AUTHOR ACCEPTED MANUSCRIPT

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PUBLISHED AS

"Domingo de Soto." In *Great Christian Jurists in Spanish History*, edited by Rafael Domingo and Javier Martínez-Torrón, pp. 134–56. Cambridge: Cambridge University Press, 2018.

doi: https://doi.org/10.1017/9781108624732.008

This is an author accepted manuscript (post-review, pre-copyedit, pre-typeset). The published version appeared online on 24 April 2018. Please cite the published version, available from Cambridge University Press at the DOI above.

VERSION INFORMATION

Version date: *June 2017 (final revised manuscript submitted to the volume editors on 30 June 2017)*

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Domingo de Soto

Benjamin Hill

In the sixteenth century, Domingo de Soto (1495–1560) was recognized most for his theological works, especially his defense of Catholic positions on grace and salvation. He is still often thought of as "the theologian" of the School of Salamanca. Soto was more than that, however. There is no question of Soto's importance for the revival and rise of Thomism in the sixteenth century, not only in Iberia but across the Catholic world more generally. Nor is there any question of his role in the rise of the University of Salamanca as a leading institution of higher education during the sixteenth and early seventeenth centuries. Nonetheless, his jural and economic thought and its effect on the emergence of modern, liberal conceptions of law, political authority, and economics comprise his greatest contributions. Soto continued, and in many cases advanced, the lines of thought initiated by Francisco de Vitoria by enriching the theoretical, Thomistic bases of law, economics, and political authority. He also added important new concepts and expanded the applications of those concepts to real political, jural, and economic problems facing mid-sixteenth-century Spain. None of Soto's accomplishments can be properly understood without acknowledging and understanding the central role that his Christianity and its Thomistic commitments played in his thinking. This chapter seeks to highlight the Christian orientation and basis for Soto's thoughts about law, rights, political authority, international law, just war, the *conquista* in the New World, private property, the treatment of the poor, and banking and taxation.

Biographical Introduction

Domingo de Soto was born into a modest household in Segovia in 1495.[1] His birth and youth lay in the shadow of some of the most monumental events in Spanish history. The reconquest of the Islamic principalities (the surrender of Granada, 1492), the forced conversions and elimination of the Jewish communities (Alhambra decree, 1492), and the establishment of the Inquisition (*Exigit sinceras*, 1478–80) all quickly followed the unification of Castile and Aragon (1469/1474) and the consolidation of political power within that unified crown. Such a sociopolitical environment undoubtedly shaped many of Soto's conceptions of the stability of the commonwealth and its basis.

Soto was also among the first generation to grow up in the shadow of Columbus's voyages to the New World. He was born within months of the signing of the Treaty of Tordesillas (1494), which divided the New World into Portuguese and Spanish zones of control, and was not yet a teenager when the Americas received their "official" name (sometime before 1507). It is hard to know precisely how such changes in fundamental conceptions about the world, its peoples, and one's place in it affected schoolboys like Soto, but undoubtedly the impact was significant.[2] Certainly the political, legal, and economical consequences of these events would affect Soto's life and attitudes, as they would virtually everyone in the sixteenth century.

Soto began his university studies in 1513 at the University of Alcalá under a very young Thomas of Villanova. In a couple of years, Soto moved to the University of Paris—the greatest university in the world at the time—where he studied under, among others, the Spanish

[1] The standard biography of Soto is Vincente Beltrán de Heredia's *Domingo de Soto, O.P.: Estudio biográfico documentado* (Salamanca: Instituto de Cultura Hispánica, 1960).

[2] For how the discovery of the New World affected philosophy in general during this period, see Joan-Pau Rubiés, "The Discovery of New Worlds," in *The Routledge Companion to Sixteenth-Century Philosophy*, edited by Benjamin Hill and Henrik Lagerlund (New York: Routledge, 2017), 54–82.

nominalist Juan de Celaya and, most likely, Francisco Vitoria himself. (Interestingly, de Celaya also taught Vitoria during his early days at the University of Paris.) Under the influence of Jean Mair and the coterie surrounding him, Paris was the center for nominalism and voluntarism in the early sixteenth century. Soto certainly absorbed much of this while there. Indeed, by his own account he began his intellectual career as a committed nominalist before having some sort of realist, and hence Thomist, conversion around 1520. His conversion seemed to dominate his time as chair in philosophy at Alcalá, 1520–24. Soto developed a name for himself there as a tough and determined critic of nominalism.

