exile (a capital punishment) and can be interpreted as a warlike act. Friendship, itself, is a natural right. Furthermore, by the natural law, all things are common: flowing water, the sea, rivers, ports (where by the *jus gentium* all ships may put in).

Proceeding beyond the generality of natural society and the right to travel, Vitoria next remarks that the Spanish have the right to conduct business with the natives, provided no injury is caused. They may bring goods to the New World and exchange them for materials which are there abundant: gold, silver, and the like. Such human communication cannot be forbidden by the native princes; nor, on the other hand, may the Spanish kings prohibit their subjects from carrying on trade. This right of trading arises, also, from the *jus gentium*, provided no harm is intended or inflicted. The law in question would hold also between civilized states (*e.g.*, Spain and France).

Taking still another step, Vitoria remarks that if any possessions or privileges are already common to the natives themselves and to "guests," it would be forbidden for the Indians to exclude the Spanish. Thus, for example, if it were permissible for all non-natives to mine gold in common fields or in rivers, and if they are allowed to search

<sup>30</sup> The Vitorian theory of the *jus gentium* will be discussed at greater length. See text accompanying note 37 *infra*.

<sup>31</sup> What Vitoria believes to be legitimate titles are found in GETINO at 357-80.

for pearls in the sea or in rivers, these same privileges could not be forbidden to the Spaniards. In precisely the same way that all foreigners are received, so must the Spanish. Guests must respect the rights of the native peoples, but the latter cannot make a particular exclusion of Spain. The right to travel implies the right to equal treatment with other travelers. Again, an object belonging to no one comes into the possession of the person or persons "occupying" it. No one by supposition owns such common areas as lands, rivers and seas. Hence, any discoverer may claim whatever is found there. The rights implied in discovery are either of the natural law or of the *jus gentium* (in turn, derived from the natural law and established by the consent of the greater part of the whole world for the common good of all).

Finally, if any Spaniard were born in the New World as a free man, there could be no reason for denying him citizenship or the privileges of other citizens. Vitoria supposes in this argument that the native born Spaniard is the child of Spaniards who have settled in a native state.<sup>32</sup> Citizenship, he continues, follows birth according to the *jus gentium*, and this statement is confirmed by recalling that, since man is an *animal civile*, he is a member of the state in which he is born and of any other. If he is not a citizen of the state of his birth, he cannot be a member of another. And without any citizenship at all, he would be excluded from rights which are his by the natural law and the *jus gentium*.

It should not escape our notice that Vitoria has excluded from his consideration all mention of a common system of posi-

tive law, except the *jus gentium*. In effect, he is saying that even when a system of law is absent, one is not at a loss to explain the relationships of peoples as diverse as the Spaniards, the French, and the varying kinds of political organization (or the lack of it) in the New World. His reliance on the arguments here advanced is threefold: (1) on the natural law, (2) the natural society of mankind, (3) the *jus gentium* (which he has stated springs from the natural law by the determination by consent of the greater part of the human race for the common good of all).

The question of the Saracens may be dismissed quickly. To Vitoria, as to most writers of the era, they were "the perpetual foe." Their position was one that had been arrived at by unjust warfare, rapine, and theft. Saracen rulers were tyrants and, *de jure*, could not be considered as true rulers. More important, they were considered so immoral that no treaty of peace could with any safety be negotiated. So far, then, as they were concerned, the relationships between Europeans and Saracens were governed by the divine law, the natural law, and the *jus gentium*. But, so far as the latter was concerned, the law of war was all that was actually required. It should be noted that, for Vitoria, the Saracens were without a just form of government. Hence, there were no legitimate states or state. They were simply warlike families, peoples, or tribes.

A careful reading of these three concrete situations makes clear the part played in Vitoria's thought by the allied concepts of "natural society," and the *jus gentium*. So far as the first idea is concerned, it appears to be clear that the natural society and communication of men is absolutely primary and the root of a system of law, the latter being the *jus gentium*.

