CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT

FRANCISCO DE VITORIA

Political Writings
CAMBRIDGE TEXTS IN THE
HISTORY OF POLITICAL THOUGHT

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FRANCISCO DE VITORIA

Political Writings

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TO PETER RUSSELL

nostrorum sermonum candidae iudex

(Horace Ep. I. 4)
Editors’ note

The two editors were able to work together on this book on the conducive neutral ground of Oxford and in the company of Peter Russell, to whom the book is gratefully dedicated in recognition of this and many other debts incurred by both of us over many years.

We share responsibility for the finished work, but the initial division of labour was as follows: the Introduction and choice of texts were Anthony Pagden’s, who also compiled the table of ‘Principal events in Vitoria’s life’ and ‘Bibliographical note’; the editing and translation of the texts were the work of Jeremy Lawrance, who also contributed the ‘Critical note on texts and translation’, the short critical introductions to each text, the footnote commentary, and the ‘Biographical notes’, glossary, list of references, and index at the end of the book. The text was subsequently revised by both editors. In particular, Anthony Pagden made numerous suggestions and corrections to the translation and notes.

Anthony Pagden would like to thank Quentin Skinner and Raymond Geuss for their comments on an earlier draft of the Introduction. He would also like to thank Ms Kate Eliot of Princeton University for allowing him to see an unpublished paper on Vitoria’s conciliarism, to which his own observations on the subject are greatly indebted.

Jeremy Lawrance acknowledges with gratitude the constant help of those Mancunienenses optimi, Dr Gordon Kinder, whose unrivalled knowledge of Holy Scripture and sixteenth-century theology saved much time and embarrassment, and Dr Joe Bergin, who kept him on the historical strait and narrow and gave him the freedom – usucapiö, if not merum dominium – of his library. And above all, of course, the support of Martha, for her price is far above rubies.
Abbreviations and sigla

References to sources and modern studies in the footnotes have been given in shortened form, by author, date, and page number; full titles are given in the List of references at the end. In addition to the usual abbreviations for books of the Bible, academic journals and periodicals, and standard reference works, the following sigla have been used:

ad

response to obiectum (in a quaestio)

AV

Authorized Version

C.

Causa (from Gratian’s Decretum, Part 2, in Richter & Friedberg 1922: I)

Codex

Codex Iustinianus (in Krueger, Mommsen, Schoell & Kroll 1970 – 2: II)

D.

Distinctio (from Gratian’s Decretum, Part 1, in Richter & Friedberg 1922: I)

d.a.c., d.p.c.

Gratian’s ‘dictum before the canon, after the canon’

Digest

Digesta (in Krueger, Mommsen, Schoell & Kroll 1970 – 2: I)

G

Granatensis (Granada MS)

in

commentary on

in c

in corpore articuli, in the body of the article

In ST II-II

Francisci de Victoria Lectiones in Illam Iiae Summæ theologicae S. Thomæ Aquinatis

Institutions

Institutiones Iustinianae (in Krueger, Mommsen, Schoell & Kroll 1970 – 2: I)

L

Legionensis (edition of Lyon, Vitoria 1557)

P

Palentinus (Palencia MS)
<table>
<thead>
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<th>Abbreviation</th>
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<tr>
<td>S</td>
<td>Salmanticensis (edition of Salamanca, Vitoria 1565)</td>
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<tr>
<td>Sext</td>
<td>Liber Sextus Decretalium Bonifacii VIII (Richter &amp; Friedberg 1922: II)</td>
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<tr>
<td>ST</td>
<td>Summa theologica</td>
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<td>s.v.</td>
<td>sub uerbo</td>
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<td>V</td>
<td>Valentinus (Valencia MS)</td>
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<tr>
<td>Vulg.</td>
<td>Biblia Sacra Vulgata Latina</td>
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<td>X.</td>
<td>Liber Extra ( = Decretales Gregorii IX, in Richter &amp; Friedberg 1922: II)</td>
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Introduction

Francisco de Vitoria was one of the most influential political theorists in sixteenth-century Catholic Europe. By profession he was a theologian, but like all theologians of the period he regarded theology as the 'mother of sciences', whose domain, as he claimed at the beginning of On the American Indians, covered everything governed by divine or natural, rather than human, law – everything, that is, which belonged to what we would describe as jurisprudence. Vitoria's writings covered a wide variety of topics, from the possibility of magic to the acceptability of suicide. But it is on those which deal with the most contentious juridical issues of the period – the nature of civil power and kingship, the power of the papacy, and the legitimacy of the European expansion – that his fame chiefly rests. Vitoria, who spent most of his active life as a university professor, was also the master, and master of masters, to two generations of Spanish theologians and jurists who achieved international fame. These men, from his closest associate Domingo de Soto (1494–1560) to the great Jesuit theologians and metaphysicians Luis de Molina (1535–1600) and Francisco Suárez (1548–1617), have been known variously as 'the Second Scholastic' and, more parochially, as 'the School of Salamanca'. Their learning was immense and their interests, which ranged from economic theory to the laws of motion, from eschatology to the laws of contract, practically unlimited; but it was in jurisprudence and moral philosophy that their achievements were the most far reaching. And it was to Vitoria that they owed the foundations of their common project.

