Histories of international law rarely engage with what experts—teachers and practitioners—feel to be the existential insecurity of the field. Is there such a thing as international law? What sort of thing is it? Engaging with the so-called deniers is a traditional textbook *topos*, and every international lawyer knows half-a-dozen ways to defend the existence or relevance of international law, and is ready with rejoinders to those who doubt. But so far no serious debate has been triggered on what the subject-matter of the history of international law might be or where its archive might be found. True, chronological problems are sometimes raised: is it possible to speak of international law with respect to the practices of warfare or diplomatic mores of Western Antiquity, for example? Was there international law before 1648, or before there were specialists addressing themselves as international lawyers in the late nineteenth century?

But questions such as whether the writings of a philosopher such as Immanuel Kant on perpetual peace belong to the history of international law are rarely posed. Basic histories do reference the teachings of the Dominican theologian Francisco Vitoria at the University of Salamanca in the sixteenth century on the question of the conquest of the Indies. They do this despite the fact that his lectures were part of the training of aspiring clerics on the management of the sacrament of penance and even as he himself pointed out that “since this is a case of conscience, it is the business of the priests, that is to say the Church, to pass sentence upon it.”¹ Why should legal historians care?
A positive response to the question “are texts composed by philosophers and theologians part of international law?” would seem to have a surprising repercussion. If what theologians, for example, have said or written belongs to (the history of) international law, does this not suggest that contemporary teachings of a bishop, an imam, or a rabbi, or the massive religious literatures on peace or justice, ought to be understood today as in some sense “part of international law”? If not, what is the criterion that includes some past but apparently no present theologians? And what about utterances by non-Christian theologians? At a time when (Christian) theology was regarded as the queen of sciences, it was natural to include religious ideas as fundamental for law as well. But when did that end? And if it did end for Christians at some point—a debatable proposition—what about those to whom religion and law are still fundamentally part of the same system of concepts and ideas?

Other problems of historical interpretation emerge. What is it that makes something “philosophical,” “theological,” or “legal” in the first place? Is it the intellectual formation or orientation of the speaker? Is it the institutional or disciplinary context where an utterance appears? A circle looms: because access to real subjective meaning is closed, it is common to derive an answer from an “objective” context. But when asked how to justify such a contextual interpretation, we are tempted to invoke the understandings of the speaking subjects themselves: Vitoria intended his words to sound beyond the classroom. To avoid this circularity, historians of international law might want to stress the supra-contextual significance of some interpretative frame: never mind that Vitoria was a theologian concerned with penance and absolution.
His utterances were nevertheless part of the process of justifying Spanish imperial expansion and justifying imperial expansion is something with which international law ought to be concerned. This would be a logical response, but also one that would open up dauntingly expansive and politically controversial avenues. The choice of a meaningful frame for the history of a field can only be made on the basis of present-day understandings and preferences. It is our world that makes us suggest that imperial expansion should (or should not) be used to illuminate international law’s past. What about “humanitarianism” or “globalization” as competing frames? No doubt, the choice of the frame depends on one’s political inclinations.²

In the standard histories of international law, finally, there is much overlap in content; most histories include texts that contain such idioms as *ius gentium*, and they discuss the enlightenment theme of *Droit public de l’Europe*, or make points about the justice of war or treaty relations between nations. This, I suspect, is how Vitoria and Kant have found their way into the curriculum. But many other theologians, philosophers, civil and canon lawyers, politicians, and diplomats have addressed those themes as well. Machiavelli’s lawyer-friend Francisco Guicciardini as well the ex-Jesuit Giovanni Botero, for example, both wrote extensively and concretely on such matters. Yet they are not usually included. Perhaps the choices emanate from an understanding of the former as more significant than the latter. Again, large questions arise about how choices about significance are made in a historiography that is directed at once to scholars and practitioners. Lawyers are likely to believe that Vitoria and Kant were good in some way that Guicciardini and Botero were not—at least good for international law. In other words, such choices may reflect the perception that these men shared the commitment of today’s international lawyers to
thinking about the field in strongly normative and teleological terms. International law intervenes and has intervened in the world as a force of the good—and this so-called good is that which aligns itself with the preferences and priorities that Vitoria and Kant (must) have had, priorities and preferences that, perhaps surprisingly, appear close to our own.

But focusing on what is being said begs the question of what belongs to the field. There is no disagreement about relations between sovereigns—diplomacy, war, treaty-making—as part of international law. But the locution *ius gentium* has also been employed to address such other issues as “just buyings and sellings and other such things…without which men cannot live together.”\(^3\) As I have elsewhere argued at more length, relations between sovereigns cannot be usefully separated from the legal conditions and techniques whereby “sovereignty” emerges and operates or that limit what it can attain.\(^4\) Sovereignty and international relations are underpinned by a network of relations of property and other aspects of private law, contract, succession, and (especially) rights over land.

In case interest in history is inspired by a wish to know how law has contributed to the way the world has been ruled, it is impossible to ignore the structures and techniques of private law that both sustain and challenge sovereignty; Vitoria and Kant taught widely on property and contract as well—without those teachings having usually been read into “international law.” Western techniques of domination regularly combine public and private law, sovereignty and property, war and commerce. Both have an international presence. So why are the writings of Emer de Vattel part of international legal history while those by the lawyers Charles Davenant or Pierre le Mercier de la Rivière are not? How come has it been forgotten that the work Adam Smith published before his *The Wealth of Nations* (1776)
declared in its last paragraph that “in another discourse” he would “give an account of
the general principles of law and government”, based on the ideas about human nature
and derived from a “history of jurisprudence.”

