ABSTRACT

The Common Law of Nations:
The *Ius Gentium* in the Political Thought of Francisco Suárez, S.J.

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Francisco Suárez preserved and refined the classical notion of *ius gentium* for modernity. According to Suárez, the *law of nations* consisted in mutually recognized norms that govern international conduct in war and peace, bearing legal status as customary standards. As such, the *ius gentium* offered a tenable basis for international order in a post-Christendom world, becoming the foundation for international relations in the emerging epoch of nation states. Suárez presented the *ius gentium* as a means to international order without an international authority. He proposed that states, as *communitates perfectae*, or self-sufficient and independent authorities, could govern international life together through common effort. By explicating Suárez's international thought, and by comparing and contrasting it with that of Hugo Grotius and Edmund Burke, I will endeavor to demonstrate that Suárez's account of international relations most accurately identifies the bases for international order without international authority.

The Common Law of Nations: The *Ius Gentium* in the Political Thought of Francisco Suárez, S.J.

by

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Ad Maiorem Dei Gloriam

CHAPTER ONE

Refining the *Ius Gentium*

Responding to the disintegration of old orders and authorities, Francisco Suárez (1548-1617) attempted to ground international order in a sense of law that could endure in modernity. The rending of Christendom and the discovery of non-Christian political communities left the traditional order of Europe unsalvageable, and Suárez perceived the urgent need to recover and revise the foundations of international society. In the Jesuit and Salamancan intellectual traditions, he found the elements needed to build a new sense of law among nations that could stand the trials of his age, but in continuity with the political wisdom of the past. The Roman and Christian idea of a *ius gentium*, a law of nations, offered the possibility of a natural and human international social order applicable to Catholics and Protestants, Christians and the unevangelized. Stoic philosophers and Christian theologians had shaped the *ius gentium*, originally a universal civil code of the Roman *imperium*, into the embodiment of the *Civitas Maxima* (The Great City) of mankind. Suárez accepted the term from his fellow Late Scholastics—especially Francisco de Vitoria—but reinterpreted it as a properly legal term referring to the common customary law of nations, understanding it as a human law that exists in the absence of a recognized political authority. In this way, Suárez brought the *ius gentium* into a humbler but sounder sphere than the philosophical or theological one it had come to occupy. He did not reduce it to the status of a universal civil law, but neither did he leave it as he had found it in the thought of the Stoics and prior Scholastics. In contrast

with his near-contemporary, Hugo Grotius, Suárez developed the *ius gentium* as a human and positive law informed by moral deliberation—informed by but not guaranteed infallibility by, reason. This law originated in the collective decision of nations, in the absence of a single acknowledged lawgiver and enforcer. Accordingly, Suárez perceived the international society as a self-governing entity that pursues its common good by establishing, promoting, and enforcing customary institutions through the gradual working out of interests and justice. As the law of an anarchical community, Suárez's *ius gentium* occupies a unique position in the philosophy of law and the study of international relations. Succumbing neither to rationalism nor traditionalism, Suárez offered an interpretation of international order that remains as pertinent in the 21st century as it was in the tumultuous years of early modernity. The study of its origins in Rome and Christendom, and of its development at the hands of Suárez, provides a robust framework within which to appraise the informal orders and institutions that states erect among themselves in the absence of international governance.

A Brief History of the Ius Gentium

The *ius gentium* originated in Roman Law as a positive legal corpus prescribing guidelines for the *praetor peregrinus*—a magistrate who judged cases involving non-citizens.[1] As the Roman *Imperium* expanded to include a plethora of nations, each with its own subsidiary institutions and laws left largely intact, it became necessary to establish a body of law that could apply to any person living under Roman rule. By the time of Justinian, this legal corpus gained a more philosophical basis as Stoic jurists

[1] Cf. Barry Nicholas, *An Introduction to Roman Law* (Oxford, UK: Clarendon Press, 1991), 54-59.

associated it with the *ius naturae* (natural right) the underlying order of nature that bound together all men as human beings and prescribed their just duties. Medieval scholastics developed the *ius gentium* further, setting it beside the *lex naturalis* (natural law) instituted by God in the constitution of the human soul, although they did not always preserve special distinctions in making this connection.[2] St. Thomas Aquinas formalized the Medieval scholastic version of the *ius gentium* as a law that existed among, not over, self-sufficient political entities. Aquinas wrote in his *articulus* on "Whether the right of nations is the same as the natural right?" that, whereas the natural right considers things absolutely, the *ius gentium* properly considers matters of convention.[3] Moreover, the *ius gentium* dictates what is just with respect to conventions among nations in the absence of a single legislating authority acting above those nations. As a kind of law, the *ius gentium* uniquely "need[s] no special institution, for [it is] instituted by natural reason itself…"[4] Following the judgement of the Roman jurist Gaius, Aquinas thus traced the universality of the *ius gentium* to natural reason. It was the great accomplishment of the Late Scholastics, the legal scholar Heinrich Rommen has argued, to expand on this interpretation of the *ius gentium* by distinguishing it more clearly from natural law and natural right reason.

> They cleared up, before Grotius, the ambiguous distinctions of Roman law that had crept in during the course of centuries. *Ius gentium* in the proper sense is not *ius naturale*, although the precepts of the latter are evidently valid for the ordering of the community of peoples. Thus differentiated, *ius gentium* is the quasi-

[2] Heinrich Rommen, *The Natural Law*, trans. Thomas R. Hanley, O.S.B., Ph. D. (Indianapolis, IN: Liberty Fund, 1998), 35.

[3] St. Thomas Aquinas, *The Summa Theologiae of St. Thomas Aquinas*, trans. the Fathers of the English Dominican Province, 2nd ed. (London, UK: Burns, Oates, and Washbourne, LTD., 1920), II-II, Q57, Art. 3.

[4] Ibid.

> positive law of the international community: it is founded upon custom as well as upon treaty agreements.[5]

Francisco de Vitoria, the Dominican father of the Salamancan School[6] of political thought initiated this clarification of the relationship between natural law, right reason, and *ius gentium*. "The whole world," Vitoria claimed in *De Potestate Civili*, "which is in a sense a commonwealth, has the power to enact laws [*leges*] which are just and convenient to all men; and these make up the law of nations [*ius gentium*]."[7] According to Vitoria, society's need for law is prescribed by God in the order of nature and right reason,[8] but the positive laws in human society—civil or international—are legislated through human agency, not Divine Providence. Contrary to the English critic of the Late Scholastics, Sir Robert Filmer, Vitoria and his students preserved the proper and distinct agencies of God and man. They thus moved the *ius gentium* farther away from the natural law than it had been in Aquinas's thought, though this did not finalize the separation between the two legal corpora. Vitoria clung to natural reason as the source of the force of law in *ius gentium*.[9] He thought that human legislators enacted the *ius gentium* within

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[5] Rommen, *The Natural Law*, 61.

[6] Although loosely based around the University of Salamanca, the Salamancan School encompassed a broad range of scholastics theologians and philosophers who sought to reevaluate and refine the foundations of scholastic thought in light of the novel problems raised by modernity. The movement certainly began with Vitoria at Salamanca, but it gained influence throughout Spanish and Italian thought through the writings of Domingo de Soto, Martin de Azpilcueta, Luis de Molina, Suárez, and Robert Bellarmine. In general, the approach of the "school" seems to have been to depart from a merely historical or traditional outlook on questions so as to address them directly. In short, the Salamancans took seriously the problem raised by humanism, Protestantism, the nation state, slavery, and commerce, and they attempted to provide answers through deliberation, not mere appeals to convention or authority.

[7] Francisco de Vitoria, *Political Writings*, trans. Jeremy Lawrance (Cambridge, UK: Cambridge University Press, 2005), 40.

[8] Ibid., 18.

[9] Frederick Copleston, S.J., *Late Medieval and Renaissance Philosophy*, vol. 3 of *A History of Philosophy* (New York, NY: Doubleday, 1993), 350.

the international community, but he was unwilling to sever its lawfulness completely from right reason and natural law. In this way, it remained unclear whether human agents properly legislated or merely confirmed the *ius gentium*.[10] A clearer and more definitive account of the *ius gentium* would not come about until Francisco Suárez assessed the question in *Tractatus de Legibus ac Deo Legislatore*.

The Force of Law through Custom

Defining the *ius gentium* was not Suárez's primary task in *De Legibus*, yet his explication of the term has endured as one of his most influential contributions. Above all, Suárez was a theologian, and *De Legibus* was a summary of the course on law that he gave to theology students at the University of Coimbra from 1597 until the text's publication in 1612. According to his Preface, no study of theology is complete without the study of law, divine and human.[11] Like Vitoria, Suárez argued that the power of human beings to legislate derives from God, but that human legislation bears the force of law through human agency, not particular providence. It was God, Suárez held, who established a law within nature by which one could evaluate the justice of human law; but the laws of God were properly his, and the laws of men properly theirs. Suárez accepted St. Thomas Aquinas's definition of law but refined it to emphasize this distinction of agency in lawmaking. Whereas St. Thomas defined law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated,"[12]

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[10] Ibid.

[11] Francisco Suárez, S.J., *A Treatise on Laws and God the Lawgiver*, in *Selections from Three Works*, trans. Gwladys L. Williams, Ammi Brown, John Waldron, and Henry Davis, S.J. (Indianapolis, IN: Liberty Fund, 2015), 11.

[12] Aquinas, *ST* II-I, Q90, Art. 4, *Respondeo*.

Suárez argued that law must be more than merely an "ordinance of reason." He did not remove Aquinas's specification that a law must be rational rather than the product of arbitrary will alone,[13] but he located the source of the binding obligation of law in "the will of the legislator."[14] The will of the legislator must be "just and upright,"[15] but also the source of intention to bind—a quality proper to the will rather than to reason *per se*. Some have argued that this placed Suárez in the voluntarist tradition,[16] and it is true that Suárez accepted some arguments from the voluntarists. Yet Suárez never wholly departed from the *lex ratio* tradition embodied in the thought of St. Thomas. He never held that "oughtness is without foundation in reality" and that "law is will, pure will without any foundation in reality, without foundation in the essential nature of things."[17] According to Suárez, reason, through the exercise of prudence, outlines a just and right precept in the mind of the legislator, but then the legislator must intend for this precept to oblige, and must communicate this intention in order for it to become law.[18] The binding force of law

[13] Aquinas, *ST* II-I, Q90, Art. 1, *Ad Tertium*.

[14] Suárez, *A Treatise on Laws and God the Lawgiver*, 81.

[15] Ibid., 81.

[16] Most notably, John Finnis.

[17] Rommen, *The Natural Law*, 52.