At Paris, where he first studied and then taught between 1509 and 1523, Vitoria came into contact with the work of the French humanists of the fifteenth century. Vitoria later admitted that he had 'sinned as a young man by spending too much time on what Cato calls the disciplines
of the Greeks, that is natural science and humanities' (lectures of 1539–40 In ST I. 1, in Beltrán de Heredia 1928: 37). But although this may have introduced him to areas of classical learning that were close to his predecessors, and given him a broader sense of the scope of theological speculation than they had envisaged, it is a mistake to attribute the originality of Vitoria’s work, as many scholars have done, to a happy marriage of Thomism and ‘Christian humanism’. Certainly he had read widely in classical literature – in both Greek and Latin, if the Valencian humanist Juan Luis Vives is to be believed – and he relied more heavily than most theologians on classical moral philosophy, in particular on the works of Seneca and Cicero. But his attitudes towards the ‘new grammarians’, as he called the humanists, hardened as the struggle against Lutheranism intensified, and he came to regard humanist textual scholarship on the Bible as the slippery slope which had led to Protestant heresy. He attacked Luther and Budé as ‘impious heretics’ for reading the Scriptures sola grammatica ‘by grammar alone’, without the aid of patristic and scholastic theology (Beltrán de Heredia 1928: 52–4), scorned the French humanist Lefèvre d’Étampes as a heretic (see On Law §128, p. 190, footnote 39), looked upon Erasmus as a jumped-up grammarian meddling in affairs he did not understand, and dismissed Lorenzo Valla, the founder of humanist Biblical criticism, as a charlatan. In the same vein, Vitoria once described Juan Doria, a Salamanca colleague who had been heard to defend Valla in the schools, as somniator ‘day-dreamer’ (Beltrán de Heredia 1928: 41).

The source of Vitoria’s originality, and of his impact on two generations of thinkers, is to be found neither in his association with the noui grammatici, nor in his methods, all of which were conventionally scholastic. It is to be found instead in an attempt to create a moral philosophy which would incorporate an interpretation of the great Roman Law texts within a discourse which was primarily concerned with the natural law – the ius naturae.

For the Thomists, the law could be divided into four general categories. The first, in that it embraced all the others, was the divine or eternal law. This is the creative ratio of God himself, and was conceived by the Salamanca theologians as a set of norms or regulae used by God at the creation, as an architect – the simile is Domingo de Soto’s – might use a set of drawings.

The natural law (ius naturae) was, to use Aquinas’ definition, ‘the participation in the eternal law by rational creatures’(ST I-II. 91. 2 in c). It was conceived as a body of self-evident first principles implanted by God at the creation ‘in the hearts of men’. Thus, as Vitoria noted, the natural law was ‘not an office of will, but of reason and enlightenment’ (On Law
§121, pp. 155–7). It consisted, however, of two distinct parts. The first was constituted by what are called the ‘first principles’ (prima praecipita), those maxims whose force no rational being could fail to recognize, the simplest and most often quoted being the commandment: ‘Do unto others as you would have others do unto you’. These are then translated by a process know to the scholastics as synederesis (an approximation to Aristotle’s practical syllogism) into secondary – and if needs be tertiary, quaternary, and so on – principles which in turn provide the rational underpinnings for all codified laws (On Law §123-4, pp. 170–2). The process which ensured the accurate translation from one stage to the next was ‘the general consensus of men’ (On Law §121, p. 160). For, the argument ran, if what I and all my (Christian) fellows, as rational beings, consider to be true is not in fact so, then God, who implanted in my mind the prima praecipita of the natural law by which I form my understanding of the world, must be deceiving me. This is clearly unthinkable. Knowledge, therefore, must be, ‘that thing on which all men are in agreement’ (Vitoria 1932–52: III. 10). For Vitoria, as for Aquinas, the law of nature was the efficient cause which underpinned man’s relationship with the world about him and governed every practice within human society. It alone could enable the theologian to describe and explain the natural world, and man’s place within it, in wholly rationalistic terms. The truth of the Gospels and of the Decalogue, and with it the rightness of the political and social institutions of Europe as set down in the Roman law texts, could all be defended, without recourse to revelation, as the inescapable conclusions of the rational mind drawing upon certain self-evident first principles.

The human or positive law (lex humana, ciuallis or positiua) was constituted by those laws enacted by man. To be binding these had to be derived from one or other precept of the natural law, since they were all simply enactments in the external world (in foro externo) of what all men already knew in conscience (in foro interno). But the dictates of the human law could also, unlike the natural law, be abrogated, and since their authority derived from purely human agency they evidently varied, sometimes radically, from community to community.

Occupying a mid-way and highly ambiguous position between the natural and the positive law was the law of nations (ius gentium). This was the body of those laws which could be said to be what Vitoria termed a set of precepts enacted by the power of ‘the whole world, which is in a sense a commonwealth’ (On Civil Power 3. 4, p. 40), irrespective of the local legislative convictions, beliefs, and customs of individual communities, or indeed their place in time. For Vitoria, although not for Aquinas, this was essentially a part of the positive law
(Vitoria 1932–52: III, 89–90). It was, he said, 'that which is not equitable of itself, but [has been established] by human statute grounded in reason' (Vitoria 1932–52: III. 12). But the need for the ius gentium to be based directly upon the prima praecepta of the law of nature, together with the fact that it relied upon a universal consensus which made it practically impossible to abrogate (who could imagine a legislative assembly of all the peoples of the world?), meant that it was clearly far closer to the natural law than were the enactments of individual rulers. So close, indeed, that even non-European 'barbarian' societies might be subject to the ius gentium, whereas they could clearly be subject to no simple human law other than their own. It was Vitoria's observations on the implications of this last argument for the legitimation of the Spanish invasion of America (On the American Indians) which has earned him the reputation as the 'father' of international law. Such a notion is anachronistic, since the concept of an 'international law' has its origins in the 'modern' natural-law theorists, notably Hugo Grotius, Samuel Pufendorf, and John Selden, whose project was very different from Vitoria's, and wholly indifferent to the Thomist definition of ius. Vitoria's account of the ius gentium, furthermore, occupies only a small part of his total work, and is not entirely consistent. But his concern with what he called 'the affairs of the Indies' and the related question of the just war placed the notion of the ius gentium as a form of the positive law founded upon the principles of natural justice firmly on the agenda for all his successors, from Soto to Suárez.