<sup>32</sup> This application of the *jus soli* raises the very interesting question of what juridical position Vitoria accorded to Spanish possessions overseas.

Here we may note an historical factor which is heavily emphasized in all of Vitoria's thought. This is the fact and conception of a primitive division of mankind.<sup>33</sup> Aside from any valid philosophical or theological explanation of the common origin of mankind, the Spanish Dominican relies on the evidence of the Scripture to account for the fact that the human race, though sprung from common ancestors, has been historically divided into various families, races, nations, states, and governments.

In his eyes, the Scripture shows that after the Flood, the human race was divided, probably on a family by family basis, each settling in a different region of the world. The division was made necessary or justified by the safety and peace of the race. He is uncertain as to whether the decision to divide was made by Noah (sending different families to settle in different areas) or, more probably, by a mutual consent of the peoples (*gentes*) involved. In either case, he takes the division to be a fact. And from the historical division, there has arisen, either by an act of tyranny or by consent, various states and governments. For Vitoria, the fact of a division is clear and decisive. It was a voluntary splitting of the race into family groups in different territories and explained the temporal origin of states and governments.

The point being made here is that mankind actually existed *as one* at a certain point in time. For the betterment of the race, a rational choice intervened. A purely natural position of the race was disturbed. The division was required for the conservation of mankind. In the face of this neces-

sity, an obligation arose. The objective situation founded the right to divide. And since this right was not natural (that is, being brought in by nature herself), it must be considered as one possessed and exercised by existing persons. All living at that time cooperated in the decision or abided by it. Hence, the division took place under the *jus gentium*.

### Universal Society and the Role of States

It will be apparent that the pursuit of Vitoria's thought has introduced us to a most complex theoretical situation. On the one hand, he has presented the human race as an existing society, one that possesses a common purpose or common good and endowed with specific juridical powers. On the other hand, he has emphasized the legitimacy of the state and the civil power of the state. With respect to civil power, he has pointed out the organic relationship of public power to the whole community, and stressed the prerogatives of the "greater part" in choosing a form of government and the actual "rulers." Complicating the picture still more, the Spaniard has brought out clearly the fact of a plurality of states, all with the same function and constitution. To some extent, he has defined the legal relationship of state with state by a double stress on: (1) the natural society of the race, and (2) the *jus gentium*. In effect, his position comes down to this: the existence and juridical position of the human race, as such, can never be completely disregarded in any consideration of the relationships of state with state.

When one adopts the Vitorian position, emphasizing as it does the universal society of mankind, his view of inter-state relations changes radically.

<sup>33</sup> This primitive division of mankind into different families is dealt with in many places. See *On the Civil Power (De potestate civili)* in GETINO 179; see also GETINO 317-19.

This general thesis can be reviewed now in the light of five other Vitorian themes which relate specifically to the twofold relationship which each state has: (1) with other states, and (2) with the universal society of men.

First, Vitoria considers a situation involving a question of justifiable warfare. Suppose, he says, that France has inflicted a wrong on Spain. Suppose, too, that the Spanish have made remonstrances, but in vain.<sup>34</sup> War would appear to be the only means of redress open to the Spanish. There would be a just cause. Ordinarily one might assume that the moral questions in this hypothetical situation were closed. But Vitoria points out that there is yet another dimension to the question of whether Spain may exercise her right to reparations by war. If, says he, it becomes clear that the war would bring harm to the whole of Christendom or to the "whole world," that war would become, by the very fact of a prospective greater injury, completely unjust. And one must note he does not say that such warfare would be a failing in friendship or charity. It would be, ipso facto, unjust. A subordination of goods and rights is present even where it would appear that the legitimate interest of a single state apparently indicates a mandatory course of action.