[18] On this point, Suárez seems to have had the position of what he later called "certain modern thomists [*aliqui moderni thomistae*]" in mind as a foil. (Suárez, *A Treatise on Laws and God the Lawgiver*, 381) On one hand, he used Thomas's claim—originally made with respect to the Eternal Law and God as lawgiver—that "a law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community" (*ST.* I. –II, qu. 91, art. 1) to typify the position that claims law is proper to an act of the intellect. On the other hand, Suárez explicated Thomas's fuller definition of law as "an ordinance of reason for the common good, promulgated by one who is charged with the care of the community" (*ST.* I.—II, qu 90, art. 4) to imply that law must be more than a dictate of reason. Because "dictate of practical reason" could also refer to a precept of counsel, Suárez argued that the will of the legislator to bind is what properly sets law apart. Consequently, Suárez understood the fuller definition of Aquinas to account for the place of the will under the qualification that law "emanate from [i.e. be promulgated by] one having charge of the community." (Suárez, *A Treatise on Laws and God the Lawgiver*, 141) Suárez thus seems to have made use of Thomas's subtly varying definitions to critique the positions of those Thomists who accepted

derives from the will of the legislator—otherwise any rational precept set down by a legislator, even one intended as counsel, would fit the definition of law.[19]

Having applied this understanding of law to Eternal and Natural Law, Suárez turned to a discussion of human law by setting out to classify the *ius gentium*. He considered the opinion of the Roman jurists that certain precepts of the *ius gentium* are "intrinsically and essentially natural law, that is to say, a part thereof."[20] He likewise assessed the argument of certain contemporary Thomists, who argued that "the precepts of the *ius gentium* are characterized by an intrinsic necessity, and that this system differs from the natural law [only] in that the latter is revealed without reflection… while the precepts of the *ius gentium* are deduced by means of many and comparatively intricate inferences."[21] Yet Suárez found this position of the jurists and Thomists unconvincing, since many matters that fall under the *ius gentium* do not derive from nature: "take, for example, division of property, slavery [, etc.]…"[22] All precepts written by God on the human heart and all precepts clearly derivable from these, Suárez clarified, are precepts

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one definition to the exclusion of others. In the end, Suárez's work was properly one of clarification: he noted the tension in Aquinas's thought on law and sought to refine a sense of law that would avoid oversimplifications. His conclusion was neither rationalistic nor voluntaristic, but resulted from a consideration of reasons for both positions and of the tension in Aquinas's own works between law as precepts discerned by reason and law as the product of will. The "modern Thomists" to whom Suárez alluded seem to have held that human law (or at least the *ius gentium*) consisted in precepts that reason *discerns*—i.e. they held that lawgiving may consist more in reflection on and translation of certain objective precepts. Suárez himself doubted that this was Thomas's position, and Ernest Fortin has supplied good reason for thinking that Suárez "probably comes close to Thomas's position" regarding the work of reason, will, and prudence with respect to lawgiving. (Ernest L. Fortin, "The New Rights Theory and the Natural Law," *The Review of Politics* 44, no. 4 [Oct, 1982]: 609). All Latin passages of Suárez's *De Legibus* have been taken from *Tractatus de Legibus ac Deo Legislatore: in Decem Libros Distributus*. Neapoli, IT: Ex Typis Fibrenianis, 1872.

[19] Suárez, *A Treatise on Laws and God the Lawgiver*, 23-24 & 140-141.

[20] Ibid., 381.

[21] Ibid.

[22] Ibid.

of the natural law, not of the *ius gentium*.[23] Most properly, the *ius gentium* constitutes a body of law

> introduced by the free will and consent of mankind, whether we refer to the whole human community or to the major position thereof; consequently, they cannot be said to be written upon the hearts of men by the Author of Nature; and therefore they are a part of the human, and not of the natural law.[24]

Suárez determined that the *ius gentium* is an intermediate form of law, standing between natural and human law. In form, it closely resembles the natural law, yet in content it is essentially positive human law, deriving the force of law from human consensus and deliberation among nations.[25] Because the *ius gentium* regulates human convention, its source is in human agency—in the human exercise of prudent deliberation and in the human community's intention to bind itself accordingly.

With this understanding, Suárez responded to the jurist and Thomist position by clarifying that the *ius gentium* is distinct from the natural law in that the precepts of the prior do not "follow as a manifest conclusion [from natural principles] but rather by an inference less certain, so that they are dependent upon the intervention of human free will [*arbitrium humanum*] and of moral expediency [*commoditas moralis*] rather than that of necessity."[26] Suárez contended that the *ius gentium* does not derive its lawfulness from necessities of nature or right reason; nor does it forbid or command anything absolute.

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[23] Ibid., 382.

[24] Ibid.

[25] Cf. Copleston, *Late Medieval and Renaissance Philosophy*, 391.

[26] Suárez, *A Treatise on Laws and God the Lawgiver*, 384. "Ergo, ut ius gentium a naturali distinguatur, necesse est, ut etiam supposita tali materia, non sequatur per evidentem consequentiam, sed per aliquam minus certam, ita ut arbitrium humanum et moralis commoditas, potius quam necessitas intercedat." Perhaps more literally than in the Liberty Fund edition: "Therefore, so that the *ius gentium* may be distinguished from the *ius naturale*, it is necessary, as indeed such matters have been supposed, that it [the *ius gentium*] should not follow by evident consequence, but by another, less certain [consequence], such that human free will and moral timeliness, rather than necessity, intercede." *Lewis and Short's Latin*

The precepts of the *ius gentium* are in some way arbitrary and are made in accord with what is fitting for circumstance. They are timely, as opposed to the timeless precepts of absolute moral necessity—true always and everywhere—that belong to the natural law. All law requires prudence in order to translate a universal moral claim into a law that governs particulars. As a result, to some degree every human law possesses elements that are transient and arbitrarily defined, yet the *ius gentium* is, more than any law set down by a designated lawgiver, especially defined by the influence of free will and moral expediency. Suárez would contend that the laws of the *ius gentium* enshrine certain fundamental tenets of objective moral worth, yet the form they ultimately take as a set of customary regulations among nations is not itself of an objective and necessary character. Like the separation of mankind into nations and kingdoms, the source of the *ius gentium* is in human agreement and agency, not in a divinely or naturally occurring moral schema.[27] More specifically, this human agreement did not come about from any single legislative event or institution—on this point, Suárez echoed Aquinas, though without Aquinas's attribution of the *ius gentium* directly to natural reason.[28] Rather, Suárez thought that the *ius gentium* develops over time as a customary common law among states. Though states individually constitute "perfect communities," no state is entirely self-sufficient, and it is the recognition of this mutual need that leads states to develop a society for the purposes of regulating their relations for the sake of greater welfare and

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Dictionary defines *commoditas* as "Due measure, just proportion, symmetry (so very rare)…" In this instance, it seems to reflect a sense of suitability for circumstance (Cf. *aptus* and *decorum*), as opposed to absolute objectivity, *semper et ubique*.

[27] Ibid., 387.

[28] Aquinas, *ST*. II. –II, Q57, Art. 3.

advantage, but also at times for "some moral necessity or need."[29] Consequently, this community of states introduces "certain special rules" through practice, "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."[30] It should be noted that Suárez thought that the *ius gentium* exists in harmony with the natural law, and that international consensus was possible largely because of the natural law's inherence in all men. Nevertheless, the *ius gentium* derived its obliging force from the consensus of the community of states. The case would be the same for any human law, in that all men have access to the natural law and right reason during their deliberations, yet human law is law because of human agency, not because of moral necessities of nature or reason.

The Ius Gentium as Law

With Suárez's philosophy of law outlined and distinguished, it remains to consider how the *ius gentium* could function as law in the absence of a single political regime. All law must harmonize with natural justice, according to Suárez, yet no human law directly follows from the necessities of natural law. Moreover, natural law prohibits things inherently evil, but human law at times prohibits things that were not evil before a law was made against them. Laws that govern matters of convention deal almost exclusively in positive justice. Suárez presented the example of diplomatic immunity as a precept of the *ius gentium* that derived from positive law, not nature:

> For the custom of receiving ambassadors under a law of immunity and security, if considered in an absolute aspect, does not spring from any necessity of the natural law, since any community of men might have failed to have within its territory any ambassador of a foreign community, or it might have been unwilling to

[29] Suárez, *A Treatise on Laws and God the Lawgiver*, 403.

[30] Ibid., 403.

> receive such ambassadors; yet this reception is an obligation imposed by the *ius gentium*, and to repudiate those ambassadors would be a sign of enmity and a violation of the *ius gentium*, although it would not be an injury committed in the contravention of natural reason.[31]

Likewise, even the law of war, according to Suárez, pertains properly to the positive and human law of nations:

> For it was not indispensable by virtue of natural reason alone that the power [possessed by a state for the punishment, avenging, or reparation by war of any injury] should exist within an injured state, since men could have established some other mode of inflicting vengeance, or entrusted that power to some third prince and quasi-arbitrator with coercive power. Nevertheless, since the mode in question, which is at present in practice, is easier and more in conformity with nature, it has been adopted by custom and is just to the extent that it may not be rightfully resisted.[32]

Diplomatic immunity, war, treaties, commerce, freedom of movement, and even the enslavement of conquered foes were all customary institutions not proceeding directly from a grasp of what is by nature just. Suárez thought that law should regulate these conventions, in accord with justice and natural equity, but he admitted that sometimes it would be necessary for the *ius gentium* to tolerate certain evils.[33] Whatever justice the *ius gentium* enshrined, therefore, would be as imperfectly upheld as in any human law. In the absence of a single, wise legislator, one should even expect justice to fair worse in the *ius gentium* than it might in civil law—but at some level, according to Suárez, even the *ius gentium* is concerned with what is just. "Moral expediency" bends all law to accord with circumstance, and the law of nations is especially governed by this consideration. Its precepts are the conclusions reached by states seeking to attain their own self-interests

[31] Ibid., 400.

[32] Ibid., 402.

[33] Ibid., 408.

even while balancing certain general considerations of justice. As such, it satisfies Suárez's claim that law must be just, but not without qualification or blemish. Even with the requirement of justice satisfied, however, how could the *ius gentium* satisfy Suárez's stipulation that law must be a "common, just and stable precept, which has been sufficiently promulgated?"[34] Moreover, how could the *ius gentium* accord with legal, commutative and distributive justice? To answer these questions, it is necessary to explicate how Suárez's *ius gentium* could be a law without a recognized authority: that is, how it could bear the force of law in a condition of anarchy.

[34] Ibid., 142.

CHAPTER TWO

Law in the Community of Nations

A Community of Communities

Suárez's "*ratio*" of the *ius gentium* as law was that, no matter how divided mankind becomes through various nations and diverse regimes, "it always has a certain unity, not only as a species, but even as if a political and moral unity."[1] Complete polities, republican or regal, are *communitates perfectae*, having within themselves all that suffices for a complete political life. Yet, no *communitas perfecta* is so self-sufficient as never to require cooperation or communication with another. States that interact frequently with one another find it necessary to regulate their relations for the sake of the goods that are common among them. Be it for moral or for material ends, kingdoms and commonwealths must on some level cooperate, and such activity entails the establishment of a loose, "*quasi*" polity or moral whole. "The universal community," as the Jesuit scholar Harro Höpfl has explicated Suárez to mean, "like any other, requires rules for its peace and well-being, and the *ius gentium* is those rules."[2] Although a political community is complete, Suárez notes a certain latitude in its "perfection," since even a complete community can be part of a larger community. The city-state, for example, is a perfect community that can federate with a larger state. Moreover, one independent, self-sufficient state becomes in some degree dependent on another when it

[1] My translation of a passage in *Tractatus De Legibus ac Deo Legislatore*, Bk. II, Ch. 9 (p. 402 in the Liberty Fund edition).

[2] Harro Höpfl, *Jesuit Political Thought* (Cambridge, UK: Cambridge University Press, 2004), 304.

enters into a relationship of trade or socialization. Suárez's justification for this sense of unity amidst plurality in the international realm is simply from experience, or "*ex ipso usu*"—from the very usage of it.[3] When one looks at how states interact, Suárez claims, one sees pervasive violence and dishonesty, yet also a surprising regularity. Contrary to what Hobbes later claimed, international life is not merely the equivalent of a standoff between gladiators. This is not to say that states actively pursue cosmopolitan, selfless goals on a regular basis. The fundamental *ratio* on which Suárez's view of international relations rests is that states act as a kind of imperfect society, and where there is society there is law—"*ubi societas, ibi ius*," to quote a Medieval Latin saying. States, like individual human beings, perceive the desirability of interacting with one another to benefit themselves, and thereby one another. Their situation thus parallels that of human beings in a pre-political environment in which cut-throat competition may take place but the establishment of informal orders is more likely.[4] Community does not occur necessarily among states, but the necessity of social goods impels states to the establishment of a regulated communal order.