It was one of Vitoria's central concerns, reiterated in On Civil Power, On the Power of the Church, On the Law of War, and On the American Indians, to reinforce Aquinas' argument that all rights (ura) were natural and the consequence of God's law, not of God's grace. The contrasting claim, made first by the fourteenth-century English theologian John Wycliff and later by the fifteenth-century Bohemian reformer Jan Huss, and more recently and far more menacingly by what Vitoria refers to as 'the modern heretics', the Lutherans, made rights, and hence the authority of secular princes, dependent upon God's grace. On this account only a godly ruler could be a just legislator. Thus, if a prince was a heretic or proved in the eyes of those who chose to judge him to be in a state of sin, his laws could not be binding in conscience (On Civil Power 3. 1–6, pp. 32–42), and he might legitimately be deposed. It was this which underpinned the Lutheran and later Calvinist theory of revolution, despite Luther and Calvin's own insistence that no opposition to established authority could be justified in practice. For Vitoria, and later for the Spanish delegates at the Council of Trent Domingo de Soto and the Archbishop of Toledo Bartolomé de Carranza (also a former
Introduction

pupil of Vitoria), it was vital that such a theory, with all that it implied for the effective right of lesser magistrates to make war upon their ordained princes, should be discredited. If Vitoria's work can be said to have a single unifying concern, it is with the preservation of the civil state from 'the arguments which heretics and schismatics use to dissuade or inveigle away the hearts of simple men from due obedience to their princes and their priests' (On the Power of the Church 1. 2, p. 55).

2

Vitoria produced two categories of text: the lectures on Aquinas' Summa theologica and on Peter Lombard's Sentences which he delivered during his twenty years as Prime Professor of Theology at Salamanca, and a series of relectiones, or 're-readings'. These latter were longer and more formal than the lectures and were also, unlike the lectures, which consisted of continuous commentaries on a set text, investigations of a particular problem. In each case this was a problem related to a tricky passage in the text discussed in that year's lecture course, but frequently also a problem of some immediate political or social significance.

Vitoria himself published nothing during his own lifetime. His students, he once said, already had too much to read. What survives of his lectures comes down to us in the form of notes taken down uiua uoce by his pupils; it was Vitoria himself who introduced into Spain the Parisian custom of dictating lectures at a pace suitable for copying (Beltrán de Heredia 1928: 13–26, and see the 'Critical note on texts and translation' below). Through this channel, much of Vitoria's teaching found its way into more accessible form in his star pupil Domingo de Soto's De iustitia et iure, first printed in Salamanca in 1553, a standard manual on rights and justice which could have been found on the shelves of every scholarly library in Europe.

The relections were delivered to an academic audience. Their purpose, as Vitoria somewhat disingenuously claimed at the beginning of On the American Indians, was, as with all theological discourse, 'demonstrative – that is, undertaken not to argue about the truth, but to explain it' (On the American Indians intro., p. 238). But they also belonged to a long tradition of ritual legitimation which the kings of Castile had, since the Middle Ages, regularly enacted when confronted by uncertain moral issues – that is to say, disputations of the kind more properly called, according to the same passage, 'deliberative' or forensic. With the defeat of the comunero revolt in 1521, the Castilian crown had
effectively secured the consensus of its own political nation. Unlike France, or even England, it had, therefore, no further need to assert its own legitimacy against particular or faction interests, and its principal ideological concern was instead the defence of its self-appointed, and increasingly perilous, role as the guardian of universal Christendom. The task of its theologians was to ensure that it acted, or was seen to act, on all occasions in strict accordance with Christian ethico-political principles. Thus even On Civil Power, which is explicitly directed against republicans and communitarians, makes no direct reference to the comuneros and is much more concerned with the external threats to kingship presented by Lutheranism than it is with any perceived internal menace.

3

The first of the six selections translated here, On Civil Power, is substantially a defence of the Castilian monarchy, and of monarchies in general, as the most perfect form of political community. Vitoria begins by stating that the self-evident purpose of all civil power is to ensure the safety and security of the members of the community. For Vitoria, as for all Thomists, societies were natural organisms. They existed both as protective bodies for a being that nature had created 'naked and unarmed like a castaway from a shipwreck' (On Civil Power 1. 2, p. 7), and as an expression of man's natural sociability, providing the only environment in which the unique gifts of virtue and reason with which he has been endowed and whose exercise are his final purpose — his telos — are at all possible.

But if men possess a natural urge to live in society, the types of political societies in which they live would seem to be of their own devising. All civil power, for Vitoria, is vested in the commonwealth (res publica), since, if all societies are natural organisms, it follows that no individual could have held power prior to their formation (On Civil Power 1. 4, p. 11). It follows, too, that if 'legislative power exists in the commonwealth by divine and natural law' the commonwealth may, and indeed, if it is to constitute a civil society where there can be only one ruler, must delegate its power and offices (On Civil Power 1. 5, p. 14). The person or persons to whom it delegates may of course be one or many. In the traditional Aristotelian division, with which Vitoria was familiar, there were three types of political rule, monarchy, aristocracy and timocracy (or democracy: On Civil Power 1. 8, p. 19 and footnote 43). Of these,
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Vitoria, like Aristotle, unsurprisingly considers that 'the greatest and best of all forms of rule and magistracy is monarchy or kingship' (On Civil Power 1. 5, p. 12), despite his tantalizing but undeveloped statement, preserved only in the MS version of this refection, that Spain itself is a 'mixed' constitution (On Civil Power 1. 8, p. 21 and footnote 45). In the first instance it is necessity, the practical impossibility of direct rule by 'the multitude', which leads to, and sanctions, the initial delegation of power to 'certain men who take upon themselves the responsibilities of the commonwealth and look after the common good'. At this stage 'it is irrelevant whether this be a number of men, as in an oligarchy, or a single man, as in a monarchy' (On Civil Power 1. 5, p. 14). Both will serve the limited function of protection. But it is clear that monarchy, apart from being the most common form of rule – or so the historical record would suggest – and hence the most natural, is also of a different order from all others. Vitoria now commits himself to the extreme claim that, unlike aristocratic or timocratic power, 'royal power is not from the commonwealth, but from God himself' (On Civil Power 1. 5, p. 16). The king is, of course, crowned by the commonwealth, but this does not mean, as some have supposed, that the act of coronation confers power on the king, any more than the act of election confers power upon the pope. At this point Vitoria makes the neo-Thomist distinction between regal power and merely human authority which Hobbes was to ridicule to such good effect. 'The commonwealth', he claims, 'does not transfer to the sovereign its power (potestas), but simply its own authority (auctoritas).'