That histories of international law do not attend to the international nature of
regimes of property is all the more surprising owing to the rise of a postcolonial
sensitivity that has questioned the traditional progress narrative within which
references to Vitoria and Kant have traditionally been made. But here too,
postcolonial scholars have not engaged in much public reflection about just what
international law is. It may be that the stronger and the more fundamental the critique,
the less it can question the relevance or the very existence of its object. The problem,
as international law scholar Anne Orford has shown, is accentuated when the writing
is produced in the genre of disciplinary history which takes for granted the
conventional boundaries of a discipline—in this case international law—and then
focuses on internal developments, trends, and in-fights within an already-defined set
of questions and assumptions. What underlies these concerns, however, is the
question of how those boundaries were formed in the first place, and how idioms—
and disciplinary power—sometimes transgress them.

In this article, I pursue the kind of history of international law that focuses on
the conflict of the disciplines or, as Kant would put it, “conflict of the faculties.” This
approach focuses on the ways that authority is vested in certain types of expert speech
and how that authority then migrates between faculties and disciplines. This kind of
history would not be internal to a given conception of international law or law of
nations; it would instead examine how the meanings of those locutions have varied,
how the limits of the field have changed, and how power has migrated across
institutional and intellectual settings. I believe that disciplinary clashes have much to

tell us about the uses of power around and through the subject of international law, including when they are being justified, channeled, and opposed by a technical idiom employed by contemporary practitioners.

The disciplinary focus, in the kind of history of international law I explore here, might tell us more about the implications of the common reflexive inclusion of Vitoria and Kant and the unnoted exclusion of other voices. It might also reveal to international lawyers much more about the origins of the objectives and assumptions of their field: in what disciplinary spaces did the problems to be resolved emerge? And how did different disciplines claim the task of resolving them? Here I will examine two moments: the late-medieval construction of *ius gentium* as part of the struggle for authority in thirteenth-century France, and the eighteenth-century transformations of natural law at German universities to assist in the government of the state. The struggles between theologians and jurists in the former case, and the internal development of the legal discipline in the latter, raise important questions about the power of disciplinary boundaries that bear a striking resemblance to present efforts in the broad realm of international law to understand and control the process commonly referred to as globalization.

*Theology, Law and the Construction of Territorial Power*

*The demise of the universal pretensions of the church and the empire in the face of the rise of territorial kingship in the thirteenth century provoked a moment of intense rivalry between theologians and civil lawyers that was both linguistic and disciplinary, as both groups worked to capture those transformations in a novel professional vocabulary. Eventually, a notion of *ius gentium* (law of nations) was invoked on both sides to justify and explain opposing positions on royal power.*
By the end of the century it would be customary for French civil lawyers to address their king as a “princeps” in his realm, even if not de iure, nevertheless de facto. The curia of Philip the Fair (1268-1314), King of France, was famously populated by jurists trained in civil law at the universities of Bologna, Montpellier, and Orleans, many of whom intensely supported the King’s independence from the Pope and the Emperor. This position found support in the famous statement by Pope Innocent III (1160-1216) that seemed to contradict the common stance among theologians on Church authority. Addressing a context of a question concerning the legitimation of bastards, the Pope announced that nobody was entitled to challenge the way the French king ruled his regnum (rex superiorem non recognescens in temporalibus).

The first jurist to expand upon this perhaps carelessly formulated view was the Burgundian lawyer Jean de Blanot (c.1230-c.1280) who later became a clerk with the Archbishop of Lyons. In his commentary on Iustinian’s Institutes of 1256 [I 4.6,13] Jean wrote that the king “in temporalibus superiorem non recogniscit” and ascribed to him “potestas iuris generalis iurisdictionis.” A few years later he came to the matter anew in the context of commenting on the Lex Iulia maiestatis [C.9.8; D. 48.4] where he affirmed that the vassals of a (treasonous) baron engaged in war against their king were freed from their vow to him. This was so because the regnum was the “patria” and the king represented the “bonum publicum.”

By 1303, with the famous clashes between Philip and Pope Boniface VIII over taxation, sovereign rights, and the trial of the Templar knights, the overarching struggle between temporal and spiritual power had been settled in favor of the former. But the conflict of the disciplines persisted; theology did not renounce its status as the principal intellectual frame for understanding and operating with the new constellation. An early work written for the instruction of Philip the Augustinian
theologian Giles of Rome (Aegidus Romanus, c. 1247-1316) offered *ius gentium* as the proper vocabulary with which to discuss the natural law of kingship and commerce while indicting lawyers as “political idiots” because they lacked an understanding of the principles of good government as set forth by Aristotle. Later, Giles would even more emphatically side with the Pope, supporting the Church’s ultimate jurisdiction even in temporal matters as long as they had some relationship to issues of conscience. Others, such as the Dominican theologian Jean Quidort (John of Paris, c. 1250-1306), joined the conversation by publishing the tract *De potestate regia et papali*, in sharp defense of his king. In twenty-five dense chapters John discussed the respective powers of priests and kings in ecclesiastical and temporal matters, the universal but limited roles of the Pope and the Holy Roman Emperor, as well as the rights of property enjoyed by individuals. He claimed that human diversity prompted legal and political diversity: “There can be different ways of living, and different kinds of state conforming to differences in climate, language and the conditions of men, with what is suitable for one nation is not so to another.” In sum, “Development of individual states and kingdoms is natural, although that of an empire or [world] monarchy is not.” Like Aristotle, John believed that these separate secular communities were to be self-sufficient and governed “under one man called a king, who rules for the sake of the common good.” This kind of rule that takes place by the “specific laws” of each community, John explained, “is derived from the natural law and the law of nations [*ius naturae et gentium]*.”

Civil lawyers struggled differently with the adoption of the language of *ius gentium*. In a sense, it was easier for theologians to adopt the language of *ius gentium* with which to found the independence of territorial rulers than it was for the jurists, committed as the latter were by the force of their very specialization to the idea that
the Empire had been established by God and that the emperor himself was Dominus mundi. [D 14. 2, 9]. The Orleans jurist, Jacques de Révigny (Jacopo Ravannis, c. 1230-1296), one of the century’s most influential French academic lawyers, for example, drew heavily from the de iure/de facto distinction to ground a compromise between the principles of written civil law (Corpus iuris) and the political reality around him. According to Révigny, although the French king seemed to think of himself as independent of the emperor in fact (de facto), Révigny argued he was not so in law (de iure). Instead of as a “princeps,” he could be addressed as a “magistratus principis,” a kind of territorial official of the emperor. In this way, he could still reign supreme in his domain, exercising most aspects of the imperial prerogative, including for example taxation and other public law powers.