It should be kept in mind that the laws governing the international community described by Suárez do not apply to private individuals. The *ius gentium* is not the moral equivalent of modern human rights. As Höpfl clarifies, "… Suárez's account imposed the most stringent limits *on princes and commonwealths* in the part of the *ius gentium* that was least concerned with private individuals and domestic relations."[5] Suárez had

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[3] Suárez, *A Treatise on Laws and God the Lawgiver*, 403.

[4] Cf. Hedley Bull, *The Anarchical Society* for his broader argument to this effect. Note that, as Bull explains, these informal orders do not eradicate violence. More often than not, they merely restrict the use of it, as in the case of *ius in bello* and *ius ad bellum*.

[5] Höpfl, *Jesuit Political Thought*, 306. Emphasis added.

identified two definitions for the term *ius gentium*: the first included civil laws universally found within polities, the second consisted in "laws which were 'common' in that they regulated the relationships *between* peoples or commonwealths…"[6] The former sense describes anthropological commonalities, whereas the latter pertains to the international order and is most properly the *ius gentium*. Suárez's summary of this second sense of *ius gentium* definitively isolates this law to political communities: "a law [*ius*] which all peoples and nations [*gentes*] ought to keep among themselves… this [definition] seems to me most properly to contain the *ius gentium* as a thing distinct from the civil law [*ius*]."[7] In the Suárezian account, the *ius gentium* is a law kept by nations for the sake of the community that persists among them. In this sense, nations reach a level of society similar to human beings, but stop short of politicizing their community.[8] The international common good is not a political common good. Suárez wrote that the division of communities persists because it is "best adapted to the preservation of human beings."[9] Further, in a disputation against King James I of England, Suárez clarified that no human government—presumably not even the Roman *Imperium*—had ever possessed, by human or divine right, political rule over all states.[10] The power of legislating the *ius gentium* stayed with the international community and remained a matter of public

[6] Ibid., 303.

[7] My translation of Suárez, *Tractatus de Legibus ac Deo Legislatore*, II.19.8.

[8] I.e. Nations do not set a regime over themselves. In Scholastic terms, nations can constitute a community together, but they stop short of entrusting any one member or set of members with the care of the community. Such a community or association is social and can have laws (since lawgiving is originally proper to the community itself), but its members do not incur the degree of obligation incumbent upon a properly political community.

[9] Suárez, *A Treatise on Laws and God the Lawgiver*, 387.

[10] Suárez, *A Defence of the Catholic Faith*, in *Selections from Three Works*, 767.

agreement, deriving the force of law gradually from custom. As legislation, therefore, the *ius gentium* originated not in any single authority, but in the loosely organized community itself.

In order for the international community to legislate over itself in this way, Suárez argued, all or nearly all of the member nations would need to consent. At first glance, this seems impossible, and Suárez cites the very objection fielded by Aquinas against the universality of the *ius gentium*: "it is not customary that all peoples should agree with respect to matters that are dependent upon human opinion and free will…"[11] But, as Suárez noted in distinguishing the *ius gentium* from the natural law, the *ius gentium* consists in general rules that are not always and everywhere observed: "Hence, that which is held among some peoples to be *ius gentium*, may elsewhere and without fault fail to be observed."[12] This qualification implies that the content of the *ius gentium* is proper to its international community, since one community of states could "adopt its own rules for relationships between its members, provided no damage was done thereby to any third party."[13] Indeed, the international common good is common only to particular states: it is not a theoretical abstraction but always contingent upon particular members of the community. At the same time, Suárez thought that there was a universality to the *ius gentium* that entailed a certain obligation to adhere to its precepts.

> No one supposed for a moment that the whole human race had at some time convened and 'consented' to some proposal put before it; on the contrary, previously unknown peoples were *expected* to have reached such conclusions

[11] Suárez, *A Treatise on Laws and God the Lawgiver*, 398.

[12] Ibid., 395.

[13] Höpfl, *Jesuit Political Thought*, 304-305.

> independently, and failure to have done so was evidence of barbarism, depravity, or lack of mind (*amentia*, Vitoria's term).[14]

As a result, on one hand, the legal legitimacy of the *ius gentium* required that the actual members of an international community consented to its precepts by employing the same customs in their interactions. On the other hand, Suárez judged some of these precepts to be so integral to sociability that failure to comply identified a polity as asocial and depraved. Refusal to extend hospitality to non-threatening strangers, refusal to admit messages from another state, and especially refusal to employ no restrictions in warfare condemned a nation as "barbaric" and a threat to the community of nations. The *ius gentium* thus developed according to the local community of states, but would always—in Suárez's estimation—need to admit of certain fundamental precepts necessary for social goods.

Although Suárez thought that all men form a kind of community, having in common the same material and moral needs that compel them to cooperate, this "human" community never entailed the same implications as the modern "global" community. The "whole world" does appear in Suárez's *De Legibus* as a phrase denoting all polities everywhere, but it does not exist in his corpus as its own community in the same way that globalism tends to appropriate the "whole world." The largest international community to which Suárez referred was Christendom, the implication being that nations must recognize themselves as being in a social relationship with one another in order for a *ius gentium* to exist among them. Though Suárez thought that the precepts of the *ius gentium*

[14] Ibid., 305.

could be drawn by reason from natural necessities,[15] the *ius gentium* always depends on the community of nations within which it has emerged. As a law, it always governs real, concrete interactions among particular states. Customary usage implies historical interaction, and two nations that have never interacted are not likely to observe exactly the same iteration of law between themselves, even if the laws of their respective international communities share certain fundamental rules of conduct.

Because of its dependence on historical interaction and the long, gradual development of usage, the *ius gentium* seemed to Suárez to have become nearly unalterable. Although he found no inherent obstacle to amendment "if all nations should agree to the alteration, or if custom contrary to [some established rule of this law of nations] should gradually come into practice and prevail,"[16] Suárez thought that it would be *practically* impossible to change the law of nations. Paradoxically, the international community could legislate the *ius gentium* over time through customary usage, but would find it difficult to alter this law at any given time. Just as common laws emerge within a state and prove difficult or impossible to amend, the *ius gentium* exists as a law consented to by custom that has no ordinary mode of positive amendment. States erect rules of interaction among themselves that gain force over time. To defy these customs would be to declare war on the community itself, and it is this mechanism that enables the community to enforce the *ius gentium* without the need for a formalized international police entity.

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[15] Suárez, *A Treatise on Laws and God the Lawgiver*, 407. This is not to say that he thought they could be "translated" directly from nature into specific laws, an effort more akin to the Kantian sense of "legislation" than to the late scholastic understanding espoused by Suárez. (Cf. Fortin, "The New Rights Theory and the Natural Law").

[16] Ibid., 411.

Mutual Enforcement

Suárez recognized that for a law to be legitimate it must be enforceable: there must be a coercive power capable of carrying out the law against erring members.[17] The *communitas perfecta* is complete insofar as it is self-sufficient both materially and politically. As a body politic, it must be governed "by means of its own jurisdiction, which has a coercive force that is legislative."[18] Consequently, with reference to the *ius gentium*, there are two riddles to be solved. First, how could there be a law governing the actions of perfect communities that already possess complete law-making capabilities within themselves? And second, what sort of jurisdiction could a non-political community of nations have over its members, absent any single authority?

In his discussion of the common good as the final cause of law, Suárez presented a situation that illustrates the attempt to make law over perfect communities. When a king comes to control "through various titles, and as the result of external accidents"[19] multiple polities that do not combine to form a single, greater perfect community, "it would be unjust to bind the different kingdoms by the same laws, if those laws were advantageous to one kingdom, and not advantageous to another."[20] In this scenario, each community must make provision for its own common good on the basis of its own laws, "just as if it were still under a separate king…"[21] According to Suárez, there is in fact a disparity of common goods among states, and there is no justification for a law *over*

[17] Ibid., 100.

[18] Ibid.

[19] Ibid., 114.

[20] Ibid.

[21] Ibid.

states determining the civil order *within* states. This distinguishes the *ius gentium* from the modern sense of international law and human rights. Only insofar as the internal affairs of a nation severely inhibit the goods of sociability and orderliness in international relations does the *ius gentium* authorize a war of intervention—although some exemptions could arise on the basis of Christian teaching about just war. Suárez envisioned the *ius gentium* as governing the interactions of states in such a way that its order would pose no infringement on the proper jurisdiction of those states. Consequently, state sovereignty remains within the international order of the *ius gentium*.

The second question is more difficult to answer. Because the international community is apolitical, and therefore imperfect and lacking an overarching coercive authority, the enforcement of the *ius gentium* depends on the actions of state-members—that is, on the community of states as a whole acting through the coordinated efforts of its constituent parts. Suárez never claimed that this process is efficient or without blemish, but he would argue that it is effective. A state that refuses to act according to the rules of international social and military engagement marks itself as a rogue state and an enemy of the public international order. Because the precepts of the *ius gentium* "were introduced by the free will and consent of mankind… [and] cannot be said to be written upon the hearts of men by the Author of Nature"[22] they represent conventional arrangements that depend on the efforts of the concerned parties. This is not to say that Suárez would have considered infractions against the *ius gentium* legitimate; rather, it implies a prudential awareness that the existence and enforcement of customary agreements depend on the parties concerned. As much as any other informal, customary

[22] Ibid., 382.

law, the *ius gentium* is contingent on human free will [*arbitrium humanum*] and "moral expediency" [*commoditas moralis*].[23] Consequently, states that defy the order of the *ius gentium* incur the penalty of losing the community's benefits and gaining its enmity. Regularity is not without its rewards and the loss of regular social and economic interactions with other states entails the loss of substantial material and moral supports. One could argue that this result, in itself, constitutes more of an exchange than a proper punishment: a rogue state might judge that the gains derived from rebelling against the international order are worth the loss of regularity.[24] But the condemnation of the community of states and the resulting war to bring the criminal member into order would imply a condemnation, not merely an exchange. Not only the lawfulness, but also the execution and interpretation of the *ius gentium* rests on the community's authority. The enforcement of the *ius gentium* is a matter for a community of nations that values social goods and, even if imperfectly, has regard for and demands some degree of good faith and justice.[25] Suárez's argument for the enforcement of the *ius gentium* was that an international community must value social goods, and therefore justice, to such an extent that—for the sake of preserving their common benefit—they will enforce the *ius gentium*, not always and everywhere, but sufficiently to preserve its force as law.

Surprisingly, the clearest example that Suárez offered of international enforcement was in his discussion of the Papacy in *A Defence of the Catholic Faith*. Therein, Suárez described how the Pope, as an international arbiter, must possess some

[23] Ibid., 384.

[24] As Henry Kissinger claimed Napoleon judged in *A World Restored*.