While at Alcalá, Soto began studying theology and was awarded his theology degree in the spring of 1524. It was then that he decided to abandon a career in the arts faculty and take up holy orders. On 23 July 1525 he joined the Dominican order at Burgos. What motivated him is unclear, though perhaps the growing influence of the Protestant Reformation had something to do with it. Whatever his motivations, he fit in well with the Dominicans. He was assigned to teach dialectics at Segovia before being moved to the University of Salamanca to serve as an assistant to Vitoria, whose poor health was proving an obstacle to his teaching. By 1532 Soto earned his doctorate in theology, and when a chair in theology became available at Salamanca, Soto was successful in being named to it. His long professorship at Salamanca had thus begun.

For the next thirteen years Soto taught in the theology faculty at Salamanca. By all accounts he was a popular lecturer, an able administrator, and a prolific author. His commentaries on Aristotle, his lectures on physics, and his logical texts date from this period. Soto was certainly also sensitive to the Spanish conquests and colonization of the New World and to events in Spain, the Hapsburg Empire, and Europe more generally. Closer to home, Charles V (Carlos I) was consolidating power and authority across Spain and projecting Spanish

might against France, the Netherlands, and principalities in Germany. Inflationary pressures were also beginning to build within the Spanish economy. This period also saw the start of the English Reformation (Act of Supremacy, 1534), the rise of John Calvin (*Institutio Christianae religionis*, 1536), and the general spread of anti-Catholic and Reformationist attitudes across northern Europe. Ensconced though he was in the ivory towers of northwestern Spain, Soto would have nonetheless been attentive to the major events unfolding across the globe in the 1530s and early 1540s. These events were soon to pull him away from the university and to dominate the final stages of his theological career.

In 1545 Charles V appointed Soto as his theological representative to the Council of Trent (1545–63). The Council of Trent was the heart of the Church's Counter-Reformation strategy and intended not only to reform but also to consolidate the teachings and power of the Church.[3] The first period of the Council (1545–47) was dominated by discussions of justification and the sacraments. Soto's influence on the traditional, anti-Protestant decrees about grace and salvation was no doubt significant, and his most important theological work, *De natura et gratia*, was an extended defense of Trent's statements supporting the role of works within the reception of grace. After the suspension of the Council in 1547, Soto returned to Charles's court as his personal confessor and theological counselor, remaining at court until the prime chair of theology at Salamanca opened up. He returned to Salamanca in 1552, succeeding Melchor Cano in Vitoria's old chair, and during this period he composed his great work on legal theory, *De justitia et jure*. Soto retired in 1556 and died in Salamanca on 15 November 1560. At the time of his death, Spain was still the dominant power in Europe; the Council of Trent had not completed its reforms of the Church (despite the apparent permanence of the Catholic-Protestant split); the inflationary pressures building within the Spanish economy had not yet wrecked the function of

[3] John O'Malley, *Trent: What Happened at the Council* (Cambridge, MA: Harvard University Press, 2013).

the government and the growth of the economy; and the seemingly never-ending series of religious wars had not yet begun ravaging most of Europe. For a Spanish Dominican theologian in 1560, there would have been much to be optimistic about, despite any qualms that might linger about the Spanish subjugation of the Americas. Soto himself would have had plenty to proudly reflect back on regarding his role in the state of the world.

Soto's Contributions and Achievements in Jural Thought

The central idea behind Soto's contributions and achievements was his addition of a subjectivist conception of rights, which are grounded in human nature itself, to the Thomistic core of legal theory that Vitoria and others had bequeathed to him. In Soto's conception of *jus*, or rights, some have seen confusion and conflation of the objectivist and subjectivist conceptions of rights. Annabel Bret has conclusively shown, however, that Soto's uses of the two types of rights are consistent and calculated.[4] Soto, argues Brett, was "able to save both Christian liberty and the notion that human activity is integrated in the natural operation of the world of created nature, and to safeguard the right of [human] agency at" the two levels in which rights operated.[5]

To understand and appreciate Soto's significance to the history of Spanish jural thought, we need to begin by understanding and appreciating his separation and use of these two concepts.

Subjectivist conception of rights

[4] Cf. the extensive work of Brian Tierney, especially his 1997 *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, his 2001 "Permissive Natural Law and Property: Gratian to Kant," in *Journal of the History of Ideas* 62 (2001): 381-399, and his 2006 "Dominion of Self and Natural Rights Before Locke and After," in *Transformations in Medieval and Early-Modern Rights Discourse*, edited by Mäkinen and Korkman, 173-203. Tierney sees movements towards and recognition of subjective rights in Aquinas and others prior to Soto. I am following the work of Annabel Brett in this chapter.

[5] Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 138.