Jurists’ effort to find a legal way to defend royal sovereignty while affirming imperial universality peaked in the views of the most famous of the fourteenth century followers of the Orleans jurists, Bartolus of Saxoferrato (1313-1357). On the one hand, Bartolus declared, “whoever would say that the emperor is not lord and monarch of the entire world would be a heretic.” On the other hand he noted, thinking especially of the northern Italian city-states, it was possible to think not only of the king but also the civitas itself as a “princeps,” though only de facto. This was so because imperial power was (“only”) “ratione protectionis vel administrationis.” Developing the de iure/de facto distinction in this way, Bartolus’s writing both exposed and attempted to reconcile the competing jurisdictions of the Holy Roman Empire and territorial sovereigns. Imperial authority did not cancel out the dominion kings had over their regna: to rule universally did not mean to rule every particular as well.
It was increasingly apparent to thirteenth-century observers that many “Roman” (i.e. Christian) peoples were ruled independently of the emperor. It was here that the civil lawyers’ distinction between *de iure/de facto*, and their use of the concept of *ius gentium* to explain the normative power of the latter, made of civil law—and those practicing it—the predominant authorities on emerging territorial power. Hence it was that Bartolus’s most famous student, Baldus of Ubaldi (1327-1400), a future defender of the absolutism of Milanese rulers, could argue ingeniously that although a Christian king would be committing a sin if he did not recognize the empire’s universal authority *de iure*, this did not mean that he did not wield the highest power in his own realm: “*aliud est dicere universale aliud integrum.*” Even the Bible recognized the existence of lawful kingship before Rome. If the Empire’s earlier power now seemed diminished, this could only mean that the old customary *ius gentium* would apply. 

In such ways, French and Italian (as well as Spanish and English) jurists, trained in civil law and using the vocabulary of the law of nations (*ius gentium*) sketched a view of the world in which territorial rulers enjoyed local independence vis-à-vis traditional authorities, inaugurating law as the authoritative discipline to determine the substance and location of territorial power. Perhaps surprisingly, theologians could easily accommodate these changes. This was most strikingly visible in the way the most elaborate system of *ius gentium* emerged from the pen of the Dominican scholar Thomas Aquinas (1224/5-1274). In his *Summa theologiae* (1265-1274) Aquinas wrote that all Christian authority (*dominium*) was derived from God. As it was written in Psalm 24: “The earth is the Lord’s and the fullness thereof, the world and those who dwell therein.” The world was God’s because He had created it.

But in creating the world, He had also ordered (or “ordained”) it by natural
law so that it had become possible for humans to grasp its manner of operation and to contribute to the realization of the divine plan. As far as humans were concerned, Aquinas continued, that divine plan operated as the law of nature. Nonetheless, “…the general principles of the natural law cannot be applied to all men in the same way because of the great variety of human circumstances; and hence arises the diversity of positive laws among various people.” When God had created human beings, Aquinas declared, he had also donated *dominium* to them (this was part of what it meant for humans to have been created in God’s image). The donation of *dominium* meant that they had the power to govern other human beings and to own private property, labeled by James of Viterbo, one of Aquinas’s followers, as *dominium iurisdictionum* and *dominium proprietatis*.

The principal instruments of government, in Aquinas’s view, were civil law and the *ius gentium*. Both were products of what practical reason derived from natural law in its search for the common good, though each was differently derived. Humans received civil law through a process that Aquinas called “determination,” the “specific application of that which is expressed in general terms.” It was the *local* specification of a universal natural law. More interesting, however, was the explication of the *ius gentium*. This was derived from natural law as conclusions that resembled those that sciences abstracted from their founding principles. *Ius gentium* had much broader validity than civil law, as it responded to conditions of human life everywhere. It was a kind of normative anthropology, a theory about human nature that combined an intrinsic need for sociability with the ability to reason. As Aquinas explained: “The *ius gentium* is indeed natural to man in a sense, in so far as he is rational, because it is derived from natural law in the manner of a conclusion not greatly remote from its first principles, which is why men agree to it so readily.
Nevertheless, it is distinct from the natural law, and especially so from the natural law which is ‘common to all animals.’\textsuperscript{32}

Here now was a law of nations that depicted the world as a system of territorial regimes whose rulers had independence in secular matters from external authorities and legislative sovereignty, that is, the power to enact civil law with binding force.\textsuperscript{33} Aquinas’s choice of \textit{law} as the applicable vocabulary ensured the effectiveness of the directives in institutional practice while his treatment of the virtues by Aquinas linked government with the supernatural ends of human striving. Both law and virtue originated in God but they operated differently: law consisted of external directives that helped humans reach their good, virtue encompassed the internal conditions to attain it.