[25] Suárez, *A Treatise on Laws and God the Lawgiver*, 391.

coercive force for the purpose of correcting the irregular activity of states. According to Suárez's account of Papal intervention in temporal affairs, the Pope possesses no direct temporal power over the internal affairs of states. Consequently the Pope's coercive power must be either spiritual—such as excommunication or interdict, penalties that temporal authorities took very seriously until the rending of Christendom—or temporal, through the actions of other nations. In the latter option, the Pope would employ "the sword of other princes, so that sword shall thus be under sword, for the sake of mutual aid in defending and protecting the Church."[26] Although Suárez supported the use of this power on the basis of theology and scripture, the existence of it—a fact attested to by the Protestant Hugo Grotius[27]—seems to imply the feasibility of an enforcement mechanism among states. The Pope acted as an arbiter of international dissensions and as a kind of international authority for declaring a kingdom or polity out of order. But until the development of the Papal States as a fellow power in the international world (and perhaps even for some time after that), nations carried out the Pope's verdicts among themselves. Neither the Pope nor even the Holy Roman Emperor acted as international civil authorities. Suárez disregarded the notion, proposed by some theologians, that

> all the rights of kingdoms and all powers of dominion were conferred upon Peter, as the vicar of Christ, and that the Roman pontiff accordingly succeeds to these rights so that supreme civil authority resides habitually… in the Pope alone,

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[26] Suárez, *A Defence of the Catholic Faith*, in *Selections from Three Works*, 801

[27] In the *Decretum Pro Pace Ecclesiarum*, drafted by Grotius for the States of Holland: "Quot dissidia sanata sint aucoritate Romanae Sedis, quoties oppressa innocentia ibi praesidium repererit, non alium testem quam eundem Blondellum volo," "How many dissensions have been healed by the authority of the Roman See, how often oppressed innocence repaired to its protection, I want for no other witness than that same Blondel." Cited in Joseph Hergenröther, *Catholic Church and Christian State: A Series of Essays on the Relation of the Church to the Civil Power*, vol. 1 (London, UK: Burns and Oates, 1876). My translation from the Latin quotation on p. 287, fn. 13.

> although he administers it through other rulers as the result of tacit or express concession.[28]

Within the context of disproving this claim, Suárez defended the proper sovereignty[29] of temporal rulers—a point that reinforces his sense of the *ius gentium* as a law enforced by a community of sovereign powers. Because the civil powers constituting the international community have not bequeathed their proper political jurisdictions to any one authority, they remain the proper governors in their respective societies and furthering their apolitical common good by coordinated efforts.

Justice Among Nations?

Suárez held that a valid law must be just in its subject and in its establishment. Because the utility of a law is its promotion of a common good, the just subject of a law is salutary to all members of a community.[30] With respect to the *ius gentium*, this understanding mandates that the law of nations benefit the international society as a whole. Customs that emerge in favor of a few states to the complete exclusion of others would therefore not carry the force of law—in fact, they likely would not gain the universal agreement necessary even for them to become customary. This does not exclude the possibility of a few powerful states becoming leaders, or even hegemons, in an international society. Suárez did not directly discuss this issue, but it does not seem that hierarchy among states necessarily undermines the existence of laws among them. He recognized that the *ius gentium* would not always enshrine perfect justice. Often the

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[28] Suárez, *A Defence of the Catholic Faith*, in *Selections from Three Works*, 764.

[29] i.e. the proper jurisdiction of a *communitas perfecta*—a self-sufficient political authority.

[30] Suárez, *A Treatise on Laws and God the Lawgiver*, 126.

law of nations tolerates evils and injustices for the sake of order, and states might use certain precepts of the *ius gentium* to benefit themselves exclusively. But this would not disqualify the precept itself from bearing the force of law. A just precept may be used unjustly, but even Great Powers may have need for just precepts among themselves. As in his discussion of unjust civil law, [31] with respect to the *ius gentium* Suárez erred on the side of toleration of injustice for the sake of maintaining order rather than of righteous subversion, "since this very toleration may be so necessary, in view of the frailty and general character of mankind or of business affairs, that almost all nations agree in manifesting it."[32] Nations pursue justice and order imperfectly, and are more fallible than individuals, given the lack of an international regime through which to conduct and formalize deliberations. Consequently, although Suárez thought that the *ius gentium* must serve the good of the international community as a whole in order to bear the force of just law, he understood that this was something states would have to work out among themselves. The possibility of just order among states does not imply the likelihood of a second Eden.[33]

Regarding the just establishment of the *ius gentium*, Suárez presented three phases of justice as the condition for any law's just formulation. The first of these phases, legal justice, accords with the standard set down for the just content of the *ius gentium*,

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[31] Ibid., 136 - 137.

[32] Ibid., 408.

[33] Suárez did not discuss the possibility of a tyrant state establishing itself in the international community. Presumably, nothing in the *ius gentium* would prevent a state from exercising an especially strong influence over fellow nations, but if such a state did violence to the proper jurisdictions of other *communitates perfectae*, then the *ius gentium* itself would justify defense against such a tyrannical use of the community's orders. Outwardly, such defensive activity could resemble "balancing;" however, the justifications would not be the same. "Balance of power" tends to justify preemptive strikes, whereas Suárez would find anything short of an actual crime insufficient to merit violent response.

namely, that the law of nations should have as its goal the furthering of the international common good and the preservation of particular jurisdictions.[34] Sovereignty is the embodiment of subsidiarity at the level of the international community; because the community of states is a social association, not a political one, its common good is not a political common good. As a result, the member *communitates perfectae* maintain their responsibilities and independence to a greater degree than do the citizens of a political society. This leads to the second phase, commutative justice. According to this phase, "the legislator shall not exceed his own power in laying down commands."[35] States elect no prince, so long as they remain *communitates perfectae* in predominantly self-sufficient existences. Consequently, commutative justice excludes the international community from legislating as if the common good of the international society were political instead of merely social. The jurisdiction of the community of states extends only so far as regulating the interactions of states; it does not bind non-state actors. It may allow for a non-state actor to become a kind of arbiter (as Medieval kings did with the Papacy)[36] or it may declare a particular kind of non-state actor an enemy of the community at large (as has been done with pirates and brigands throughout history).[37] Nevertheless, the *ius gentium* binds states, and binds them only in their relations with one another. Even a just

[34] Ibid., 129.

[35] Ibid.

[36] On the usage of the Papacy as an international institution, it is worthwhile to consult St. Robert Bellarmine's *De Potestate Summi Pontificis in Rebus Temporalibus*. There, Bellarmine attempts to argue that the Pope's international power (i.e. *potestas indirecta*) has a theological foundation. In the process, Bellarmine catalogues a plethora of historical instances in which the Pope acted successfully as an international arbiter without himself possessing much direct political power. For Bellarmine's more tenable theological assessment of the Pope's temporal power, Cf. *De Officio Primario Summi Pontificis*.

[37] Cf. Cicero's famous passage regarding the exemption of *hostes humani generis* from the laws of war (including fidelity) in *De Officiis*, III.29.107.

war waged for the purposes of preventing a state from destroying itself does not represent, according to Suárez, the authority of the international community over the domestic politics of a member state. The society of states is analogous to a neighborhood, to borrow the image from Edmund Burke, and while public nuisances invite intervention, the neighborhood council ought not to fine-tune the interior workings of member households. The final phase of justice helps to define the relationship thus constituted between members of an international community: distributive justice commands that law proportionately distribute the burdens of regulating the community among the members.[38] In the international society, the burden of regulating interactions falls to all of the members, if unequally, throughout time. Again, Suárez did not exclude the possibility of a few states taking leadership roles in maintaining the community; yet, even under a hegemon, cooperation among members is necessary in order for states to maintain the mutually beneficial society. Enforcing the international common law is a responsibility that no one member could ever take on successfully, except through empire (in which case, the community would no longer be international but a consolidated dominion). If all or nearly all members do not agree to maintain the social system among themselves, then the *ius gentium* will fail. Thus, contrary to civil law which has the benefit of a formal regime, the *ius gentium* relies entirely on the efforts of members. Customary precedent is a powerful authority, but only insofar as those who take part in the practice endeavor to uphold it. Suárez found it improbable that all states in an international community would uniformly remove or alter the *ius gentium*, but it is true nonetheless that the force of the *ius gentium* always relies on the willingness of the current generation of states. As a

[38] Suárez, *A Treatise on Laws and God the Lawgiver*, 129.

result, Suárez held that, for the sake of social goods, the majority of states would engage in the ever-precarious business of regulating their relationships. Though the pressures of anarchy remain and though justice is not always apparent in the workings of the law of nations, states find the benefits of cooperation too valuable to jettison them entirely. As competitive and aggressive as states often are, one finds that they continue to work at the problem of constituting themselves as a society with unofficial rules. They continue to bear the burdens of this informal distribution, despite the constant threat and almost constant presence of wars and misunderstandings.[39]

[39] In this way, Suárez's understanding of international relations offers a worthy foil to John Mearsheimer's theory of great power politics. Without reducing the "tragic element" of international affairs, Suárez focuses on what Mearsheimer seems to ignore, namely, that states strive to overcome the problem of communication and of diverging interests. Cf. Hedley Bull's *The Anarchical Society* in this respect. Mearsheimer's emphasis on the problem of unintelligibility and lack of trust can be found summarized in his *The Tragedy of Great Power Politics*.

CHAPTER THREE

Suárez, Grotius, and Burke

Suárez's refinement of the *ius gentium* came at—and arguably played a part in causing—the genesis of a movement in legal philosophy to examine and uphold Christendom as an international community. Of course, Christendom had existed for nearly a thousand years, at least since the intense diplomatic, evangelical, and legal initiatives of Pope Saint Gregory the Great. But it was when Christendom stood rent and in danger of being lost that theologians, lawyers, and statesmen sought to preserve it as an international arrangement. The Salamancan School's investigations culminated in Suárez's teachings, but the Protestant Dutchman Hugo Grotius produced a more elaborated, rationalistic account of the *ius gentium*. Moreover, the boisterous Edmund Burke, though he claimed no intellectual heritage from scholastics or humanists, Catholic or Protestant, shared Suárez's and Grotius's appreciation for the order of Christian nations. All three of these men wrote and spoke of the *ius gentium*, and in their respective fields they each ascribed this idea to Christendom, endeavoring to apply a sense of informal legal order in theory and in praxis. Other authors certainly wrote of the *ius gentium*—notably, Alberico Gentili, Samuel von Pufendorf, and Emer de Vattel. However, Suárez, Grotius, and Burke typified and embodied three approaches to the *ius gentium* that permeated the emerging literature on international order. Grotius asserted that the conclusions of natural right reason are of objective moral rightness, and that from them the law of nations is deduced. Burke, on the other hand, identified human custom as the sole means through which natural right is known—a contention not be confused with

Suárez's conviction that the naturally right should inform custom. Suárez respected reason and custom, and would have agreed with Grotius and Burke on many points. But Suárez maintained law and morality as distinct realities: neither reason nor the wisdom of tradition, in Suárez's account, rendered the *ius gentium* morally absolute or certain. Prudence characterized Suárez's international thought, because, unlike Grotius and Burke, Suárez the theologian did not feel the need to engage in the modern search for moral certainty in the absence of theology. Although "moral expediency," to use Suárez's phrase, pervades all three authors' approaches, only Suárez avoided the contrary pitfalls of rationalism and conventionalism. Arguably, in short, the consequences of other internationalists' theories during this period of decay are played out and typified in the positions of Suárez, Grotius, and Burke.[1] In the silent exchange between these three Christian thinkers in the last days of Christendom, one finds the tension between prudence, reason, and custom displayed through a debate about the relationship between the *ius naturale* and the *ius gentium*. By assessing the similarities and differences between Suárez, Grotius, and Burke's presentations Christendom's international legal

[1] Without downplaying the distinctness of Gentili's and Vattel's works, arguably each of their *approaches* were represented—with modification—in Grotius and Burke. Theodore Meron (in "Common Rights of Mankind in Gentili, Grotius, and Suárez," *The American Journal of International Law* 85, no. 1 [Jan., 1991]) has drawn attention to the grudgingness of Grotius's acknowledgment to Gentili: "I know that others may be helped by [Gentili's] diligence, and I admit that it has helped me; so I leave it to his readers to judge what is lacking in the way he distinguishes between questions and between different types of law. But I will say this, that when he discusses a controversy he tends to follow either a few ill-founded examples, or the authority of recent Jurisconsults in their answers; and many of those were written on behalf of clients, and not with a view to what is right or good… while [Gentili] outlined the principal topics in his distinctive fashion he did not deal at all with many aspects of the most important and persistent controversies." (quotation from Hugo Grotius, "Appendix: Prolegomena to the First Edition of *De Jure Belli ac Pacis*," in *The Rights of War and Peace*, trans. Jean Barbeyrac, ed. Richard Tuck, vol. 3 [Indianapolis, IN: Liberty Fund: 2005], 1755). Moreover, James F. Davidson (in "Natural Law and International Law in Edmund Burke," *The Review of Politics* 21, no. 3 [July, 1959]: 485) has indicated Burke's frequent citation of Vattel as evidence of intellectual kinship, not with respect to Vattel's republicanism or rationalism, but in the shared equivocation of "The Law of Nature" and the positive international law. Neither Grotius nor Burke cited Suárez, though Grotius acknowledged his debt to Vitoria in a manner similar to (and in a passage neighboring) his acknowledgement of Gentili.

order, it becomes possible to distinguish the significance of Suárez's contribution. Although internationalists have at times placed Suárez in shared categories with either Grotius or Burke, Suárez's understanding of the relationship between reason and custom sets him apart from either of his successors. Suárez's reservation about the objective morality of the *ius gentium* allows his international thought to avoid many of the pitfalls of rationalism or conventionalism. As a result, assessing the approaches of Suárez, Grotius, and Burke helps one make distinctions within their loosely shared tradition and vindicates Suárez as an author worthy of study by contemporary students of international relations or the philosophy of law, even in an age after Christendom.