Aquinas's moral theory was oriented toward the preservation of Christian liberty, and a strong break between reason and nature was crucial for this. The natural law was restricted to rational nature and the principles of reason. To achieve human perfection individuals need to consciously and freely follow the natural law in pursuit of the human goods, namely virtue and happiness. To do this, individuals need to recognize the precepts of rational nature and then use those precepts in guiding and sustaining their actions.

An advantage of this approach was that it drew a sharp boundary between the teleologically structured activities of nature and the teleologically driven actions of rational humans.[6] Being teleologically *structured*, the activities of nature blindly follow procedures or inherent functions built into creatures. The actions of rational humans, however, must be a conscious and willed pursuit of a cognized end or goal, because they are teleologically *driven*. Thus, teleologically structured activities of nature are not morally significant, because they are not conscious and free in the same way as rationally principled human action. It is precisely because of the different, intentionally oriented function of rational precepts that they join together cognition, freedom, and moral significance into a single framework for moral behavior.

The Thomistic framework, however, ran into a serious problem when considering human nature. Humans are as much natural creatures as they are rational creatures, and human nature is generally seen as a curious blending of both. Thomas was no exception to this. The problem within the Thomistic framework is that it threatens to alienate us from ourselves in so far as it renders many human actions (including some fundamental and even iconic ones) outside the sphere of the moral. A parent's love; a habitual generosity of spirit; and natural bonhomie and sociability—these should be examples of virtue and morality, yet they are natural and

[6] This is my distinction to try to understand the division within Thomas' thinking. I am not aware of anything within the vast literature on Thomistic natural law or Thomistic ethics that expresses this point in quite this way.

spontaneous. Indeed, it seems as if cases like these are not just examples of virtue and morality but necessary conditions for the free pursuit of rational nature. One way, then, to characterize Aquinas's problem here is to say that his distinction between rational nature and nature itself is too strong and not drawn in the right place.

Soto sought to address this problem by recognizing subjective rights and attempting to fit them into a Thomistic version of the natural law. The basis for a subjective conception of rights comes up almost immediately in *De justitia et jure* in the form of a crisis for the theory of the natural law.[7] In book I, question 4, article 2, Soto identifies the first principle of the natural law as the precept that "the Good must be pursued and the Bad (or Evil) shunned." In human nature, this precept generally manifests itself as a natural inclination rather than as a maxim guiding and regulating behavior. Even more problematically, all creatures, natural as well as rational, seem to share this principle by virtue of their teleological orientations. Still more problematically, all of nature seems to satisfy this principle in the same way, namely through natural, inborn inclinations toward the good. The same applies, *mutatis mutandis*, to the principle Soto immediately derives from the first general principle—*esse proprium cuique conservandum est*: "Being is to be conserved for itself." For all things, this principle of self-preservation is a natural inclination and nothing more. From this it would seem to follow that the natural law is followed by all of creation *just as much as and in much the same way as humans follow it*. Furthermore, these natural principles and inclinations are fundamental to the natural law, which means that they are per se principles and prior to all of the other derived principles of the natural law.

The consequence of recognizing that these fundamental principles are rooted in natural inclinations is that Aquinas's attempt to forge a sharp boundary between natural, nonmoral

[7] Soto's work spawned a tradition of extended discussions on justice and right that continued into the Ninteenth Century. Figures who produced works entitled *De Justitia et jure* (or some variation thereof) include Luis de Molina, Leonard Lessius, Juan de Lugo, Christoph Haunold, and Johann Treitlinger.

activities and rational, moral actions appears to have failed. If there is a significant distinction between the two domains, it cannot be how and where Thomas originally drew it. For Soto to reintroduce this distinction between the natural and nonmoral on the one hand and the rational and moral on the other, he needs to reintroduce it on grounds other than Thomas's distinction between being teleologically structured and being teleologically driven. Soto hints at the need to do this: "it is conceded that all inclinations, even sensitive appetites, belong to the natural law, but for different reasons: in so far as [sensitive appetites] are considered not as obedient to reason but as tending to their sensual objects, they are called natural precepts in the same way that they are in animals; but in so far as they are governed by reason, they are the peculiar precepts of humans."[8] But this hint of a different basis grounding and tracking the divide between nature and rational nature is not properly developed until book IV.

Soto's move in reintroducing and grounding a morally significant difference was the reconceptualization of the Thomistic notion of dominion. For Thomas *dominium* was an objective right, a right that one had by virtue of occupying a social role whose rights and privileges are determined by a lawgiver. Humans, for example, have dominion over the beasts because God granted it to humans. Soto characterizes *dominium* in terms of the advantageous use an agent can make of something. It is, he says, "one's faculty and right in any thing, which he can use for his own advantage in any way permitted by law."[9] This kind of right is to be contrasted with rights one has that are not grounded in advantageous use, according to Soto. A father, for example, has rights over his children not because he can use them to his own advantage but because he is to rule for their own good and well-being. Fathers have, in other words, certain rights that are not reducible to *dominium*, according to Soto.