This crucial distinction between power and authority, although left largely unexamined in On Civil Power, is set out more clearly in Vitoria's commentary on Aquinas' discussion of civil obedience, ST II-II. 104: 6 (Vitoria 1932–52: V. 212–13), and in 1 On the Power of the Church 1 (p. 50). The Latin term potestates, he says, can be used in two senses: either to mean 'capabilities', as in expressions such as 'the powers of the senses, of the intellect, [and] of the will' (which, given Vitoria's acceptance of an Aristotelian psychology, means that they are innate), or in the different sense of 'authorities', as in expressions such as 'the powers of magistrates, priests, empires'. In this second sense, potestas refers only to the 'authorities or jurisdiction' which are conferred upon the magistrates, priests, and empires by the community. Royal power, then, is a 'capability' and comes from God; but since such power clearly cannot be exercised in a void, kings must receive their authority or executive power from the community. 'Power' as authority, he says more bluntly elsewhere, 'is from the people' (On Dietary Laws, or Self-Restrains 1. 5, p. 218). It is also obviously the case that the community
may withhold that authority since, as he later claims, the community may lawfully be punished for the sins of its monarch, as ‘anyone may lawfully be condemned for the wrongdoings of his appointed agent’ (On Civil Power 1. 9, p. 21). But the power to act on behalf of the community – what we today would call the ‘high executive prerogative’ of the state – can only be conferred by God. It is ‘the authority or right of government over the civil community’, and although the community may have chosen this king as opposed to some other, there can, Vitoria says later, be no appeal against the king to the commonwealth (On Civil Power 2. 1, p. 31). As power derives from God, and not from a merely human contract, ‘it cannot be abolished even by the consensus of men’ (On Civil Power 1. 7, p. 18). And once transferred, the commonwealth ‘does not retain that power to itself, otherwise there has been no transfer’ (On Law §136, p. 199; compare §137, p. 200).

To say that regal power derives from God, however, is not to affirm a divine right to rule, much less is it to propose absolute authority on the part of the monarch. For, although the king may be the executor of the positive law, legislative power itself resides with the commonwealth (On Civil Power 1. 4, pp. 11–12). The king may be the ultimate source of law, but he is also subject to the laws he makes, and these must always be in accordance with the customs of the commonwealth for which they are intended. The king may be ‘over the whole commonwealth, [but] he is nevertheless part of the commonwealth’, and he is subject to its uss directuia or ‘guiding force’ (On Law §126, pp. 181–2). There is, however, some doubt as to whether the king may be coerced in any way if he fails to behave like a subject. Vitoria, like his Jesuit successors, was willing to admit the possibility of tyrannicide on the grounds that ‘even if the commonwealth has given away its authority, it nevertheless keeps its natural right to defend itself’ (On Law, §137, p. 200); but he was also, in common with all early-modern political theorists on both sides of the confessional divide, reluctant to ascribe coercive, and thus potentially revolutionary, powers to any authority other than of the established ruler, whatever his conduct might be. On the one hand it is clearly legitimate for a subject to resist his king, or indeed his pontiff; on the other it remains the case that it is sacrilege for subjects to question any duly constituted authority. For Vitoria, unlike Suárez (or indeed Locke), there was no way out of this impasse. But he was certain that a ruler who fails to observe the law is as guilty of sin as any of his subjects. Indeed, ‘his sin may be more serious, because he commits an offence against his subjects by burdening them with laws which he is unwilling to raise a finger to obey himself’ (On Law §126, p. 182). Neither can the prince abolish any law which is ‘useful to the common good’, although in
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concert with the commonwealth ‘he may abrogate any law whatever' (On Law, §127, pp. 184–5).

This, crucially for Vitoria’s later arguments about the American Indians, is true even of non-Christian communities, for to claim that royal power was restricted to Christians would, of course, be to assume ‘that the true title and foundation of all power is grace’, which, as we have seen, was a claim Vitoria was very eager to refute. Vitoria does not say how, or by what means, kings are invested with their power. But he does make it clear that certain communities may, if they so wish, elect a king, and that once elected this king would be in possession of the divine power of kings (On Civil Power 2. 1, pp. 30–1).

‘Civil societies which have no sovereign and are ruled by a popular administration’, says Vitoria, ‘often boast of their liberty, accusing other civil societies of being the servile bondsmen of sovereigns’ (On Civil Power 1. 8, p. 19). For Vitoria, who in common with most scholastics refused to accept the republican claim that virtue derives from participation and not protection, this was ‘a stupid and ignorant idea’. For in reality ‘there is no less liberty under a monarchy than under an aristocracy or timocracy’. In the first place, every individual is subject to the civil power, by whomever it is exercised; ‘there is’, he observed, ‘clearly no greater liberty in being subject to three hundred senators than to one king’. Secondly, since the undivided nature of regal rule makes it more effective in the preservation of peace, a monarchy is in a better position to fulfil the declared ‘purpose of every commonwealth and power, [which] is the sociable intercourse (conversatio) and companionship of its members’ (On Civil Power 1. 8, p. 20).