Was Suárez a "Grotian?"

At first glance, Francisco Suárez seems to fit neatly into Martin Wight's category of "Grotian" political theorists. So much is this the case that Wight chose to explicate what he perceived in *The Three Traditions* as the foundation of Grotian rationalism with a paragraph from Suárez's *De Legibus*:

> The human race, though divided into no matter how many different peoples and nations has for all that a certain unity, a unity not merely physical, but also in a sense political and moral bound up by charity and compassion; wherefore though every republic or monarchy seems to be autonomous and self-sufficing, yet none of them is, but each of them needs the support and brotherhood of others, both in a material and a moral sense. (Therefore they also need some common law organizing their conduct in this kind of society.)[2]

[2] Cited in Martin Wight, *The Three Traditions* (New York, NY: Holmes & Meier, 1992), 22. In this passage, Suárez used the Latin conjunction "*quasi*" to preface his description of the "unity" among nations as political or moral. "*…humanum genus… semper habet aliquam unitatem non solum specificam, sed etiam quasi politicam et moralem…*" (Suárez, *A Treatise on Laws and God the Lawgiver*, 402). That is, "…the human race… always has a certain unity not only as a kind [species] but also as if it were political and moral." This does not imply that the "unity" among states (i.e. what constitutes them as a community) is political; on the contrary, Suárez's wording implies that he was making a comparison not a classification. On one hand, an apolitical community (i.e. a *societas*) may imply a likeness to the political community, insofar as the apolitical may still entail a certain common good, interest in justice, and laws. However, as Aquinas made clear in his discussion of the community for which the natural law exists (Aquinas, *ST* I. –II, Q. 94, Art. 3), not all law-bearing communities are properly political. It would seem that there is a

This passage distinguishes Suárez from Wight's realist and cosmopolitan categories, describing a vision of international life consistent with ordered unity despite a diversity of states. On one hand, Machiavels would scoff at any indication of underlying solidarity among states, let alone one bound up by "charity and compassion." On the other hand, cosmopolitans might find Suárez's statement lacking in that it advocated cooperation rather than revolutionary unification. But would it be accurate to place Suárez in the Grotian tradition—the only alternative in Wight's tripartition to realism and idealism? According to Wight, the rationalists (another name for the Grotians) eponymously focus on the centrality of reason as the foundation for a workable and just international order. "The Rationalists hold the tradition of natural law… a belief in a cosmic, moral constitution, appropriate to all created things including mankind; a system of eternal and immutable principles radiating from a source that transcends earthly power (either God or nature)."[3] Because Suárez wrote of the *ius gentium* as an intermediary between natural and human law, but as "more closely allied to the first of these extremes,"[4] he seems to fit this description of the rationalist internationalist. However, it is on this very point that Suárez departed from the rationalism that would characterize the thought of his reader, Hugo Grotius.

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community of human beings, for instance, whose "natural common good" differs greatly from the political common good. Aquinas claimed that temperance, for instance, would be mandated in accord with the natural common good, but that such laws as might require temperance would not be found in the political community. In a similar way, apolitical communities (i.e. communities that possess no regime and thus no single authority with care of the community) might "legislate" within themselves through informal means such as custom. Robert Bellarmine describes such a scenario in *De Laicis*, and calls the rules of such an informal arrangement (even though this example is of individuals, not of states) a *ius gentium*. (Robert Bellarmine, *On Temporal and Spiritual Authority*, trans. and ed. Stefania Tutino. Indianapolis, IN: Liberty Fund, 2012. 22-23).

[3] Ibid. 14.

[4] Suárez, *A Treatise on Laws and God the Lawgiver*, 374.

Just one line past where Wight's quotation stopped, Suárez explained the feature of his thought that most drastically separates him from the Grotius. Regarding the need for a common law to regulate the intercourse and association among nations, he wrote that, although "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…"[5] Although Suárez considered customary law among nations to be possible largely because of the natural law and right reason, he emphasized the mediating element of human agency more than Grotius did. According to Suárez, the *ius gentium* accorded with and could be evaluated in light of natural law, but Grotius located the source of the binding force of the *ius gentium* in nature itself. Consequently, Suárez conceived of the *ius gentium* as a law proceeding from fallible free will and moral expediency, [6] whereas Grotius derived *ius gentium* directly from nature through right reason. Grotius explained in the *Prolegomena to the Law of War and Peace* that he sought to defend the cause of justice and law in international politics against the cynical claims that "success is the only justice" and that violence is the only significant arbiter.[7] He selected the Skeptic philosopher Carneades as spokesman for the opposing view, for

> Who better than Carneades, who… [w]hen he undertook the critique of justice (which is my particular subject at the moment), he found no argument more powerful than this: men have established *iura* according to their own interests [*pro utilitate*], which vary with different customs, and often at different times with the same people. So there is no natural *ius*: all men and other animals are impelled by nature to seek their own interests.[8]

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[5] Ibid. 403.

[6] Ibid. 384.

[7] Grotius, "Appendix: Prolegomena to the First Edition of *De Jure Belli ac Pacis*," 1745.

[8] Ibid., 1746-1747. This use of Carneades is reminiscent of Cicero's use of him in *De Re Publica* III.5-18. In what is extant of this dialogue, Philus offers a defense of conventionalism in the voice of

Grotius called this claim[9] the "crucial error" against which his *De Iure Belli ac Pacis* would contend. As a humanist, Grotius considered man a special kind of animal whose nature calls him to a higher existence than that of wolves. A man may choose to act a s wolf among his fellow men, but in doing so he cannot escape the consequences of betraying the rational nature that constitutes him. Nature embodies a *ratio* that legislates and executes judgment against those who contest it. Man alone, according to Grotius, is capable of discerning the "the internal principle, which is associated with qualities belonging not to all animals but to human nature alone."[10] Through this knowledge, man can derive with certainty just *iura* for society (be it political or international).[11] Man's rational nature is the source of natural law, which consists in normative standards knowable by and enforceable on all human beings.

After explicating the origins of natural law in the *ratio* of nature, Grotius suggested the paradox that most distinguished his approach to law:

> What I have just said would be relevant even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to him: the contrary of which on the one hand is borne in upon us (however unwilling we may be) by an innate light in our soul,

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Carneades, "whose way it is frequently to make the best causes appear ridiculously by his talent for sophistry." (Cicero, *De Re Publica*, III.5).

[9] Originally made by Carneades in a speech at Rome replying to arguments he advanced to the contrary on the day before: "This Carneades, when he had been sent by the Athenians as ambassador to Rome, disputed copiously on the subject of justice… But on the next day the same man overthrew his own argument by a disputation to the contrary effect, and took away the justice which he had praised on the preceding day… as it were by an oratorical exercise of disputing his opinion on both sides." (Lactantius, *Divine Institutes*, trans. William Fletcher, vol. 7 of *Ante-Nicene Fathers*, ed. Alexander Roberts, James Donaldson, and A. Cleveland Coxe, 224-258, [Peabody, MA: Hendrickson Publishers, 2012], Bk. V, Ch. 15).

[10] Grotius, "Appendix: Prolegomena to the First Edition of *De Jure Belli ac Pacis*," 1747.

[11] Regarding the "certainty" that Grotius aimed at, it is worth noting the verse from Terence that he quoted (Ibid., 1746). Later in the text, Grotius confirms the "directness" with which one can derive human *iura* from human nature by saying that human nature is the "mother" of natural law and the "grandmother" of civil law (Ibid., 1749).

> and on the other is confirmed by many arguments and by miracles witnessed down the ages.[12]

Despite the pious recovery that he quickly supplied after posing this impious thought, Grotius continued to remind his reader that the natural *ius* with which he was concerned "necessarily derives from intrinsic principles of a human being."[13] By extension, one could attribute the source of natural *ius* to God, but Grotius did not find it necessary to do so. Significantly, Grotius maintained that nature and right reason alone could act as sufficient lawgiver. Heinrich Rommen has identified this shift from God to Nature as the source of transcendent law as having the same implications for jurisprudence that deism would have for theology: whether or not there is a God, there is something like providence intrinsic to nature that is scrutable to man.[14] Grotius thus converted what had been a theological claim—that there is *ratio* in nature and that it bears the force of law due to God acting as lawgiver—into a rationalistic and naturalistic argument. "[F]or human nature itself is the mother of natural law."[15] In this way, Grotius's project was a modern one at heart, attempting to offer on a a rational and natural basis what previously would have required a theodicy. Grotius piously attempted to salvage the importance of the divine for living a complete human life; however, the crack was opened and those who followed in Grotius's steps would continue to look for natural law in the absence of a divine lawgiver.

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[12] Ibid., 1748.

[13] Ibid., 1749.

[14] Rommen, *The Natural Law*, 57.

[15] Grotius, "Appendix: Prolegomena to the First Edition of *De Jure Belli ac Pacis*," 1749.

In contrast with Grotius, did Suárez hold right reason and natural law in no esteem? On the contrary, like Grotius, Suárez thought that the natural light of reason prescribes what should be done and "may be called the natural law, since men retain that law in their hearts…"[16] But this natural *ius* derived the force of law from the divine lawgiver, who wrote it on the hearts of men such that the mind could discover it. Unlike Grotius, Suárez denied that precepts of reason alone could constitute laws. Suárez thought that a legislator is always necessary for there to be a law. Consequently, just as human law demands a human legislator, natural law demands a legislator of nature—that is, a creator-god. By locating the source of law's binding force in reason, Grotius attempted to salvage natural law as a sure source of universally binding international law in the absence of theology. If there exists a natural law clearly discernible by all through right reason, and if reason apart from the intention of a lawgiver could constitute law, then theology could be excluded from political discussions even while the universal law previously attributed to God remained as a kind of secular universal standard of justice. Ironically, the key difference between Suárez and Grotius stands out in the very title of the former's seminal text: *De Legibus ac de Deo Legislatore*, *On Laws and on God the Lawgiver*. As a theologian, Suárez was willing to consider the "law" in nature as something originating in a divine lawgiver distinct from the source of lawfulness for the *ius gentium*. This left the *ius gentium* in a humbler position than the natural law, being the product of human consensus rather than divine mandate or natural order. Yet, by preserving the independent agencies of God and man, Suárez left open a legitimate avenue for discussing the *ius gentium* as a properly legal and human—not theological—

[16] Suárez, *A Treatise on Laws and God the Lawgiver*, 205.

concept. Grotius might have judged this assessment of the *ius gentium* too near to Carneades's conventionalism, but Suárez did not claim that justice originates in human convention. Rather, Suárez acknowledged that there is no merely human convention guaranteed to embody the just wholly and infallibly. Suárez, as a theologian, was content to find the full measure of justice in the divine alone; man consults God's justice through theology and may reason about the just with less surety through philosophy. However, the full measure of justice cannot be realized in human law: only in the City of God are law and justice perfectly unified. Grotius was not content with this view, which leans heavily on prudence and does not promise complete certainty of the just in human affairs. He had to be sure that an objective order of justice could exist even in the absence of God. Consequently, for all of its admirable qualities, the Grotian tradition tends to place an undue, secular faith in the principle of right reason to dispel uncertainty. Suárez's position, on the contrary, reserves infallibility to the divine. Suárez would agree with Grotius that some precepts are self-evident to natural reason, and he would posit this as an explanation for the general solidarity of the *ius gentium* across differing cultures and times. Yet while this point helps explain the phenomenon of the *ius gentium*, it alone does not sufficiently justify the *ius gentium* as law—as it must in Grotius's account. Consequent to the Grotian tradition's dependence on right reason, subsequent rationalists often have consigned themselves either to legal positivism or to an agnostic assessment of international law that relies on but shies away from explaining the rational basis of international order. A Suárezian position, however, need not resort to either of these extremes, but understands the *ius gentium* as the result of human agency even while leaving open the possibility of evaluating this customary law on theological or

philosophical bases. This, in fact, is what Suárez did in his brief but potent discussion of the subject in *De Legibus*.