Second, Vitoria considers a situation where an individual state may wish to alter not only its regime but the very form of government. As has been noticed, he would permit such a change by the consent of the "greater part" of the citizenry. He, then, takes a further step. Supposing that the "whole world" wished to choose one uni-

versal monarch, would such an act be permissible and what degree of consent would be required? Vitoria's general reply is in the affirmative. And the reason given is that the whole human race *once* possessed this power, and it is inconceivable that the power was ever lost. Coming, then, to the question of consent, he simply replies that the majority consent of all peoples would suffice. And if such consent by the majority were given, the monarch so chosen would be the "lord of all," and all would be subject to him.<sup>35</sup>

Third, there is question of what we would call the "intervention in the internal affairs" of another state. If a particular state or people were burdened with a tyrannical ruler or regime, and if it were clear that oppression were taking place, the innocent killed or subjected to immoral rites, laws, or practices, it would, says Vitoria, be the obligation of "princes" to intervene and overthrow the tyrant. And the reason given is that the "whole world" has committed its power to rulers.<sup>36</sup> This power can be exercised only through them. In other words, an obligation lies upon all "princes" to act as organs of the race.

Fourth, when Vitoria examines the question of whether a monarch is subject "to his own laws," he takes the position that he is. If the monarch's consent is required for the "passing" of a law, the consent may be given or withheld. But once given, the law is valid. It is a law of the state and brought into being by the power (*potestas*) of the whole community of which the monarch is and remains a member. As a corollary to this position, he notes that the *jus gentium* is a

<sup>35</sup> GETINO 192-95.

<sup>36</sup> See *On the Right of War (De jure belli)* in GETINO 403-04, for a discussion of the obligation of rulers to act on behalf of the "whole world."

<sup>34</sup> *On the Civil Power (De potestate civili)* in GETINO 192.



true law (or complex of laws) and passed by the authority of the "whole world." A consent of the majority suffices for the validity of any law belonging to the *jus gentium*. If, then, an individual state consents to a particular law, its consent is irrevocably binding. And, under the majoritarian principle, the state is bound anyway, since what the majority consents to is held to have the consent of all. No state may exempt itself from the *jus gentium*.<sup>37</sup>

Fifth, it will be clear that the theory of the "greater part" plays a decisive role in Vitorian political theory. It is used both within the state and within the international community. So far as "state sovereignty" is concerned, the right of the whole of human society or of a majority enjoys a primacy of any kind of sovereignty, irrespective of definition. An intrinsic limitation is imposed on each and every individual state.

These five aspects of Vitorian theory point clearly to a situation wherein the moral and legal position of any individual state is severely limited. In effect, it does not do to say that "the state" is self-sufficient or sovereign. Both adjectives may correctly be applied to "the state" or to any individual state, but neither may be simply predicated without qualification. What they assert is true, but what — during the course of history — they have come to deny is false.

Both terms are justified solely in terms of a purpose or a set of purposes. If it is assumed that the justifying purpose is exclusive, it will also be assumed that it is limited. By inference, an exclusion has been made which, at least in Vitorian theory, cannot be tolerated. The purpose or common good of an individual state is, at

bottom, one with the general end of human society as such. Since this is so, the intrinsic powers of the individual state (while sufficient for it) are still justified only by the one, single common good of all mankind.

Vitoria's devotion to the common end of the race and the limitations imposed on each member of the multiple system is shown in his restriction of the right of war. And it may be argued very persuasively that Vitoria would allow warfare only as a function of the common good of mankind. In this case, an individual state which takes up arms does so on behalf of and as an organ of the whole human society. The "organic" role of warfare is illustrated by his stand that the power (*potestas*) of the whole world is and has been committed to rulers.

Finally, the Vitorian view of war grows out of the basic view that the "whole world" retains a fundamental political right which is never lost, and which could be activated by the choice of the "greater part" of the race. This exercise could take the form of a majority selection of a universal and common government. Actually, however, Vitoria held that majority choice has been shown by the existence of the *jus gentium*, giving the world a body of law which binds all alike and to which all (individual states included) are subject.