As we have seen, one of Vitoria’s prime objectives was the refutation of the social theories of the ‘new heretics’. This required not only a strong theory of monarchy firmly grounded in natural law, but also an equally strong, and similarly grounded, theory of papal power. For Vitoria, as for most contemporary theologians and canonists, there existed an inescapable, if also highly ambiguous, analogy between the constitution of the secular community and that of the Church. The two rejections on the power of the Church are largely concerned with the refutation of the claims of the conciliarists, and in particular of the Parisians Jean Gerson, John Mair, and Jacques Almain, whose work Vitoria had encountered during his time in Paris. For Vitoria the fundamental claim that the power of the Church ‘is immediately vested in a duly constituted council’ (II On the Power of the Church 1. 1, p. 112) seemed all too close to the belief of the heretical modernists (neoterici) that ‘all Christians are rightfully priests’ (II On the Power of the Church 2. 1, p. 126). Although the conciliarists had not, of course, challenged
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the traditional view of the sacraments, much less the status of the priest-
hood, it was not absurd to see an analogy between their attacks on papal
power and Luther’s attack on episcopal privilege. The Parisian concili-
arists had argued that although the Church differed significantly from
civil society in that it was the corpus Christi mysticum and hence a gift
from God rather than a human creation, the organization and the struc-
ture of power within the two societies were fundamentally the same.
Both, furthermore, were ‘perfect’ communities unto themselves. This
meant that the power of the pope within the Church could be con-
strained in exactly the same way as the power of the king in civil society;
and that, just as secular rulers could not interfere in the affairs of the
Church, so the pope could make no claim to secular authority. Vitoria
accepted these basic premises. The pope, he states bluntly, ‘gives no
power to kings and princes, because no one can give what he does not
have’ (I On the Power of the Church 5. 2, p. 85). He also shared the view
that both the civil and ecclesiastical states were ‘perfect’ common-
wealths with their own separate ends; and he seems to have accepted
Almain’s general claim that God could not possibly have ordered the
Church less perfectly than civil society, by failing to provide it with the
same protection against tyranny with which secular states were provided.
The Church, unlike civil society, may be both eternal and ‘a spiritual
community ordained towards a supernatural end’, but no society, what-
ever its ends, ‘can be self-sufficient (perfecta) without magistracies and
authorities’ (I On the Power of the Church 4. 2, p. 75). And if such
intermediary powers exist, then, as in the secular state, they must possess
some executive authority. Similarly the pope, like any secular ruler, is
bound in conscience to obey his own laws.

But although Vitoria was prepared to accept those conciliarist claims,
which accorded with his natural law arguments about the nature of all
forms of power, he vehemently rejected the conciliarist conclusion that
these implied that the members of the council ‘represent the whole uni-
versal Church’, and that the papacy was consequently an elective monar-
chy. Church power, he claimed, ‘is not vested immediately in the
Church’. The civil commonwealth ‘may keep the administration of civil
affairs in its own control; but the Church may not’. The pope, Vitoria
reminded his opponents, was the ‘Vicar of Christ’, not the ‘Vicar of the
Church’ (II On the Power of the Church 1. 1, p. 118). Church and civil
power differed, Vitoria argued, in two crucial respects. First, ‘Church
power . . . neither was in the beginning, nor is in itself or indeed in any
other way whatsoever, vested immediately in the whole universal
Church, in the way in which civil power is vested in the commonwealth’
(II On the Power of the Church 1. 1, p. 114). Second, although it was
clear that civil society could exercise no power over the Church, it did not follow that the papacy had no political power of any kind. The pope ‘may neither confirm nor rescind civil laws’ (I On the Power of the Church 5. 3, p. 88), because spiritual and civil powers are directed towards different ends which are in most cases independent; but there are cases in which the civil power might be subjected to the pope's spiritual authority. If, for instance, the action of a king were to cause his subjects to suffer a loss in spiritual goods, then the pope might be in a position to rescind a civil decree (I On the Power of the Church 5. 6, p. 90 – 1). This effectively granted to the papacy, if only in extremis, a measure of positive legislative authority; the authority, that is, to make laws outside the bounds of the natural and divine laws. To deny that the papacy did, indeed, possess such power was, in Vitoria’s view, yet another feature which the ‘new heretics’ and the old conciliarists (or, more specifically, Gerson) held in common. For Vitoria, then, the pontiff could be said to enjoy the same high degree of authority within the Church as the king did within civil society; but he could also exercise limited executive power in the secular domain. This conception of power, inevitably, played a central role in Vitoria’s observations on the most pressing, and certainly the most intractable, issue in contemporary political theory: the legitimation of the Spanish conquest of America.

Vitoria’s two rejections on this subject, On the American Indians and On the Law of War, are his best-known works. The dispute over the legitimacy of the colonization of the Americas, to which Vitoria alludes at the beginning of On the American Indians, began in 1513 when King Ferdinand called a commission (junta) of theologians and civil and canon lawyers to discuss the matter. This resulted in the first piece of colonial legislation, the Laws of Burgos of 1513. But the dispute only became the subject of the prolonged and international contention that it was to remain until the end of the eighteenth century with the discovery and conquest of Mexico in 1520 – 2, and of Peru in 1531 – 2. The invasion and virtual destruction of empires as great, or so it seemed, as China could hardly pass unquestioned. Vitoria first mentioned what he called ‘the affairs of the Indies’ in his lecture course on Aquinas’ Summa theologica for 1534 – 5 (On the Evangelization of Unbelievers §3, Appendix B), where he asked whether ‘Christian princes can convert [the American Indians] by violence and the sword’. His answer was that only the supposed cannibalism of the Amerindiens conferred upon the emperor the right of coercion, and only then because such crimes against nature ‘are harmful to our neighbours’ and the ‘defence of our neighbours’ is ‘the rightful concern of each of us’ (On the Evangelization of Unbelievers, p. 347). His letter of 1534 to Miguel de Arcos, the
Dominican Provincial of Andalusia, displays an evident disgust at the news of Francisco Pizarro’s massacre of the Inca army at Cajamarca and the subsequent imprisonment of the Inca Atahualpa (Appendix A, pp. 331–3); and in the relection On Dietary Laws, or Self-Restraint, delivered in 1537, he returned to the question of cannibalism and the practice of human sacrifice at some length.

On the American Indians was delivered two years later. It is an attempt to answer the question, ‘by what right (ius) were the barbarians subjected to Spanish rule?’ (p. 233). The answer to this question, however, turned upon another: had the Indians in fact possessed dominion (dominium) over their own affairs, and over the territories they occupied, before the arrival of the Spaniards?