Between Grotius and Carneades

Thus distinguished from Grotian rationalism, Suárez's position would seem to accord with the conventionalism of Carneades. It is true that Suárez left less room than did Grotius for the influence of natural law as a source of moral obligations; and so, like Carneades, Suárez might seem to locate lawmaking activity solely in human choice. Yet, the determinative thesis of Carneades's conventionalist argument was not that law depends on human agency, but that justice is a human construct. Suárez differed from Grotius in ascribing less activity to God and nature—to direct providential activity—but he did not concur with Carneades that law precedes any sense of justice. This position allowed Suárez to keep God, nature, and justice in mind while discussing law, but also meant that he kept these realities within the purview of theology, philosophy, and moral doctrine, acknowledging that neither God nor nature ensures that justice prevails always and everywhere in temporal human affairs. As a result, Suárez and the other Jesuits who adhered to a similar position found critics among secular rationalists like Thomas Hobbes, as well as among theistic occasionalists like Robert Filmer. Hedged in on all sides by the advocates of reason, providence, convention, and nature, what could Suárez's response be? His position seemed, all at once, too rational, too theological, too conventional, and too natural, giving deference to reason, God, human agency, and nature in due proportion.

Contrary to Carneades's conventionalism, Suárez wrote that there is no law if there is no preceding sense of justice. This does not imply that all human law necessarily

follows directly from natural law or right reason, but that human law should accord with rational deliberations about the divine and the natural. According to Suárez, the legislator has an obligation to discern the justice or injustice of actions and to legislate, even if imperfectly, on the basis of this speculation. Natural justice, he thought, was something to which all men have access and of which all legislators should make themselves students. At the same time, Suárez acknowledged that many laws, and especially laws governing matters of political convention, operate on morally neutral ground and impose obligations that are not naturally just or unjust, but conventionally so.

> For, even as an act not of itself evil becomes evil through the just prohibition of a superior, so an act not of itself either good or evil, will become good through a law which justly prescribes it; and accordingly, law always relates to a good act since it either presupposes that the act is good, or causes it to be so. [17]

Between the discernment of natural justice and the positing of convention, legislators work out legal, commutative, and distributive justice for their communities. Suárez did not deny that many regimes impose rules on citizens that flagrantly violate or seek to redefine these notions of justice. But, as he argued, the term "law" is a misnomer when applied to unjust rules, "law" being reserved for rules that embody some commonly acknowledged sense of right. At the same time, Suárez did not subscribe to the occasionalist thesis that God and nature always make the attempt to descry justice easy or straightforward. Whereas for Filmer, God actively ensures that justice prevails in temporal affairs, Grotius ascribed this providential activity to nature and right reason: nature makes clear the precepts of justice and their application, and it punishes those who disobey. Suárez, on the other hand, left much to the fallibility of human agency. Without despising reason, he granted the possibility that prudence may never completely

[17] Ibid., 121.

overcome uncertainty about the just. The laws of the *civitas* are not written in the heavens; rather, as far as Suárez was concerned, Heaven reflects the justice at which human beings should aim, but only God could bring about a city in which law and justice are perfectly united. Suárez did not attribute the binding force of the *ius gentium*, or of any other human law, to God or nature directly; he contended that human legislators must consult God and nature for guidance, but that ultimately human law (including the *ius gentium*) is the creature of men, through sue of the faculties that God has given them. Justice thus remained a concern for Suárez—in a way that it was not for Carneades—but Suárez did not agree with Grotius that natural right reason can perfectly clarify what is just or that justice is ever guaranteed in human affairs.

Burke and Suárez on Customary Law

Whereas Grotius looked to the natural precepts discerned by right reason for guidance in political affairs, Burke located natural right in the development of precedent.[18] Suárez's political understanding thus seems to have more in common with that of Burke than that of Grotius, who admitted the value of customary precedent but did not rest his case on it. Unlike Burke, Grotius based his position on what Burke might have called "speculative" rationality—on the existence of a transcendent *ratio* at work in nature and on the individual's faculty for apprehending it. "The multitude, for the

[18] In Burke's thinking, the precedent of what has come before is significant because it embodies "all our old prejudices" which should be cherished "to a very considerable degree." (*Reflections on the Revolution in France*, vol. 2 of *Select Works of Edmund Burke*, ed. Francis Canavan [Indianapolis, IN: Liberty Fund, 1999], 181). Such "inbred sentiments" as the fear of God and the fear of kings—"the active monitors of our duty, the true supporters of all liberal and manly morals," as opposed to the "paltry blurred shreds of paper about the rights of man"—as are enshrined in traditional precedent are "*natural*" affectations. (Ibid. 181) Consequently, "We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages." (Ibid. 182)

moment, is foolish, when they act without deliberation," wrote Burke, "but the species is wise, and when time is given to it, as a species it almost always acts right."[19] Certainly Burke did not ascribe absolute moral truth to every traditional and customary precept. Nevertheless, he considered tradition, not right reason as such, to be the one sure means of discerning moral truth, short of Divine Revelation—though, even Providence is especially perceptible through historical institutions. The Burkean scholar Russell Kirk has observed that, "Just as purpose is to be discerned, however dimly, in the procession of history, Burke contends, so there exists irrevocable enactments of Divine authority which we can endeavor to apprehend through observing humanity living and humanity dead… [Burke] says that natural right is human custom conforming to Divine intent."[20] Human beings thus perceive natural and divine right not through speculation (be it philosophical or theological), but through "*entailed inheritance* derived to us from our forefathers, and to be transmitted to posterity; as an estate specially belonging to the people of this kingdom without any reference whatever to any other more general or prior right."[21] In short, Burke preferred to restrict the knowable rights of men to the rights of "English-men" or "French-men" or "Dutch-men," while disavowing knowledge of the rights of Man as such. Knowledge of right is inherited through one's particular traditional context. Paradoxically, right is transcendent according to Burke, but men can know it not as an "abstract principle" but only in the transient patrimony of one's community—

[19] Edmund Burke, "Speech on the Reform of the Representation of the Commons in Parliament," vol. 4 of *Select Works of Edmund Burke*, ed. Francis Canavan, 18-25 (Indianapolis, IN: Liberty Fund, 1999), 21. https://oll.libertyfund.org/titles/659.

[20] Russell Kirk, "Burke and Natural Rights," *The Review of Politics*, vol. 13, no. 4 (Oct., 1951), 442. Cf. James F. Davidson, "Natural Law and International Law in Edmund Burke," 486.

[21] Burke, *Reflections on the Revolution in France*, 121. Emphasis in original.

transient because inheritance is in flux, being "derived from the fathers" and ever in transmission.[22]

Burke's emphasis on custom as the sound basis of moral judgement resembles Suárez's reliance on "usage" as the basis of the *ius gentium*. Both men revered tradition and custom; but while Suárez and Burke concurred in recognizing custom as a basis for law, Suárez did not locate the standards of law solely in custom. One should recall Suárez's judgment that the *ius gentium* and all human law never reflect the just simply. Suárez never presented secular human institutions as clear embodiments of binding, objective moral truth. In matters that were not of themselves objectively determined to be good or evil, human law could decide the good or evil of an action; yet human law is never anything more than the product of prudence and counsel. As such, it can never reflect the justice of God or the rightness of nature perfectly: the laws of the City of Man cannot realize the order of the City of God without blemish. Suárez ascribed the knowledge of divine right to theology, and he argued that philosophy—acting as handmaiden to theology—would attend to the knowledge of natural right. Human law, in this schema, represents an effort by lawmakers to reflect in particular ordinances the truths embodied in the precepts prescribing the universal *ought* of these two *Scientiae*. According to Suárez, human beings should look beyond the law in order to judge whether a law is just. Customary usage can act as a mechanism for legislation, but it cannot translate perfectly the transcendent standards of right. With respect to the *ius gentium*, customary usage among nations creates laws, but it does not ensure that such laws will embody what is right always and everywhere. Suárez contended that laws inevitably

[22] Ibid.

emerge among nations, not that the process of customary legislation is inherently trustworthy. Indeed, through theology or philosophy, men can judge the process of customary usage (precedent) to be seriously lacking, though not so unjust as to be incapable of producing laws. It is the task of prudence, then, to mediate between what ought to be and what is in a given time and place possible. In short, Suárez suggested that there is no reason to view customary legislation as a necessarily good process that seldom fails,[23] but that one should employ prudence to evaluate the transient according to the transcendent. Because the *ius gentium* is legislated in the complete absence of a regime, it requires this prudential review even more than does domestic customary law. Consequently, the *ius gentium* is a much more general and imperfect law than what one finds even within nations.

Burke may not have ascribed the same degree of surety to custom as Grotius ascribed to the precepts of right reason, but he certainly judged that custom encompassed all that mankind could (in the present) know with any degree of surety about what is right. Consequently, while Suárez considered custom to be imperfect but useful, Burke thought that customary and precedented—in short, the *practical*—was the highest to which man could look for moral guidance. His claim was not Carneades's—that justice is no more than what conventions prescribe. Rather, it was that genuine justice and right can be known only through the medium of conventional precedent. For Suárez usage operated as a mechanism for establishing human law among men in the absence of a

[23] By contrast, Burke writes: "Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek (and they seldom fail) they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice, and to leave nothing but the naked reason… Through just prejudice, [man's] duty becomes a part of his nature." (Burke, *Reflections on the Revolution in France*, 182)

single lawgiver. It implied that moral reasoning was taking place informally, and that the result of this deliberation would be something unsatisfactory in the grand scheme of *the whole* known through theology and philosophy, but sufficient to serve man's needs. For Burke, on the contrary, usage was a process that combined knowledge of the *is* with knowledge of the *ought*. Because Burke lacked a faith in the ability of the individual to 'read' any transcendent order outside of what is transient,[24] he departed from both Grotian rationalism and Suárez's sense of prudence. Ironically, this departure effectively committed Burke to the same problem that Grotius faced: Grotius sought to ground the existing law of nations in objective moral right through the medium of rationality, and Burke attempted to do the very same thing through his use of tradition as a process. Rationalism and traditionalism brought Grotius and Burke to the same problem: "How can the objective moral necessity of Divine Law be imported into human institutions so that we can arrive at morally right precepts without deference to theology?" The most significant difference between Grotius and Burke thus lies in the fact that Grotius was satisfied with a philosophical response while Burke was intent on avoiding all metaphysical speculations, not just theological ones. Suárez would have thought that this—the question of locating something like a divinely revealed certainty in secular affairs—was simply the wrong question to ask. On the contrary, Suárez proposed that objective morality itself exists with God, and that it can be seen only as through a glass darkly.[25] Conventions have legitimacy, but one cannot produce a coherent guide for

[24] Cf. Davidson, "Natural Law and International Law in Edmund Burke," 486, and Burke's own observations on the limits of human knowledge in *A Philosophical Inquiry into the Origin of Our Ideas of the Sublime and Beautiful*.