### The Jus Gentium

Much has been made in the foregoing pages of Vitoria's position on the historic concept of the *jus gentium*. This emphasis coincides with a certain stress laid in our time on the great Spaniard's position as one of the "founders" of international law. Sharp differences of opinion exist regarding Vitoria's position. Into none of these will this paper enter. What seems important, however, is to survey the principal points which he does make.

<sup>37</sup> GETINO 207. It should be noted that the *major pars* does not determine matters of intrinsic or basic morality.

It will be remembered that for Vitoria the *jus gentium* represents a source of true law and that this law is "passed" by the authority of the "whole world." In this usage, "whole" can mean either all persons living in the world, or it can mean a "greater part" of them. Either suffices for the validity of a law passed *de jure gentium*. Under the majoritarian principle, a greater part can act for all, and their action is valid. Furthermore, these laws bind and it would be a serious moral fault to violate one if the matter were of serious import.

As one would expect, Vitoria consistently compares the *jus gentium* with competing forms of right (*jus*) or law: divine, natural, or positive law. To make this distinction come out, it may be well to examine a list of those items which Vitoria says are *de jure gentium*.

For the sake of convenience, these may be separated into several classes. First, we may consider those rights (and laws) which arise out of the natural society of mankind.<sup>38</sup> This society is natural, but specific kinds of communication, travel, commerce, contracts, hospitality, asylum and the like would arise *de jure gentium*. Second, there arises a series of rights which result from a culpable violation of any of the rights which have their source in the *jus gentium*: declaration of an offensive war, reception and immunity of legates, enslavement of captives, capture of movable goods, deposition of the enemy government and occupation of a hostile country.<sup>39</sup> Third, one might consider forms of ownership and jurisdiction. The right to own material possessions is a natural right, but actual dominion arises *de jure gentium*.<sup>40</sup> Likewise, nonfamilial

types of jurisdiction arise from the *jus gentium*, though the basic right to *create* or *acquire* jurisdiction is of the natural law. Finally, the right of citizenship in the land of one's birth is had by both the natural law and the *jus gentium*.

It will be noticed that in each example some situation of natural right is involved.<sup>41</sup> Thus, to look briefly at the question of dominion over material possessions, we may observe that mankind's relationship to the goods of the earth is natural. Land, the fruit of the earth, food, shelter, etc., are related to man's necessities and satisfactions. A natural relationship or proportion exists here. But how is one to explain that the private dominion of one man over a particular part of the earth's goods is justified? Per se, a simple participation in the fruits of the earth should suffice. At this point another *natural* need enters the picture. Mankind must live in peace and without contention, and each person must have a real interest in his own livelihood.

In this situation, therefore, there are three terms to be considered: (1) man or mankind, (2) the goods of the earth, and (3) peaceful living. The relationship between the first two terms is natural. However, the relationship of the first two to the third is not natural (in the sense of being logically necessary). Yet, peace is necessary for mankind. In this sense, peace is just and rightful. When, therefore, it is foreseen and agreed that the primitive relationship between mankind and the goods of the earth involve the creation and preservation of peace, some constructive action with re-

Thomas on the relationship of the *dominium* to the *jus gentium*.

<sup>38</sup> *On the Indians (De Indis)* in GETINO 357-63.

<sup>39</sup> GETINO 381-438.

<sup>40</sup> See GETINO 316, where Vitoria cites Saint

<sup>41</sup> An extensive analysis of the relationship of the *jus gentium* to the natural law is found in VITORIA, COMMENTARY ON THE SUMMA THEOLOGICA II-II.

spect to the original relationship is justified. Historically, mankind has in fact agreed that a division of the goods of the earth is necessary and conducive to the preservation of peace. Since, then, the actual division arose as the fruit of human perception and choice (but in view of peace, to which mankind had a right), this division is said to be *de jure gentium*.

Transposing this explanation into more technical terms, Vitoria would say that man's relationship to earthly goods is natural and necessary or that the commensuration between these two terms is natural. He would say, further, that the relation of mankind to peace is also natural. But he would claim that the commensuration between mankind and the "world-as-divided" is justified only because of peace. A human need and purpose which is legitimate and necessary (peace) was seen to have a relationship to the particular mode of use made of the earth's goods.