Before 1539, the Castilian crown’s principal claim to dominion in America had rested on the Bulls of Donation made by Alexander VI in 1493. These had granted to Ferdinand and Isabella possession of all the lands inhabited by non-Christians they might discover in the Atlantic. The power to make such donations, however, rested upon those kinds of papal claims to temporal authority which Vitoria had already rejected (I On the Power of the Church 5. 1–5, pp. 82–90), and now rejected again (On the American Indians 2. 2, pp. 258–64). Whatever claims the Castilian crown might have, therefore, could only be claims made in natural law.

It was, Vitoria said, evident from all he had heard that before the arrival of the Spaniards the Indians had been ‘in undisputed possession of their property, both publicly and privately’. There were, therefore, only four possible grounds for the Castilian crown’s implicit claim that they did not also enjoy dominium: because they were either sinners, non-Christians, madmen (amentes), or insensate (On the American Indians 1. 1, p. 240). The first of these grounds invoked, once again, the Lutheran supposition that rights depended not upon God’s laws, but upon God’s grace. Man, argued Vitoria, is a rational creature and he cannot loose that characteristic of himself through sin, any more than he can willing renounce his natural rights (On the American Indians 1. 2; compare On Civil Power 1. 6–7). His dominium is inalienable. The same applies, of course, to non-Christians, since unbelievers are also subject to the natural law (On the American Indians 1. 3). It therefore follows that Christians cannot ‘use either of these arguments to support their title to dispossess the barbarians of their goods and lands’ (On the American Indians 1. 3, p. 246).

This left Vitoria with his last two claims. Fully irrational beings (insensati) do not have dominium because they are not truly men. They cannot be capable of suffering injustice, and creatures who are incapable
of suffering injustice clearly cannot be the subject of laws, and cannot, therefore, be said to possess rights; those who cannot receive iniuria cannot possess iura (On the American Indians 1.4, pp. 247–8). Madmen have rights, but cannot exercise dominion (1.6, p. 249). But in Vitoria’s view there was no empirical evidence to suggest that the Indians were either madmen or insensati, and he concluded briskly that although the Indians were certainly barbaric, they ‘undoubtedly possessed as true dominion, both public and private, as any Christians’ (On the American Indians 1. concl., p. 250). This made any claim to rights of conquest, or the claim to have occupied previously unoccupied territory – the so-called ‘right of discovery’ (On the American Indians 2.3) – invalid.

In the course of this refutation, however, Vitoria introduces, almost in passing, what was in effect the most contentious argument of all (On the American Indians 1.1, p. 239). In 1510, the Dominican John Mair had suggested that the American Indians might be the ‘slaves by nature’ described, somewhat confusedly, by Aristotle in Books I and III of his Politics. In Aristotle’s account there existed groups of people, possibly whole races (which at one point he loosely defines as ‘the barbarians’), who possess only a share in the faculty of reason, ‘enough to apprehend but not to possess true reason’ (Politics 1254b20–2). Such creatures may be said to be capable of understanding, but incapable of what Aristotle called ‘practical reason’ (phronesis), for ‘practical reason issues commands . . . but understanding only judges’ (Nicomachean Ethics 1143a8–9). Conveniently for his masters, then, a ‘natural slave’ might be said to be one who is capable of carrying out a command, but unable to initiate one. To some of the apologists for the conquests, it had seemed obvious from their behaviour that the Indians were just such creatures, and that therefore they could not possibly have exercised dominium before the conquests.

Vitoria rejected this claim also, on the empirical grounds that the Indians clearly did have ‘some order (ordo) in their affairs’. They lived in cities, had a recognized form of marriage, magistrates, overlords, laws, industries, and commerce, ‘all of which require the use of reason’ (On the American Indians 1.6, p. 250). Even if it were the case that, as he claimed at the end of the relection, these things were not always quite what they seemed to be and that their societies lacked many things ‘useful, or rather indispensable, for human use’ (On the American Indians 3.8, p. 290), this was clearly not because they belonged to a state of semi-rationality but because ‘their evil and barbarous education’ had made them incapable of fully rational behaviour (On the American Indians 1.6, p. 250). They were in full possession of their rights, but without the capacity to exercise them. Their status was be similar to that
of children, who, in Aristotle’s definition, were only potentially, but not actually, rational beings. Children do have dominium because they can suffer injury, and because in law their goods are held independently from those of their tutors. But as they cannot make contracts they own these goods only as their inheritance (On the American Indians 1. 5, p. 249). Vitoria conceded, therefore, that the Castilian crown might (but only might) be able to claim a right to hold the Indians and their lands in tutelage until they reached the age of reason. ‘Such an argument could’, he concluded, ‘be supported by the requirements of charity, since the barbarians are our neighbours and we are obliged to take care of their goods’ (On the American Indians 3. 8, p. 291).

Vitoria further considered seven ‘unjust titles’ for conquest, all of which depended either on spurious claims to world sovereignty by pope and emperor, or on the supposition that the Christian faith might be imposed by force. The emperor could, he argued, could make no claim to exercise either sovereignty (imperium) or dominion over peoples who lie outside the jurisdiction of the former Roman Empire (On the American Indians 2. 1). The papacy, as we have seen, has civil jurisdiction only in cases where the spiritual goods of Christians are endangered, and certainly cannot confer rights over pagans upon its Christian subjects (On the American Indians 2. 2). The faith cannot be imposed by force, any more than Christians have the right to punish non-Christians for their sins, for, as we have seen, neither sin nor unbelief can deprive a man of his natural rights (On the American Indians 2. 4–5). Of the last two unjust titles — that the Indians had voluntarily chosen to accept Spanish rule, and that America had been given to Spain ‘as a special gift from God’ — the first is evidently false, since even when the Indians seemed to be accepting Spanish sovereignty they had only done so under duress (On the American Indians 2. 6). The second is based on a prophecy ‘contrary to common law’ and would not, in any case, have sanctioned the Spanish invasion (On the American Indians 2. 7).