Aquinas’s sense of \textit{ius gentium} also exhibited this dual character: on the one hand, as “law” it consisted of “conclusions” derived from natural law and promulgated by lawful authority. But at the same time it contained an aspect of the virtue of justice, understood as the commensurateness or appropriateness of something “by reason of some consequence of its being so.” Using Gaius’s old definition of the \textit{ius gentium}, Aquinas explained that the law of nations was something that “natural reason” had established “among all men.” It was a set of practical conclusions that humans had made out of existing conditions and it was “observed by all equally” because of its “closeness to equity.”\textsuperscript{34} As examples Aquinas gave “just buyings and sellings and other such things…without which men cannot live together.”\textsuperscript{35} These institutions emerged as conclusions produced by practical reasoning, appropriate to human circumstances in general so that they should be respected in the life of every \textit{civitas}.\textsuperscript{36}
Aquinas’s work would have important consequences in the entwined histories of international law and the conflict of the faculties. Situating *ius gentium* within a universe of theological arguments and presuppositions, as one of the instruments through which human beings sought supernatural blessedness, would greatly strengthen the position of theology as the “queen of the disciplines” and ultimate platform within which questions about legal right ought to be resolved. It is no coincidence that as the Spanish second scholastic—a dominant school of Catholic thought that sought to reconcile Aquinas’s legacy with a post-Reformation world in the early sixteenth century—began to look for a language with which to address problems that had arisen in the context of the conquest of the Indies as well as in the massive expansion of trade that followed the consequent importation of silver into Europe, it was this language of the *ius gentium* that was taken up by its leading representative, the Dominican scholar Francisco de Vitoria. In the introductory part of his famous *relectio*, Vitoria took pains to demonstrate the ultimately religious character of the question of Spanish power in the Indies, reminding his audience not only that the verdict of religious authority was to be followed “even though they [“wise men,” i.e. theologians] may judge wrongly,” but also that this was “not the province of lawyers, or not of lawyers alone, to pass sentence in the question.” The lawyers’ province was in any case limited to *leges humanae* that do not deal with the question of the conquest. “Since this is a case of conscience,” Vitoria wrote, “it is the business of the priests, that is to say on the Church, to pass sentence upon it.”

But even before Vitoria employed Aquinas to address the enduring struggle between the jurists and the theologians for authority in the construction of territorial rule in sixteenth-century Europe and overseas, other theologians had contributed to their discipline’s claim to predominance as the field in which the law of nations
should be situated. In the fourteenth century, for example, the theologian Nicholas Oresme (c. 1320-1382), one of Charles V’s closest friends who prepared, at the king’s request, a French translation of Aristotle’s *Politics*, had a very negative view of lawyers’ efforts to expand their authority beyond simple legal-technical questions. Instead, Oresme propounded an Aristotelian “science of politics” based on naturalist ideas and spoke against what he thought was the civil-law-inspired absolutism of the lawyers. Oresme stressed instead the necessity of adapting governmental policies to the character of each regime: “One polity is suitable for one people and another for another, as [Aristotle] says…For it is appropriate that the positive laws and government of peoples should differ according to the diversity of their of their regions, complexion, inclinations and habits.”

Any effort to transcend their natural boundaries by some idea of universal rulership would be unnatural and unjust. Oresme completely rejected the juristic habit of relying on Roman law as the repository of timeless and universal principles, and the king’s exalted position within it. The inclination of jurists to conceive of their abstractions as an as autonomous “science” was part of their political naïveté; it was visible above all in their faith in the universal applicability of the codification of Roman civil law by Justinian, the ruler of one realm, and their complete ignorance of the kind of political prudence of which governmental wisdom consisted.

Criticisms of jurists’ claim to authority in matters of territorial power had likewise been voiced at the Paris theology faculty where conciliarist masters such as Pierre d’Ailly (1351-1420) and Jean Gerson (1363-1429) stressed theology’s superiority over the predominantly negative character of law. As Gerson once put it: “God would have needed neither canonists nor legists [civil lawyers] in the pure state of nature, just as He will not need them in the glorified natural state.” Gerson’s
efforts to develop a notion of the mystical community within the Church, including aspects of individual right, would emerge in the conception of domestic community as an important alternative to the monarch-centered views of the legists. In addition, Gerson and D’Ailly debated the theories of just war that had originated with Augustine and Aquinas in much more detail than the jurists who generally refrained from seeing any limits to the king’s discretion. It is precisely from such debates that the young Vitoria, during his years with the Dominican convent of Saint Jacques in Paris, and later with the university itself, would learn to update the Thomistic vocabulary so as to apply it in the controversies that arose over the justice of Spanish imperial expansion.

In the seventeenth century, the Dutch Hugo Grotius eventually took over much of what the Spanish theologians had written, and turned it into a robust view on the law of nature and of nations in his *De iure belli ac pacis* (1625/32). By this act of partial adoption, Grotius would join Protestant theology with natural law. Grotius also wrote massively on theological subjects, and points of contact can easily be found between his moderate Arminianism, his effort to seek to unite the Christian churches, and his law of nations. Had the relations between Christian denominations developed in a more peaceful way, not only the Spaniards but also Protestant Aristotelians might well have adopted *ius naturae et gentium* as a platform for speculating about the European political order. But as the development of the discipline eventually moved to Germany, this took place in the philosophy and law faculties, sometimes against massive protests by more orthodox Protestant theologians.

<titl>From (Natural) Law to Economics</titl>
From the seventeenth to the nineteenth centuries, thinking and writing on the law of nations took place largely within the German academic discipline of *ius naturae et gentium*. The few tracts produced on the subject in sixteenth-century Germany still operated within the narrow boundaries of Christian Aristotelianism; the closed confessional state of post-1555 did not aspire to the neutral space offered by natural law to conflicting beliefs. Change began after 1648 with the slow introduction of Grotius’s work at German universities. At first, German scholars came to know Grotius through his religious writings (especially *De veritate religionis Christianae*), texts received critically by orthodox Lutherans and Calvinists. Larger awareness of Grotius’s *The Rights of War and Peace* (*De jure belli ac pacis*) began to spread only in the latter half of the century, through contacts with Leiden and Dutch intellectual circles.