This example contains the kernel of his philosophical theory of the *jus gentium*. The sending of legates is not, per se, necessary to the welfare of man. Yet, they become necessary owing to the need there is of preserving peace, friendly relations, and communication. Since these latter items are necessary, it is, by inference, necessary that legates be immune from slaughter or capture. Likewise, purely defensive war is necessary and justified for self-preservation. But simply repelling an enemy is neither peace nor a guarantee of peace. Recovery of goods, punishment of the enemy, occupation of his country, the weakening of his power to attack and all other phases of offensive warfare are needed for peace in any full and lasting sense. Hence, the declaration of offensive war is justified by reason of securing peace (which, in this case, is an extension of the notion of self-defense).

In effect, then, Vitoria's notion of the *jus gentium*, though closely related to the natural law, is not the natural law. It is positive law. And the reason it is positive law is twofold: (1) it deals with matters which are not formally brought in by nature and, therefore, not absolutely necessary; (2) it supposes that human intelligence has perceived a relationship to a third term (for example, peace) and that human beings have agreed and consented that this third term requires and justifies some act, institution, or mode of behavior. The *jus gentium* is, therefore, human or man-made law.

Provisions of the *jus gentium* are either written or unwritten. But irrespective of the form, all have the intrinsic character noted above. Furthermore, the apprehension of the necessity and the consent necessary is had by all of the human race or by a greater part of it. Such consent could be given in a common meeting or congress, if such were possible. In the absence of a universal congress, this consent can be evidenced by the customs and sentiments of mankind.

When it can be shown that mankind has, indeed, agreed upon some particular provision, then Vitoria would hold that this is a true positive law. It would provide a norm of action for human behavior. Its purpose would be discernible. The fact that a particular provision is widely supported argues to consent. And, since mankind constitutes a universal society, it may take those steps necessary for its common or universal welfare. It has the right (*jus*) to make a law (*jus/lex*).<sup>42</sup>

#### Historical Reflections on Vitoria's Universalism

It will be evident that there is little room in Vitoria for many of the preoccupations

<sup>42</sup> In this sense, Vitoria claims that the *jus gentium*

of contemporary legal and political practice. If we return to the conception of the study of ideas as a laboratory where hard experience tests the validity of theory and thought, it will be found that our examination will find much difficulty with the statecraft of the modern world.

Why, for example, does Vitoria have so little difficulty in adjusting the relative position of the state? How does one explain the ready confidence with which the Spanish Dominican explains the status of the whole of mankind in view of political relationships? By what means does he face the question of the position of the ruler with respect to the whole state? Even though Vitoria's theory rests upon an organic conception of the state and the world, what prevents him from falling into a position where the state becomes a Leviathan? From what source arises his sureness of touch in dealing with the independence of the state and at the same time refusing to see in the state an entity which is "sovereign"? Or, finally, why, as a matter of fact, does he refuse to discuss sovereignty at all?

To heighten somewhat the historical contrast between the Vitorian position and modern thought, one may turn quickly to review a few critical questions which arrest so powerfully the attention of contemporary jurists.

1. Is the individual state, as such, the sole framer of the provisions of international law? For Vitoria, the answer must be in the negative. In his teachings, there does not appear to be any absolutely necessary role which the individual state must play.<sup>43</sup>

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is a true law "passed" or "made" by the authority of the whole world.

<sup>43</sup> It is only fair to remark that competent interpreters of Vitoria disagree on the organic nature of the international community.

He does not see human society as broken up into a discrete set of atomized communities which must be bound together with the slender thread of transient pacts and agreements.