None of these arguments could provide the Castilian crown with dominium in America. Vitoria now turned, therefore, to a set of arguments which he characterizes as the ‘just titles’, drawn from the law of nations (ius gentium). Under this law the Spaniards possessed the right of what Vitoria called ‘natural partnership and communication’ (On the American Indians 3. 1, p. 278). Seas, shores, and harbours are necessary to man’s survival as a civil being, and they have, therefore, by the common accord of all men, been exempted from the original division of property. This right of travel, the ius peregrinandi, gave the Spaniards the right of access to the Indies. There was also, under the legal definition given to ‘communication’, an implied right to trade. If it could be
Introduction

said that the Spaniards had originally come to America as ambassadors, travellers, and traders, they had to be treated with respect and be permitted to trade with all those who wished to trade with them, just as the French must, in Vitoria’s view, lawfully be permitted to trade in Spain (On the American Indians 3. 1, pp. 279 – 80) – though this argument was given short shrift by Vitoria’s pupil Melchor Cano: ‘who’, he asked, ‘would have described Alexander as a “traveller”? ’ Vitoria further argued that the law of nations granted the Spaniards ius praedicandi, the right to preach their religion without interference (On the American Indians 3. 2), and also that it permitted them to wage a just war ‘in defence of the innocent against tyranny’ (On the American Indians 3. 5, p. 287).

In the first two cases, the Spaniards could enforce their rights if opposed, because any attempt to deprive a man of his rights constitutes an injury, and the vindication of injuries provides grounds for a just war. As Vitoria had told Miguel de Arcos in 1534, ‘they [the conquistadores] can allege no title other than iure belli, the law of war’ (Appendix A, p. 332); and in On the Law of War, which he delivered as a continuation of On the American Indians, Vitoria considered whether such a war had, in fact, been waged against the Indians. By the terms of a just war the victor acquires the status of a judge and may, therefore, appropriate the property of the vanquished (although usually only their private goods, their bona). Similarly, prisoners taken in a just war may legitimately be enslaved (On the Law of War 3. 3, pp. 318 –19; cf. Vitoria’s comments on the Portuguese slave trade in his letter to Bernardino de Vique, Appendix A, pp. 334 –5). It was clear, however, as he had already stated in On the Evangelization of Unbelievers, that only evidence of those sins against nature which constituted an injury to humanity itself could provide grounds for a just war against the Indians. And although Vitoria seems never to have ruled out this possibility, he also failed to accept it as a legitimation for the kind of colonial enterprise on which the Castilian crown was engaged.

Vitoria had thus left his king with only a slender claim to jurisdiction (dominium iurisdictionis) in America, but no property rights whatsoever. And, of course, the rights the crown might claim under the ius gentium would only be valid if, in fact, the Indians had ‘injured’ the Spaniards. If, however, as seemed overwhelmingly to be the case, they had not, all that Vitoria was left with was the starkly objective claim that, since the Spaniards were there already, any attempt to abandon the Indies would result in ‘a huge loss to the royal exchequer, which would be intolerable’ (On the American Indians concl., p. 291). As he reminded his audience, there was no evidence the Portuguese in Africa had gained less by licit trade than the Castilians had gained in America by illicit occupation.
Vitoria – Political Writings

Vitoria had not quite argued his emperor out of the larger portion of his empire; but he had come perilously close to it. The rumours which circulated in Mexico in the late 1530s that Charles V and later Philip II were preparing to 'abandon the Indies' were merely rumours, but they were founded on a clear, if over-extended, understanding of the implications of all Vitoria's writings, and of those of his pupils, for the precarious legitimacy of the Spanish monarchy in America.

Vitoria's writings on power and the rights of conquest effectively set the agenda for most subsequent discussions on those subjects in Catholic Europe until the late seventeenth century. In Spain his rulings – as they came to be seen – on the legitimation of the colonization of America became something of an orthodoxy. They also provided much of the theoretical underpinning for an extensive body of ethnographical writings on the American Indians. And although it is clearly false to speak of Vitoria as the father of anything so generalized and modern as 'International Law', it is the case that his writings became an integral part of later attempts to introduce some regulative principle into international relations.
Principal events in Vitoria's life

ca. 1485  Francisco de Vitoria born, probably in Burgos, one of three sons of Pedro de Vitoria and Catalina de Compludo. (One brother, Diego, also became a Dominican, a fierce opponent of Erasmus and, in 1527, prior of the Dominican convent at Burgos. Of his other brother, Juan, we know nothing.)

1492  Columbus makes the first landfall in the New World.

1493  Pope Alexander VI grants sovereignty in the New World to the Castilian crown.

1504  Queen Isabella of Castile dies on 26 November.

1506?  Vitoria enters the Dominican order at the monastery of San Pablo, Burgos.

1509–10  Vitoria is sent to the Collège de Saint-Jacques at Paris. There he studies arts under the Valencian Juan de Celaya, from whom he learns a late form of nominalist logic known as terminism.

1512–13  Vitoria begins to study theology under the Fleming Peter Crockaert. Crockaert began as a nominalist, but had been converted to Thomism and, in 1507, had replaced Peter Lombard’s Sentences as the set text in theology by Aquinas’ ST, a move which Vitoria himself was to make at Salamanca some years later.

1513  A meeting (junta) of theologians and canon and civil lawyers meet in Burgos to discuss, for the first time, the legitimacy of the Spanish conquests in America.

1515  Crockaert’s edition of Aquinas’ ST, which had been prepared with Vitoria’s assistance, is published in Paris.

1519 Charles I of Spain is elected Holy Roman Emperor, as Charles V, on January 28.

1520 Vitoria edits the *Sermones dominicales* of his countryman Pedro de Covarrubias, and the *Summa aurea* of St. Antonino of Florence.

1522 Vitoria receives the licence and doctorate in theology. He writes an introduction to a new edition of the *Repertorium morale* (c.1340) of the medieval French scholar, Pierre Bersuire OSB (c.1290 – 1362), a sort of alphabetical encyclopaedia.

1522–3? Travels in the Low Countries.