*De iure belli ac pacis* soon overcame its rivals. By 1661, thirteen Latin editions were circulating in Germany, and the first vernacular commentaries followed in the 1660s and 1670s, including annotated student editions and larger analyses, both positive and critical. The first chair in “natural law and the law of nations” that was established in the Heidelberg philosophy faculty in 1661 was designed for teaching according to Grotius. New chairs were founded at other German universities soon thereafter, including Kiel (1665 in the law faculty), Jena (1665), Greifswald (1674), Helmstedt (1675), Marburg (1676), Giessen (1677), Strasbourg (1694), and other (especially Protestant) universities. The high point of the reception of Grotius in the German legal academy came with the publication of the first German translation in 1707, followed by those translated editions by Christian Wolff in 1734 and the Cocceji brothers in 1752. In his introduction to the 1707 edition, Christian Thomasius celebrated the work’s usefulness for princes and their advisors; it would help them to
decide, he wrote, how to act in accordance with one’s conscience and the good of one’s community, for the purposes of justice among princes and the protection of one’s subjects.48

The content of the reception varied. Many objected to Grotius’s notoriously haphazard choice of source-materials, and took issue with the relative scarcity of Christian texts. Jurists who would nonetheless label themselves Grotians rejected the theologians’ view of innate moral and legal norms. The so-called modern approach called for focus on the instinct and right of self-preservation, something understood as a radical departure from past scholasticism.49 By the end of the century, natural law had become such an important part of the legitimation of political statehood that even orthodox Christian jurists such as Veit Ludwig von Seckendorff (1626-1692), whose early *Teutsche Fürsten-Staat* (1656) had put forward a divinely ordered state as the total context of the care of souls by a Christian prince, annexed to his later *Christen-Staat* of 1685 a text on natural law. For Christians, however, von Seckendorff insisted that the best guides for the princes were contained in the ten commandments whose validity with pagans, too, was based on their practical usefulness.50

In this era of intense discussion among scholars, natural law and *ius gentium* first entered the German academy via the philosophy faculty rather than the law faculty, as part of what was designated practical philosophy. There it contributed to the relative rise in importance of politics at the cost of ethics in the Aristotelian curriculum.51 Natural law also provided a descriptive frame for understanding the operation of human societies, preparing students for their study in the higher faculties, including law. Chairs of natural law later came to be established in the law faculty, too. The jurists who held these positions drew upon natural law to develop a general theory of law and government, integrating the settlement of the Thirty-Years’ war in a
theoretical architectonic that consolidated absolutist statehood and developed in the eighteenth century into an increasingly pragmatic discipline of statecraft and diplomacy. It also eased the religious worries emerging with confessional antagonisms in Europe and the discovery of alien cultures outside. “So it was that the discussion of public law which had begun in the universities of the Counter-reformation Catholic Spain, slipped from the hands of catholic science and, in the 17th century, with Althusius, Grotius, and Hobbes, became the domain of Protestant jurists and political philosophers.”^53 Natural law (which included *ius gentium*) now offered itself to the German princes as a scientific technique of the government of the state, depicted as a special type of machine for the production of secular happiness (“Glückseeligkeit”).^54

The most influential early proponent of this program had been the Saxon jurist Samuel Pufendorf (1632-1694), the holder of that first chair. Although he was disappointed that the chair was in philosophy and not in law, Pufendorf took up the question of law of nature and of nations in his new disciplinary home. Deeply affected by the devastation caused by the Thirty-Years’ War, of which his family had first-hand experience, he wanted to develop an approach to government that would enable humans to understand and control states—which he regarded as “moral entities” analogous to “physical entities”—so as to avoid the reoccurrence of similar disasters.^55 In his principal work, *The Law of Nature and of Nations [De iure naturae et gentium]* published in 1672, Pufendorf thus created a simple algorithm for ruling. From what he believed to be the three most basic aspects of human life—the egoism of human beings; their pathetic weakness; and their ability to reason—he produced a new foundation for the science of government. As he put it in a later, abbreviated version of this work: “Man, then, is an animal with an intense concern for his own
preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits.”

People, according to Pufendorf, quite simply needed each other. They did not live in states out of love to each other but rather they did so based on the recognition that they could not realize their egoism (self-love and self-protection) alone; remaining in the natural state of civil society, all kinds of harm would befall them. “State” would be the name for that system of cooperation—the “machine”—that civil society, anterior to statehood, would create to protect itself and to enable it to attain its objectives. Once such a state had been set up, they would fully subordinate themselves to it. It was purely instrumental; its single objective was the salus publica. Its technicians would be neither theologians nor philosophers but rather natural lawyers.

Theologians and orthodox jurists were initially suspicious of Pufendorf’s vision of government. God, or indeed Christian moral principles, played no part in it. Pufendorf had also attacked some of the most hallowed principles of German constitutionalism, maintaining in polemical tones that the Aristotelian tradition had no credible understanding of Germany’s complex political reality and had contributed to its having become an ungovernable “monstrum.” Yet by the end of the seventeenth century most German Protestant universities had set up chairs for ius naturae et gentium and natural lawyers had begun to find lucrative careers in the courts of their respective princes. Some of them, like the “universal genius” Gottfried Wilhelm Leibniz (1646-1716) even sought to create a metaphysical system of “universal benevolence” under which the ambition to “say clearly how things really are” was combined with elaborate statements on justice, benevolence, and even piety to guide rulers to cooperate among themselves.
By mid-eighteenth century, however, a malaise had crept into the community of natural lawyers. Once the rational-empirical justification for statehood had been laid out, the need had emerged to produce practical instructions about how to govern the state so as to attain the hallowed objective of happiness. But now natural lawyers found themselves as divided on policy as royal counsel had always been in the past. Neither of the two directions from which they had looked for scientific rules had shown itself fully authoritative. The more rationalistically inclined jurists followed the Halle-based philosopher Christian Wolff (1679-1754) who had tried to deduce detailed instructions for government and policy from higher-level axioms about everything in the world pursuing its perfection. With the “Wolffian,” true philosophy would produce a society of perfect security and happiness where *summa potestas* and *summa sapientia* would coalesce to turn the ruler into “an agent of a social reason.”