2. Would states, then, be bound by an international law conceived after the manner of the *jus gentium*? Yes, they would. Indeed, they would be bound whether each had given its consent or whether it had not. Underlying this thesis is the Vitorian conception that mankind itself constitutes a basic society. Human persons or individuals stand in relation to each other in important and intimate ways. The family of mankind possesses rights which are not simply legal, as this term is understood in our time. If a majority of the people composing the race should consent, this consent creates a law. And the law in turn binds all. What is done by and for the majority is done by and for all.

3. Are states, then, equal? They are and may be described as equal, provided that one remembers that this "equality" indicates a relationship which obtains only among and between states as such. One must acknowledge that no individual state is the "equal" of the whole of mankind.

4. Should states be considered as sovereign? Here the reply must be that they are and they are not. The organized community has a function which implies the right to govern and direct its members to a human end. In this sense, the state is sovereign. But if sovereignty implies either that the state possesses overriding rights with respect to the personal rights of its own citizens, or if it means that its position is paramount in relation to the rights of the whole race, then it is not sovereign.

Historical reflection makes plain that the political struggles of modern times have

reduced many themes of contemporary jurisprudence to absurdity. What has been the sad history of revolution against the omniscient state? Why is it that personal, human rights have proved to be so great a stumbling block to international jurists? How is it that expressions like the "family of nations" have such a hollow ring?

When all is said and done, it would appear that a fundamental error lies at the base of a great deal of the political thought of the modern world. To state this error crudely, one may say that it consists in severing the rational and natural relationships which obtain between all persons everywhere. Akin to this fault is a kindred error in most philosophies of the state. This consists in erasing the fundamental human purpose of the state as a means to an end, namely, the promotion and securing of human goods or values. Once this function has disappeared, the state can become the instrument of vicious ends, and when devoted to these, the interrelationship of state with state vanishes.

At bottom, these types of errors may be explained by saying that they are the fruits of nominalism and voluntarism. Or, to put the matter another way, they are the result of the disappearance of an intellectualistic outlook. Nominalism deals with powerful concepts without grounding them in real being. It manipulates terms precisely as divorced from any real order. Thus "sovereignty" became a term which was, in point of fact, unrelated to anything objective. It became a slogan for naked power.

Since nominalism represented a kind of inability to perceive relationships in the