[25] This, in fact, represents the scholastic position generally, insofar as it does not depart into voluntarism. Cf. St. Thomas's introduction to the *Summa Theologiae*.

political life by attempting to unite the *is* and the *ought* simply and as such so that the ways of God become perfectly scrutable and embodied in the ways of man. Suárez recognized that the ways of God are mysterious and that human affairs do not necessarily embody divinely guaranteed certainty.[26] He would have thought it foolish to attempt to locate anything like a scrutable providence in nature, right reason, or human tradition. Any attempt to do so must remain vulnerable to question of why reason or custom deserves godlike reverence—a problem from which the Grotian and the Burkean never completely escape.[27]

Law and Prescription

Prudence is at the heart of Suárez's and Burke's approaches to law, but one should not mistake them as referring to the same virtue. This becomes clear when one perceives the difference in how they each understood the nature of law. For Suárez, the *ius gentium* stood between natural and civil law but was decidedly human. On one hand, he surmised that its precepts were "conclusions drawn from natural principles," in the sense that their "appropriate character and moral value are immediately made manifest by

[26] Cf. Nietzsche's assessment of Hegel's attempt to do so with History: "History understood in this Hegelian fashion [as the world process] has been mockingly called God's sojourn on earth, though the god referred to has been created only by history… In that way you become Devil's advocates… you make success, the factual, into your idol…" (Friedrich Nietzsche, "On the Uses and Disadvantages of History for Life," in *Untimely Meditations*, trans. R. J. Hollingdale [Cambridge, UK: Cambridge University Press, 2007], 104 & 106). Though Nietzsche's critique betrays a similarity between Burke and Hegel, it is worth noting that "One goes beyond what Burke himself says if one ascribes to him the view that a sound political order must be the product of History. What came to be called 'historical' was, for Burke, still 'the local and accidental.' What came to be called 'historical process' was for him still accidental causation or accidental causation modified by the prudential handling of situations as they arose." (Leo Strauss, *Natural Right and History* [Chicago, IL: The University of Chicago Press, 1965], 314.)

[27] G. K. Chesterton and Leo Strauss each have noted this point regarding Burks's views on foundings. Cf. Strauss, *Natural Right and History*, 310, and Chesterton, "The Judgment of Dr. Johnson," vol. 9 of *The Collected Works of G.K. Chesterton*, ed. Denis J. Conlon, 233-296 (San Francisco, CA: Ignatius Press, 1989), 282.

the force of natural reflection… more because of the pressure of necessity… than because of [deliberate] will."[28] On the other hand, Suárez judged that, while true law cannot contradict natural equity, the *ius gentium* did not embody perfect justice: "For [the natural law]… prohibits all evil acts in such a way as to be tolerant of none; whereas the *ius gentium* may permit some evils…"[29] All human law and custom is fallible, according to Suárez. Though it must be just in order to be valid law, even the *ius gentium* is limited and is wanting in comparison to the Divine and Natural orders. As the product of moral expediency, its precepts "are not deduced from natural principles by a necessary and evident inference" and its obliging force "does not spring from reason alone, apart from human obligation of every sort…"[30] As a result, it is not unthinkable that the *ius gentium* could change:

> …there would be no inherent obstacle to change, in so far as the subject-matter of [the *ius gentium*] is concerned, if all nations should agree to the alteration, or if a custom contrary to [some established rule of this law of nations] should gradually come into practice and prevail. That event, however, although it might be conceived of as not contrary to reason, yet seems impossible, practically speaking.[31]

Though Suárez considered the *ius gentium* to be sacred in the sense that any law is sacred—namely, that an incompetent authority would not be justified in altering it—he did not regard intentional change of the *ius gentium* as an evil necessarily. He thought it unlikely to occur, but he did not claim for the *ius gentium* a sacredness that would set it apart from amendment. Although Burke shared Suárez's appreciation for the human

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[28] Suárez, *A Treatise on Laws and God the Lawgiver*, 407.

[29] Ibid., 408.

[30] Ibid., 410.

[31] Ibid., 411.

origins of the law of nations, and of customary law generally, for Burke the grounding for this law lay not in the consensus of nations, but in the wisdom of the process through which it came about. Tellingly, his objection to the French revolution was chiefly that it was destabilizing: "It is the concern of mankind," he wrote, "that the destruction of order should not be a claim to rank."[32] With this statement alone, Suárez would not have taken issue, since he too saw the value of order for the sake of achieving peace and justice. Yet Suárez thought that the international order and law had value primarily because of their utility for attaining other goods. Burke, on the other hand, ascribed value to order insofar as it was inherited, for "the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission."[33] That is, Burke vested the process itself of customary usage and transmission with a kind of objective value. Henry Kissinger offered a telling summary of Burke's dilemma when this process of conservation and transmission seemed threatened during the Regicide crisis:

> But what is a conservative to do in a revolutionary situation?... His fundamental position involves denial of the validity of the questions regarding the nature of authority… To fight for conservatism in the name of historical forces, to reject the validity of the revolutionary question because of its denial of the temporal aspect of society and social contract—this was the answer of Burke.[34]

The regicides questioned not only the inherited order, but also the process of inheritance. Burke's response—which typified his position in general—was to assert the *primacy* of transient ("practical") things over anything ostensibly transcendent ("speculative"). Whereas in Suárez's thought, the deliberations producing the *ius gentium* invited

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[32] Burke, *Letters on a Regicide Peace*, vol. 3 of *Select Works of Edmund Burke*, ed. Francis Canavan (Indianapolis, IN: Liberty Fund, 1999), 86.

[33] Buke, *Reflections on the Revolution in France* (section 39).

[34] Henry Kissinger, *A World* Restored (Boston, MA: Houghton Mifflin, 1957), 192-193.

considerations of both the timeless and the timely as distinct, Burke would not admit of questioning the inherited order on the basis of any claims supposedly deferring to the transcendent directly. France would have been a rogue state under either Suárez's or Burke's senses of the community of nations, but not for the same reasons. For Suárez, the Regicide would represent a party with which no lawful relations could be had, so long as it made itself, to quote Burke, "at war with all orderly and moral society, and [was] in its neighbourhood unsafe."[35] But while the actions of France in this circumstance would be illegal, the questions raised by the French might not themselves be wrong. The historical, traditional scene as such had no necessary good or evil value for Suárez, whereas Burke trusted that the ways of the past had culminated in the present inherited situation for a reason that must not be questioned. An unlikely critic makes this division clear and is worth quoting at length:

> [Burke] did not attack the Robespierre doctrine with the old medieval doctrine of *jus divinum* (which, like the Robespierre doctrine, was theistic), he attacked it with the modern argument of scientific relativity; in short, the argument of evolution. He suggested that humanity was everywhere molded by or fitted to its environment and institutions; in fact, that each people practically got, not only the tyrant it deserved, but the tyrant it ought to have. "I know nothing of the rights of men," he said, "but I know something of the rights of Englishmen." There you have the essential atheist. His argument is that we have got some protection by natural accident and growth; and why should we profess to think beyond it, for all the world as if we were the images of God! We are born under a House of Lords, as birds under a house of leaves… Man, said Burke in effect, must adapt himself to everything like an animal…[36]

Burke thought that the transcendent order of Providence could be found in the practical and transient. Suárez—coming from the perspective of theology—held, on the contrary, that no human historical order represents the order of Providence completely and as such.

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[35] Burke, *Letters on a Regicide Peace* 132.

[36] G.K. Chesterton, *What's Wrong with the World* (San Francisco, CA: Ignatius Press, 1994), 179.

Suárez certainly saw value in the society of states before the rise of Protestantism, for example, but his understanding of the *ius gentium* did not entail attachment to any century over another or to the way history had developed up to that time. One could evaluate even the product of inherited tradition in light of theology or philosophy and judge tradition to be unsatisfactory. Justice and goodness in custom and tradition are imperfectly realized, and while a blatantly unjust law is not a true law, no law or human arrangement satisfies the claims of justice absolutely. That would not, in Suárez's judgment, give *carte blanche* to any revolutionary wishing to amend or innovate the current law in favor of a more just order, but neither would it prevent men from questioning the current human order or even from amending it.

Suárez and Burke both understood that nations engaging in relations with one another involve themselves in a network of unwritten laws. But Suárez knew that these laws are uncertain—that they depend on human free will and moral expediency.[37] Suárez acknowledged that prescription—the establishment of law on the basis of long-standing use—is a valid means for legislating the results of informal moral deliberations. However, he did not invest prescription with the degree of surety that Burke gave it, and did not interpret the inheritance process as the only sure means to knowledge of what is right. Underlying their contrary interpretations of customary law as useful mechanism or intentional process is Suárez's and Burke's diverging understandings of prudence. It is the explication of this deeper issue, made possible by a description of their understandings of law, which is the true source of the divide between Suárez and Burke.

[37] Suárez, *A Treatise on Laws and God the Lawgiver*, 384.

Two Senses of Prudence

To appreciate the difference between Suárez and Burke on prudence, one must recall that Suárez affirmed the existence of a knowable natural right and natural law. Suárez denied that the *ius gentium*—or any human law—could perfectly enshrine the precepts of the natural law. Yet, (as we have seen) Suárez remained convinced that there is a natural law that legislators do and should contemplate. Suárez thought that human reason could apprehend the natural right embodied in the natural law, albeit as through a glass darkly. He thought that through deliberation human beings could wonder about this moral order among themselves, and—with respect to the *ius gentium*—he thought that the leaders of nations deliberate about what is just even as they contend with one another over matters of self-interest. Prudence and "moral expediency" take into consideration both the *ought* and the *is*: there is no merely practical process through which justice fully realizes itself in human affairs. Suárez thus adapted the premodern sense of prudence as a virtue that consults considerations of *theoria* and of *praxis* distinctly but in tandem. Burke parted ways not only with Suárez but also with the classical pagan and Christian views of this virtue by emphatically dividing the practical from the speculative. In Burke's usage, prudence resembles Suárez's "moral expediency" insofar as it is concerned with "time and circumstances" and "with the particular and changeable."[38] However, Burke excluded consideration of "the universal and unchangeable"[39] apart from the changeable. Alberto Coll has aptly observed that Burke did not lack principles;

[38] Alberto Coll, "Prudence and Foreign Policy," *Might and Right After the Cold War*, ed. Michael Cromartie, 3-29 (Washington, D.C.: Ethics and Public Policy Center, 1993), 20.