Yet even as the search for perfection and the obsession with reason would become defining features of the German bureaucratic ethos, it was still hard to derive specific policy-proposals for government from the thick volumes produced by Wolff or his followers. At Göttingen, natural lawyers such as Johann Jakob Schmauss (1690-1757) and Gottfried Achenwall (1719-1772) were engaged in historical and comparative studies that hoped to advance a realistic theory of government as *Staatsklugheit* (“State-wisdom”). This work was conducted alongside the development of specialized subfields such as universal and particular civil and public law and the law of nations on the one hand, and an empirically oriented policy-science (*Staatenkunde* and *Statistik*) and cameralism on the other.

Across the board, the curriculum of the Göttingen law school was geared in an increasingly pragmatic direction. Schmauss insisted on separating natural law from divine law and every aspect of theological morality, and he wanted to provide an
anthropological basis for the field. Achenwall and his colleague Johann Stephan Pütter (1725-1807), for their part, wanted to change the emphasis between the three terms in the Aristotelian triad of “ethics, politics, oeconomia.” They relegated the first to the realm of “internal happiness,” a task beyond State institutions. Politics and oeconomia, by contrast, were developed into techniques instrumental for the production of security and welfare. In order to sort out the relations between politics and oeconomia, Achenwall began to pursue a comparative history of European States. In a work from 1761 he distinguished between state-wisdom and Staatskunst (state-technique), the latter conceived as the techniques for the implementation of the former. He further explained that economic and financial matters were crucially important for the latter; it was essential that the modern “Politicus” knew them well so as to optimize the operation of the state—that “great machine.”

In due course, however, ideas of economic governance broke off from the image of the state-machine. In a pamphlet from 1759 on “The Chimera of the Balance of Power in Trade and Shipping” (Die Chimäre des Gleichgewichts der Handlung und Schiffart), the prolific and obscure but influential natural lawyer and cameralist Johann Heinrich Gottlob (von) Justi (1717-1771) attacked with force the suggestion that the balance of power under European public law could possibly be extended to include trade and commerce. The proposal had been made during the Seven Years’ War (1756-1763) by, among others, the French minister Maubert de Gouvest (1721-1767), with the ostensible goal of thwarting England’s attempt at establishing universal monarchy through its mastery of the seas. During the war, England had successfully obstructed French access to and from the Caribbean by sinking or capturing French ships and foreign vessels operating on France’s behalf. Through the unrivaled efficiency of its naval warfare, and by simultaneously being able to pursue
its own commercial relations virtually unhindered, England had gained a decisive advantage in world affairs. According to Maubert, English economic warfare was in breach of the well-established principle of European public law of the balance of power. The rest of Europe was therefore to be enlisted on the French side against English aspirations.

Justi’s pamphlet contained a vigorous and at times quite personal attack on Maubert’s arguments and motivations. But mostly it tried to explain why the idea of an internationally enforced “balance of trade and shipping” was outright ridiculous, unjust, unreasonable, and above all impossible to realize. Already a few years earlier Justi had produced a work where he had attacked the basic idea of balance of power as a part of European public law. Even as the arguments made in that earlier work applied also with respect to trade and shipping, he now wanted to make the case that the very idea of prohibiting belligerent powers from gaining advantage through trade was “a thousand times more unreasonable than the system of balance of power between European nations.”

This was so, he explained, because while it was theoretically possible (though again, impracticable and unreasonable) to agree on a political and military balance, such suggestion went directly against the very nature of commercial relations. Politics and commerce were related but different, indeed in some respect wholly opposite domains. Both, Justi wrote, had as their objective the enhancement of the happiness and strength of the state. Both were crucially dependent on the economic resources. But they were vastly different in that while the direction of political government depended on the will of the ruler, commerce and economic prosperity had their own laws that governments needed to know and respect and with which they could interfere only in a limited way.
Justi made four arguments to demonstrate the utter impossibility of the
diplomatic establishment of a “balance of trade and shipping.” All commerce
depended on the natural resources a state possessed and the skills and industriousness
of its people. It would be ridiculous to demand that a state leave its resources unused
or demand that its citizens engage in commerce or production no more than its
neighbors do: to demand this, he maintained, would be unreasonable, ridiculous and
chimerical (“ungereimt, lächerlich und chimärisch”). Even if a country were willing
to do this, the effects of such a (foolish) decision would not be self-contained; they
would cause direct harm to all its trading partners. For commerce brings reciprocal
benefits in that it enables each nation to concentrate on selling what it can produce
most cheaply, and thus creates products that are most beneficial for its neighbors to
purchase.

To decree on balance would not only strike at the ambitions of an
economically active country but at all nations seeking to purchase the cheapest goods
available. This led Justi to speculate on the nature of commerce and freedom; in
pursuing the happiness of their populations all governments sought to establish the
kinds of commercial relations that would be most profitable. Their merchants were
constantly looking for the best bargains while hoping to satisfy their clients with the
smallest possible cost. To compel nations by law to deal with partners with whom
benefit would be less or where shipping would be hard or dangerous would violate
everyone’s freedom. All nations traded on the basis of their natural situation:
countries like England, France or the Netherlands possessed long coastlines and had
much experience in navigation. To limit the number of their commercial vessels, for
example, or directions where they could sail, would create an irrational advantage for
nations without advanced long-distance trading contacts. Moreover, international
trade was not just a function of the number of ships but also of the skill, energy, and experience of the merchants and sailors so that even if the numbers of a country’s ships were limited, this would not lead to equality among trading partners; nations with skillful merchants and sailors would always enjoy an advantage.\textsuperscript{72}

Justi was aiming to persuade his readers that a view of statecraft and diplomacy that focused only on the powers of the government was mistaken; such a position ignored the presence within the domestic realm of natural laws of human behavior that were relatively independent of state legislation and which the sovereign would neglect to his peril. In itself the idea of other—superior—laws was not new. Justi did not have in mind laws derived from an abstract constraining morality, however, but rather from empirically derived social facts that had survived the establishment of states and continued to be operative within the sphere that some would call civil society. To govern the state efficiently, he maintained, necessitated taking full account of these laws. This position would later inform the development of what would become labeled the laws of political economy.