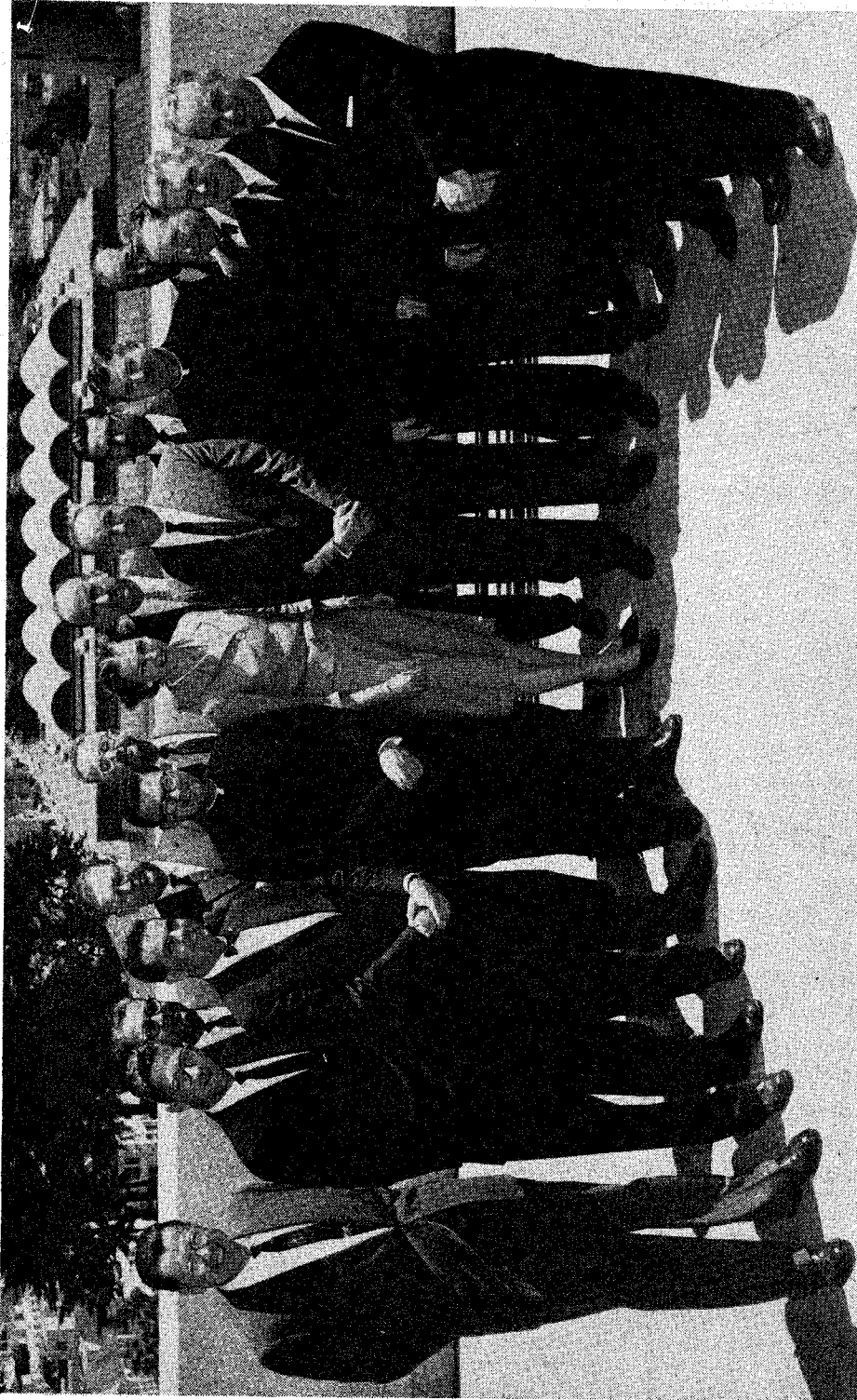
order of reality, it gave birth to a voluntarism in law and political thought. Essentially, legal voluntarism consists in an effort to impose relations which are believed to be non-existent.<sup>44</sup> This imposition takes place by the will of a superior (either a ruler or a system of law). And since human choice is unlimited in itself and finds its guide or limit from the intelligence, voluntarism, since it enshrines the unlimited will, tends to beget systems of thought which despise rational restriction and order. The unlimited will imposes an order which is artificial. Imposition is allied with compulsion and power, and the voluntaristic state becomes the power state.

Given, finally, a system of power states, there is also given the proper spawning ground of pure positive law and pure sovereignty. By their very nature, they imply no intrinsic limit which would be imposed by an intellectual perception of reality and of order. And this is why Austin found any limitation of "supreme power" a contradiction in terms. Given his premises, Austin was completely correct.

But the poised assurance of Vitoria would not concede the premises, based as they are on the inept and crude terminism of eighteenth century empiricism. Vitoria illustrates the tradition of reason. The fruit of his thought shows in a striking way how superior this tradition is in dealing with human affairs. And its secret lies in a profound but stirring humility in the presence of the witness of nature.

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<sup>44</sup> A useful introduction to the question of the influence of voluntarism on legal thought may be found in DAVITT, *THE NATURE OF LAW* (1951).



*San Francisco Law School Faculty. From left to right: John Duff, William J. Riegger, Harold E. McIntosh, Leo J. O'Brien, William Q. deFuntak, Rev. Richard A. Vachon, S.J., William B. Spohn, Elizabeth Anne Quigley, Librarian, George F. Clinton, Dean Francis Richard Walsh, Robert C. Hays, Rev. Timothy L. McDonnell, S.J., William J. Dowling, Edward J. Boessenecker, Charles J. Barry, William J. O'Keefe. Not pictured are A. Russell Berri, Luther J. Avery, John J. Lank and Lt. Mallory B. Hood.*