1523 Vitoria becomes professor of theology and director of studies at the College of San Gregorio in Valladolid.

1526 Vitoria is elected to the Prime Chair of Theology at the University of Salamanca, and is transferred to the Dominican house of San Esteban in that city.

1527 Vitoria participates in a meeting (*junta*) in Valladolid called by the Inquisitor General Alonso Manrique to discuss the orthodoxy of the writings of Erasmus, whose *Enchiridion militis Christiani* had been translated into Spanish the previous year. The meetings are, however, interrupted by an outbreak of the plague, and come to no conclusion.

1529–30 While in Burgos on university business, Vitoria falls seriously ill for the first time.

1539 Vitoria is asked by the crown to assess the orthodoxy of the practice of forced baptism in America.


1545 Vitoria is nominated by Charles V as a delegate to the Council of Trent, but is forced to refuse because of ill health.

1546 Vitoria dies on August 12.
Bibliographical note

Biography

There is no satisfactory biography of Vitoria. Villoslada’s La universidad de París durante los estudios de Francisco de Vitoria (Villoslada 1938) is an excellent account of Vitoria’s years in Paris, but Father Getino’s Francisco de Vitoria: su vida, su doctrina e influencia (Getino 1930) is little more than well-documented hagiography. Further information is available in the introduction to the edition of Vitoria’s Relectiones by Urdánoz (Vitoria 1960).

Intellectual background

Studies on Vitoria’s intellectual milieu and the ‘School of Salamanca’ are few and uneven in quality. The best analysis of the political thinking of the Neo-Thomists is that of Skinner, in his Foundations of Modern Political Thought (Skinner 1978: II. 135–73). P. Mesnard, L’Essor de la philosophie politique au XVIe siècle (Paris, 1951) is still worth consulting. Hamilton’s Political Thought in Sixteenth-Century Spain (Hamilton 1963) provides a useful introduction to the writings of Vitoria and some of his pupils; J. A. Fernández Santamaría, The State, War and Peace: Spanish Political Thought in the Renaissance 1516–1599 (Cambridge, 1977) contains interesting observations, but is weak on the legal and theological context of Vitoria’s thought. Marcel Bataillon’s chapter on the Junta de Valladolid in his classic study, Erasmo y España (Mexico, 1966), pp. 226-78, offers a valuable account of Vitoria’s relationship with Erasmus. The essays in P. Rossi (ed.), La seconda scolastica nella formazione del diritto privato (Milan, 1977) provide an introduction to the School of Salamanca’s thinking on private law, while the first chapter of J. Muldoon, Popes, Lawyers and Infidels: The Church and the Non-Christian World, 1250-1550 (Liverpool – Philadelphia, 1979) discusses Vitoria’s use.
of the canon lawyers. Tuck's *Natural Rights Theories* (Cambridge, 1979) contains an authoritative discussion of *ius* and *dominium*; so does K. Seelmann, *Die Lehre des Fernando Vázquez de Menchaca vom dominium* (Cologne, 1979), though he comes to different conclusions. V. Carro, *La teología y los teólogos-juristas españoles ante la conquista de América* (Salamanca, 1951) is generally tendentious and chauvinistic, but well-informed on Vitoria's theology.

**Works**

On the transmission of the texts of Vitoria's works see the following 'Critical note on texts and translation'. The standard modern edition of all thirteen *Relectiones* by Urdánoz (Vitoria 1960) has been superseded, at least as far as the critical text is concerned, by the editions of the two relections on the affair of the Indies in the Corpus Hispanorum de Pace series (Vitoria 1967, 1981). Vitoria's lectures on *ST* may be consulted in Beltrán de Heredia's reliable edition (Vitoria 1932–52).

Of Vitoria's individual works, only *On the American Indians* and *On the Law of War* have received attention. J. Baumel's *Les Problèmes de la colonisation et de la guerre dans l'oeuvre de Francisco de Vitoria* (Montpellier, 1936) makes interesting observations, as does the excellent introduction to Barbier's translation (Vitoria 1966). Pagden's 'The "School of Salamanca" and the "Affair of the Indies" ' (Pagden 1981b) gives an account of the background to *On the American Indians*; this text, and its implications, are analysed at greater depth in his *The Fall of Natural Man* (Pagden 1986), and 'Dispossessing the Barbarian: the Language of Spanish Thomism and the Debate over the Property Rights of the American Indians' (Pagden 1987).
Critical note on texts and translation

The texts

This anthology consists of unabridged translations, arranged in chronological order, of five of Vitoria’s thirteen surviving Relectiones theologicae (On Civil Power, I and II On the Power of the Church, On the American Indians, and On the Law of War); three articles from On Dietary Laws, or Self-RestRAINT; and extracts from Vitoria’s lecture-cycle on Aquinas’ Summa theologica I-II. 90–105 (On Law). In the appendices we give a passage from Vitoria’s lectures on ST II-II. 10, and four of his letters (the latter being the only texts written in Spanish).

As explained in the Introduction, none of these works appeared in print during Vitoria’s lifetime. The only surviving witnesses for the great cycles of Vitoria’s ordinary lecture-courses (lectiones) on Lombard’s Sentences and Aquinas’ Summa theologica, which as Prime Professor of Theology he was required to deliver daily for over twenty years, are MSS known as reportaciones: that is, notes taken down by students from the master’s dictation in the Salamanca lecture-halls. Some twenty such MSS survive, the most important being those of Francisco Trigo and Juan de Barrionuevo; they remained unpublished until this century, when they were edited by Beltrán de Heredia. The texts on ST I-II. 90–105 and II-II. 10 translated here are taken from reportata of the lecture-courses of 1534–6 preserved in Vatican MS Ottob. 1000 and Salamanca University MS 43 (edited in Vitoria 1952: 11–93, and Beltrán de Heredia 1928: 185–203).

By contrast, the text of the relectiones, which Vitoria was required to deliver once a year from 1526 to 1540, derives from a single original, a copy in Vitoria’s own hand or one that circulated on his authority. The existence of this original, now lost, is attested in the most authoritative of the surviving MSS copied from it, known as P or Palentinus. This