In his political metaphysic of 1761, Justi had followed many of his colleagues in putting forward the view of state power as, above all, economic wealth.\textsuperscript{73} But he differed from them in contending that state power was predominantly created by private industriousness. He even claimed that one of the objectives of statehood was to create a space of economic liberty for individual subjects.\textsuperscript{74} A few years later, translations of the French Physiocrats and Adam Smith began to circulate in Germany. By this time, Justi had already concluded that it was no longer possible to rule the state only with lawyers—what one needed were “universal cameralists,” men who would be knowledgeable about the operation of the private economy and the resources of the state as a whole.\textsuperscript{75} Justi would now define the political power of a
state as a combination of the wealth of private families and efficient statecraft, taking seriously the existence of a realm of private commercial exchanges that operated best without excessive interference by public power. Unlike an older generation of naturalists, Justi regarded commerce in luxury goods as welcome; it would contribute to the emergence of a wealthy merchant class that would then be emulated by the rest of the population. Indeed it was to be one of the objectives of the state to have rich and powerful merchants. He advocated for the removal of monopolies, guilds and other restrictive provisions in all other cases apart from protecting the initial operations of large investments.

The internal debates among natural lawyers turned the field first into empirical statecraft, cameralism and Policey, but ultimately into Oeconomia. As long as natural law was taught in the philosophy faculty, its expansion into such other areas would be encouraged by re-thinking the canonical curriculum, especially the relations between Aristotelian ethics, politics, and oeconomia. When natural law and the law of nations was removed into the law faculty, however, cameralism and Policey remained cantoned in the theory of statehood until the idioms of competition and market gradually began to penetrate even within the debates under enlightened absolutism. The reception of Adam Smith in Germany drew even more attention to a whole range of economic activity that lay outside public finances. Justi had still supported the Ständestaat, but many others were ready to describe society in more individualistic terms. Attention was directed to the objective of need-fulfillment in policy, accompanied by the sense that a different kind of rationality existed outside that of the state-machine.
A new generation of natural lawyers writing under the influence of Smith and the French physiocrats began to stress inalienable individual rights as the core of natural law, the basis of a well-functioning economy and a cosmopolitan world order. When the emphasis on the autonomy of the subject in Kant was associated with the kind of vision of the economy put forward by Smith, the basic ingredients were in place for the shift of attention from Staatswirtschaft to Nationalökonomie. When in the 1790s Wilhelm von Humboldt suggested limiting the state’s role to that of guardian of security, this undermined dramatically the role of the legal class that had, since Pufendorf, committed itself to expanding the operations of the State-machine. In a sense, natural law had itself created the conditions of its demise as law both domestically as well as in the internal arena; to fulfill the promise it had made those in governing positions, and to follow up its empirical turn, there was no way it could avoid turning into political economy.

Conclusion: The Struggle Continues

Kant’s eighteenth-century plea for the independence of the faculty of philosophy from the so-called higher faculties of theology, medicine, and law was founded on the idea that whereas the latter faculties were teaching what those in power had decreed as useful for the soul, the body, and society, philosophy’s only concern was truth, and truth could not be decreed by anyone. In particular, Kant argued that the law faculties had no business debating the truth or justice of positive laws. The decrees of the government are the juristic right “and the jurist must straightaway dismiss as nonsense the question of whether the decrees themselves are right.” The questions of the law’s truth or justice would become the exclusive preserve of the philosophical faculty.
Today, faculties are no longer limited to philosophy, theology, medicine, and law. Every discipline, old or more recently established, has come to claim authority over its own truths. Even in law, especially international law, the fragmentation of legal knowledge had led to the proliferation of legal truths, associated with particular institutions and experts and containing embedded biases for policy. This fragmentation, at once historical, epistemological, and institutional, has had profound impact on the subject of international law. None of the disciplines is in the position of claiming a monopoly for truth or reason in the manner Vitoria once claimed for theology or Kant for philosophy. As Leo Strauss would have predicted in his critique of the historicization of political philosophy, the absence of a universal standpoint has led to a certain type of skepticism: if we cannot determine the truth of any particular knowledge, at least we can ask the question of where the regimes of knowledge we are left with come from, how have they organized themselves, and what influence have they had on the world?83 What, in particular, Foucault has taught us to query, has been their relationship to power?

This essay has been an attempt to examine how the relations between theology, law, and economics were structured during five centuries of thinking about ius gentium, the law of nature and of nations, and empirical policy-science. Some internal developments have been triggered by causes related to the formation and reformation of universities, some by expectations or pressures from the outside. The disciplines have often been critical of each other and resistant to change. But they have also sought change to fortify their positions or expand their influence. Without aiming at anything close to exhaustiveness, the essay has tried to make the point that history of the formation of knowledge about the law of nations has not yet been told in any great depth: how is it that authority about universal norms has migrated
between different disciplines and public and private institutions? What factors have situated such authority either in this or that faculty or specialization? Far from being a question of merely historiographic interest, an account of where authoritative speech has been found at any moment might alert us to the subtle ways in which authority claims about universal norms are being made and can be challenged today.84

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<Notes>


2 For the debate about “contextualism”, see Anne Orford, ‘The Past as Law of History? In Emmanuelle Jouannet, Hélène Ruiz-Fabri, Mark Toufavuyan, International Law and New Approaches to the Third World (2014),


Per venerabilem, 1202. Text e.g. in Jean-Marie Carbasse & Guillaume Leyte, L’état royal XIIe-XVIIe siècles. Une anthologie (2004), 23-29 and Brian Tierney, The Crisis of Church and State 1050-1300 (1988), 133-134 (extracts). The literature on Per venerabilem is enormous. For brief treatments, see Antony Black, Political Thought in Europe 1250-1450 (1992), 113-115.


Blanot, Tractatus, 160-161. [I 4.18, 3].

The king acted “propter bona tocius patriae sive propter bonum publicum regni gallie cui administrationem gerit”, Blanot, Tractatus, 162.