[39] Strauss, *Natural Right and History*, 304.

rather, as Coll wrote, quoting Burke, it was "circumstances (which with some gentlemen pass for nothing) [that] give in reality to every political principle its distinguishing color and discriminating effect."[40] At its core, Burke's prudence embodied a rebellion from "speculatism" and the seeking of principles outside of the practical. Thus examined, this view of prudence more closely resembled the Machiavellian than the classically pagan or Christian: it sought to dispense with such perceptions of the good as might be found only in "imagined republics and principalities that have never been seen or known to exist in truth."[41] At the same time, Burke did not follow Machiavelli in dispensing with "what should be done" for the sake of "what is done."[42] Rather, Burke attempted to combine the two, locating the *should* in the *is*, the ethical in those practical deeds and events that have actually come to pass (in contrast with such a "city in speech" or a "City of God" that can never be realized fully in the practical affairs of this life). Coll notes that

> To protect himself from Machiavellianism, Burke drew a distinction between 'true prudence' ('public and enlarged prudence,' which is concerned with the good of the whole and which takes a larger, long-term view of things,) and 'that little, selfish, pitiful, bastard thing, which sometimes goes by the name,' and which is little more than cleverness or cunning.[43]

Burke's prudence thus maintained a sense of "the whole," perhaps unlike Machiavelli's, but it also located the transcendent principles of this wider vision in the particulars of things actually done. The principles that Burke invoked in situations as varied as the question of American independence and the trial of Warren Hastings depended on there

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[40] Coll, "Prudence and Foreign Policy," 21.

[41] Niccolò Machiavelli, *The Prince*, trans. Harvey C. Mansfield, Jr. (Chicago, IL: The University of Chicago Press, 1985), 61.

[42] Ibid.

[43] Coll, "Prudence and Foreign Policy," 21.

being a process through which local tradition had discerned them. There was, for instance, a natural law in Burke's rhetoric, the precepts of which were not merely conventional; [44] yet, at the same time, Burke was clear that "the rules and definitions of prudence can rarely be exact; *never universal*."[45] In short, Burke's principles were not merely the product of convention, but it seems to have been the case that Burke thought they could be known only through tradition and practical experience.

Burkean prudence seeks to know the ethical in the practical; it does not seek out truths through speculation and then apply these truths to particular situations, but looks for natural right and natural law embedded in and unearthed by the process of political life unfolding through tradition and accumulating its wealth of wisdom through entailment. Strauss's summary of the Burkean trust in tradition as a process is worth quoting at length:

> Burke's political theory is, or tends to become, identical with a theory of the British constitution, i.e., an attempt to 'discover the latent wisdom which prevails' in the actual. One might think that Burke would have to measure the British constitution by a standard transcending it in order to recognize it as wise, and to a certain extent he undoubtedly does precisely this: he does not tire of speaking of natural right, which, as such, is anterior to the British constitution. But he also says that… the British constitution claims and asserts the liberties of the British 'as an estate especially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right.'… Transcendent standards can be dispensed with if the standard is inherent in the process; 'the actual and the present is the rational.' What could appear as a return to the

[44] Strauss, *Natural Right and History*, 295 and 299: "The people, or for that matter any other sovereign, is still less master of the natural law; natural law is not absorbed by the will of the sovereign or by the general will." Cf. Thomas Pangle and Peter Ahrensdorf, *Justice Among Nations* (Lawrence KS: The University Press of Kansas, 1999), 314, fn. 57: "[Victor] Davidson seems to go too far when he adds that '*all* meaning for what Burke calls the law of nature must be sought in these prescriptive frameworks;' it suffices to repeat Burke's invocation of 'universal equity' as expressed in the 'law of neighborhood.'"

[45] Cited in Pangle and Ahrensdorf, *Justice Among Nations*, 278-279, fn. 33. Emphasis added.

> primeval equation of the good with the ancestral is, in fact, a preparation for Hegel.[46]

For Burke, law reflects truth, goodness, and justice by virtue of the historical and cultural process leading to its creation. The wisdom of the species originates in the repeated trial and error of succeeding generations just as the progressive development of a biological species depends upon the trial and error in nature's evolutionary process according to Darwin's theory. Suárez thought that prudence should always be *timely*, seeking to guide the practical by referring to the theoretical. He thus concurred with Aquinas, quoting the Angelic Doctor: "[M]an [alone] among living beings is cognizant of the essential nature of his end and of the comparative relationship between the work and the end…"[47] According to Burke, such knowledge is beyond man's reach, unless he approaches it through knowledge of the practical. Suárez would have agreed with Burke that political prudence "looks to the community and is concerned therewith…"[48] However, unlike Burke, Suárez held that prudence also looks to transcendent principles found outside of the merely practical. There is no process, for Suárez, in the world of action that necessarily produces evident good, true, or just precepts. On the contrary, theology and philosophy must often look with disappointed eyes at the City of Man, where human law is a product of fallible and disorganized (i.e. not organized as a process) but at times prudential efforts. Suárez grasped that customary law codes like the *ius gentium* that have been developed over time do not necessarily and of themselves approach the laws of the

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[46] Strauss, *Natural Right and History*, 319. Cf. Chesterton's observation, quoted on p. 37 above, to the same effect.

[47] Aquinas, *Sentences*, Bk. IV, Dist. xxxiii, Art. I, cited in Suárez, *A Treatise on Laws and God the Lawgiver*, 43.

[48] Suárez, *A Treatise on Laws and God the Lawgiver*, 90.

City of God. Burke, in denying the powers of reason to grasp what is not implicitly practical (thus ruling out theology and philosophy) attempted to locate Divine Providence and the justice of God in activities of man. Burke, like Hegel, sought for "the sojourn of God on earth;" he saw God's truth as too far out of the reach of human reason, and so he attempted to make Providence scrutable by making it discernible in human affairs.[49] Unlike Hegel, Burke did not go so far as to consecrate History as God's Providence itself, but he did entertain an *almost* Hegelian faith that accidental causes would ultimately produce good and just results through a Divine-like process that the "species" undergoes.[50]

Neither Grotian nor Burkean

According to Suárez, there is a natural law, the precepts of which should inform men's deliberations regarding human laws and orders. However, unlike Grotius, Suárez thought that the natural precepts could not be implemented directly in human affairs. He simply did not share Grotius's confidence that the just can be known perfectly through the rational. On the contrary, Suárez thought that prudence must play a mediating role between what *should be* and what *is possible*. What is Divinely or naturally right does not necessarily translate directly into specific human legal precepts and institutions. Nature itself offers only general guidance; right reason offers material only for moral

[49] "The 'secularization' of the understanding of Providence culminates in the view that the ways of God are scrutable to sufficiently enlightened men. The theological tradition recognized the mysterious character of Providence especially by the fact that God uses or permits evil for his good ends. It asserted, therefore, that man cannot take his bearings by God's providence but only by God's law, which simply forbids man to do evil." (Strauss, *Natural Right and History*, 317).

[50] Cf. Strauss, *Natural Right and History*, 314-321.

deliberation, not for generating universally applicable precepts.[51] In this respect, Grotius's attempt to derive the *ius gentium* from right reason bears a closer resemblance to Kant's categorical imperative than to the classical Christian sense of prudence. By attempting to make reason a moral oracle, he paved the way for a kind of deism in international thought which assumed that the correctly rational mind could read nature like a book and translate natural precepts into exact rules for international conduct. Suárez, by contrast, offered an interpretation of the *ius gentium* that preserved a relationship with natural law and natural right but in which reason clarifies and fills in where the guidance of nature is lacking or obscure. Contrary to Burke, Suárez held that men can know transcendent moral truths apart from the purely practical. Just as Suárez would not have agreed with Grotius in finding the just clearly scrutable and readily applicable in right reason, likewise he would not have agreed with Burke that the teachings of custom necessarily entail some degree of moral objectivity. Grotius and Burke each attempted to make the justice previously attributed to God alone scrutable in human affairs—either by reason or by inheritance. Each in his own way endeavored to locate providence in the realm of how things are: Grotius said that anyone with disciplined rational faculties could always discern what is just, and Burke claimed that from the natural development of tradition one could discern the tried-and-therefore-true. Suárez attributed certainty neither to right reason nor to tradition; he did not attempt to simplify the relationship between the *is* and the *ought*. Rather, Suárez's philosophy of law appreciates the limits of human law but also the need to look beyond those limits for

[51] Suárez, *A Treatise on Laws and God the Lawgiver*, 402-403. With respect to the moral reasoning that takes place among nations, "although… 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…"

guidance. Most of all, he took into account both that human beings can make moral judgments outside of their historical circumstances and that the application of such deliberation's results is never straightforward. Consequently, Suárez's *ius gentium* was neither a direct and necessary result of nature nor a purely positive convention. In his estimation, the *ius gentium* is a positive human law that nations establish among themselves by usage, characterized by moral expediency but not mere conventionalism. It is, therefore, not the product of pure reason, of convention, or of historical processes, but of the enduring tension between rational speculation and the attempt to realize the just in human affairs.

CHAPTER FOUR

Conclusion

Francisco Suárez set out to refine the notion of the *ius gentium* for his students of theology. He did not devote a legion of pages to the subject, as did Grotius. Nor did he deliver speeches in a house of deliberation on questions of real war and turmoil, as did Burke. Nevertheless, ironically, it is this theologian's sense of international order that is the soundest. In Suárez's iteration of the *ius gentium*, one finds that what held together the order of Christendom still remains of worth for modern international thought and legal philosophy: namely, Suárez perceived the natural tendency of human beings to elaborate orders among themselves, as individuals and as communities. He rightly concluded that society breeds law and that law is the basis for the pursuit of common goods. The fundamental order among nations is spontaneous, coming to be when relations take place for periods of time. With this understanding, one can appreciate the need to consider the character of nations and peoples, and to rely on *iura* (laws or precepts of justice in relationships) as the means of preserving the international community. The orders that arise from interactions do not themselves restrain nations, but they help nations identify threats to their society and act as a community to secure regularity. This process is not bloodless and it does not promise perfect sociability: war is a key part of Suárez's sense of the law of nations. But neither does it reflect an absolute war of all against all as the natural state of nations. On the contrary, if Suárez is correct, without seeking to escape anarchy, nations do make cooperative efforts to mitigate the harsh and unpredictable realities with which they deal. Like individuals, nations

deliberate for the sake of satisfying material and even moral needs. They do not arrive unanimously at sure and maxim-like conclusions, but they take more into consideration than precedent alone. They jostle and fight and strive with and against one another to realize their concepts of the good and the just among themselves even as they pursue their interests. Most of all, they deliberate across long periods of time. Nations never assemble all together to decide once and for all how to constitute their society, but they do make efforts to preserve a kind of society among themselves and to define it by their actions.

From Suárez's position, one arrives at three conclusions regarding international order. First, that while informal order represents the efforts of nations to deliberate among themselves about how they should interact, it does not embody absolute, necessarily just precepts. Contrary to Grotius, Suárez allowed greater sway to human freedom and circumstance. Suárez trusted in the ability of human reason, but he did not vest it with perfect clarity. The second conclusion is that, while order develops historically and spontaneously among interacting nations, the historical outcome (or, precedent, to use Burke's term) does not necessarily represent the best conceivable situation. Custom is human and therefore fallible. Merely because a practice is customary does not make it right, divinely or naturally. The final conclusion seems the most paradoxical, in light of Suárez's defense of Christian Europe. Although Christendom embodied the *ius gentium* in a way that international relations have not since modernity's rise, Christendom did not represent the only possible community of nations. The *ius gentium*, as Suárez understood it, is supported by shared ideals, philosophies, and religions—in fact, such a communal order may not be possible among states of

dramatically differing characters. Nevertheless, Suárez's *ius gentium* might exist among non-Christian nations, or between Christian and heathen peoples. According to Suárez, it is a natural human phenomenon. The term most properly refers to a historical reality that developed from the Romans through the Christian tradition, but the idea persists even in an ostensibly post-Christian age. It remains reasonable to view the relations among nations through the lens of the *ius gentium* tradition, even when the *ius gentium* is no longer a "household phrase" among internationalists or philosophers of law. Suárez's *ius gentium* reflects a human reality, and it remains a timely and timeless means by which to understand the interactions among nations as communal. Even after Christendom, it is reasonable to look for a common law among nations. "*Ubi societas, ibi ius*"—where there is society, there is law. This principle applies to nations as well as to persons: order can exist among human beings, even in the absence of political authority.

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