Aegidus Romanus (Giles of Rome), De regimine principum libri III. Ad francorum regem Philip IIII cognomento pulchrum (Rome 1556), II.II.viii & III.II.xxv (183v and 308r).


17 According to Iustinian’s *Novella* No. 73 “*Quia igitur imperium propter Deus de coelo constituit*” and the law *Cunctos populos* that opens the *Code* was usually read so as to affirm that the emperor was “lord of the world. The text [C 1.1] reads in English “We desire that all peoples [Cunctos populos] subject to Our benign Empire shall live under the same religion.” The leading glossator Azo oscillates. In his Summa codicis (3, 13) the emperor is said to possess “plurissima iurisdictio” and the king only “merum imperium”. Elsewhere in discussing the French king’s position he notes that “hodie videtur eandem potestatem habere in terra sua quem imperator; ergo potuit facere quod sibi placet”. See Bruno Paradisi, *Studi sul medievo giuridico* (1987), 308-9.


20 “… probatur quia rex princeps est quia non recognoscit superiorem. Dico: hoc est comitere in principem, non, sicut ipsi dicunt, quod quod rex princeps est, set


23 See Magnus Ryan, ‘Bartolus of Sassofedrrato and Free Cities. The Alexander Prize Lecture’, 10 *Transactions of the Royal Historical Society* (1999), 65-89, 66. Ryan points to the many unclarities and contradictions in that concept, however, and argues that it had more to do with the right of the city government to govern (internal sovereignty) than the city’s customary independence from the emperor or the pope).


25 Petit-Renaud, *Faire loy’ au royaume de France.,* 29


28 “‘the eternal law is the plan of government in the Supreme Governor”,

Aquinas ST I-II Q 93 A 3 resp. (*Political Writings*, 106).

29 Aquinas ST I-II Q 95 A 2 ad 3 (*Political Writings*, 131).

30 Aquinas, ST I-II Q.95 A 2 resp. (*Political Writings*, 130).

31 Aquinas, ST I-II, Q.95 A 2 resp. (*Political Writings*, 130)

32 Aquinas ST I-II Q 96 A 4 ad 1 (*Political Writings*, 136).
The tasks of the territorial rulers were laid out by Aquinas in the unfinished tract, ‘De regimine principum (De regno)’, written for the king of Cyprus. See Political Writings,

Aquinas ST II-II Q 57 A 3 ad 1-3 (Political Writings 164).

Aquinas, ST I-II Q.95 A 4 Resp. (Political Writings 135).

For Aquinas’ debt to Roman law in his understanding of natural law and ius gentium, see Jean-Marie Aubert, Le droit Romain dans l’oeuvre de Saint Thomas (1955), 91-97.

I have discussed this in “Empire and International Law: The Real Spanish Contribution”, 61 University of Toronto Law Journal (2011), 1-36


See e.g. Peter Haggenmacher, Grotius et la doctrine de la guerre juste (1986), 484-5.

See e.g. Horst Denzer, Moralphilosphie und Naturrecht bei Samuel Pufendorf (1972), 317-318.

46 For a full discussion, see Hoffmann-Loertzer, *Studien*, 250-260.


Older theories, too, had justified monarchical power by allocation from the “people”. Roman *lex regia* provided one such theory, and medieval Germany knew many theories of elective kingship by a “pactum” between subjects. See e.g. Dieter Wyduckel, *Princeps legibus solutus. Eine Untersuchung zur frühmodernen rechts- und Staatslehre* (1979), 163-166.


The ‘Georgia Augusta’ was established in 1734 as an institution to teach imperial history, constitutional and international law from the “empirical” perspective. Göttingen scholars would connect a historical notion of civil society with
an instrumental-technical concept of statehood, one a matter of regulating passions, the other of rational rules, that would lay the basis for the subsequent development of the knowledges that had up to this point been collected under the law of nature and of nations. See Notker Hammerstein, *Ius und Historie. Ein Beitrag zur Geschichte des historischen Denkens an deutschen Universitäten im späten 17. und im 18. Jahrhundert* (1972) and Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600-1800*, (1988), 309-317.


67 *Gottfried Achenwall, Die Staatsklugheit nach ihren ersten Grundsätzen* (1761), Vorrede § 11-12.


69 Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart*, 42.


71 Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart*, 43.

72 Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart*,
73 JHG Justi Natur und Wesen der Staaten als die Quelle aller
Regierungswissenschaften und Gesetze (1771 [1760]) ch 3 §§ 30–44 (61–95). See also
EP Nokkala ‘The Machine of State in Germany—The Case of Johann Heinrich
71–93.

74 See eg JHG Justi Der Grundriss einer guten Regierung (1759) Einleitung §§
32, 34 (20–22); Staatswissenschaften (n Error! Bookmark not defined.) 233.

75 Keith Tribe, Governing Economy. The Reformation of German Economic


78 Eckart Hellmuth, Naturrechtsphilosophie und bürgerliches Welthorizont.
Studien zur preussischen Geistes- und Sozialgeschichte des 18. Jahrhunderts (1985),
122-140.

79 See Diethelm Klippel, ‘ ‘Naturrecht als politische Theorie. Zur politischen
Bedeutung des deutschen Naturrechts im. 18 und 19. Jahrhundert’ in H.E. Bödeker &
U Herrmann (eds), Aufklärung als Politisierung – Politisierung der Aufklärung ,

80 Wilhelm von Humboldt, Über die Sorgfalt der Staaten für die Sicherheit
gegen auswärtige Feinde’, 20 Berlinische Monatsschrift (1797), 346-354.

81 Immanuel Kant, The Conflict of the Faculties, (Mary J. Gregor transl. &
ed.1979), 42-47.

82 Immanuel Kant, The Conflict of the Faculties, (Mary J. Gregor transl. &
ed.1979), 36-39

83 Leo Strauss, Natural Right and History (1953).