[8] Domingo de Soto, *De justitia et jure* (Salamanca, 1556), bk. 1, q. 4, art. 2.

[9] Ibid., bk. IV, q. 1, art. 1.

This move carves out conceptual space for *dominium* to be properly conscious so that only free and rational agents can possess a dominion. To use something for one's own advantage requires being able to recognize an end to one's action, being able to choose to act in that way, and striving to achieve that end. Natural inclinations will not suffice to ground a dominion over creatures or creation, thus generating a principled distinction between distinctively human, conscious actions and the activities grounded by natural inclinations. These principled kinds of actions satisfy the conditions Thomas identified as necessary for blame or praise and thus ground a robust conception of moral responsibility.

There remains something morally significant about the natural inclinations nonetheless. And here is where the idea of a subjective right in an interesting sense comes into focus in Soto's thought. These inclinations remain tightly connected to our natures and directed toward the good. They are, after all, tied to our natures as *sine qua non* causes of the drive to the completion and perfection of our natures and the good, properly speaking. This means that these inclinations are what Brett calls a *jus in re*, a right inherent in something as opposed to right over something (a *dominium*). Soto makes this out to be a power inherent in a subject, the moral basis of which is the power's innate orientation toward the subject's proper good. Thus he identifies a natural, subjective right contained within created natures. This concept provides the grounds for certain duties others have not to block or prohibit our exercising of subjective rights. In this very important way, then, Soto's broadly Thomistic anthropology and his broadly Thomistic understanding of natures and creation underlie his seemingly anti-Thomistic move toward a modern, subjectivist conception of rights. Understanding the Christian, Thomistic roots of Soto's jural thinking is thus vital to properly understanding the nature of his thought.

The immediate significance of this move toward an inherent *jus in re* was the recognition of a certain degree of intrinsic (maybe even inalienable) worth for every individual within a commonwealth. In *De justitia* bk. V, q. 1, art. 7, Soto uses this intrinsic worth to ground the inability of a state to order the sacrifice of one of its citizens for the preservation of the state as a whole:

> If someone threatened to kill me if I do not commit to cut one of my hands or my tongue, I could deliver that member in order to conserve my life, even though the cutting is only a necessary means due to the malice of another; as a consequence, in the same way, a nation could deliver one of its citizens. This consequence must be denied because a member has no distinct existence from the existence of the whole, nor is it capable in itself of right or injustice. But a man, although he is part of the commonwealth, is nevertheless also a person existing for himself, and so capable of suffering injustice, which the commonwealth may not impose on him."[10]

This use of the notion of intrinsic worth dates to 1556, but Brett has identified an important, even earlier example of it. In the 1545 *Deliberation in the Cause of the Poor*, Soto argued for the right to mendicancy, the right to economic migration, and the right to free travel.

> Soto's juridical handling of mendicancy recognizes two principal subjects of rights: the individual on the one hand and the *republica* or "commonwealth" on the other. From the point of view of the individual, mendicancy involves the intersection of two rights: the right to freedom of movement and the right to the means of living. From the point of view of the commonwealth, the rights in

[10] Ibid., bk. V, q. 1, art. 7, quoted in André Azebedo Alves and José Manuel Moreira, *The Salamanca School* (New York: Continuum Press, 2010), 43.

> question are the rights of territorial states vis-à-vis other territorial states, and the right of the public power to promote the internal common good. . . . The fundamental individual human right, for Soto, is the right to stay alive—more formally, to "preserve one's being" (*ius se conservandi*). . . . He mentions this right several times in his major work *On Justice and Right* and it always figures as the right that overrides every other right. This right is more "innate" than any other—that is, more intimately connected with one's very nature than any other—and it can never be "trumped."[11]

It is the intrinsic worth of individuals and their *jus se conservandi* that for Soto accords them the rights to mendicancy (within certain limits), to economic migration, and to free travel.

Political authority and the rejection of absolutism

The subjectivist conception of rights also lies at the heart of Soto's understanding of the nature of political authority. He uses the concept when characterizing the origins of the state and the basis for its limitation on political authority:

> Through nature God gave things the faculty of self-conservation and resisting contraries: not only for the safe-guarding of their temporal well-being, but also for their spiritual prosperity through His grace. But since scattered individuals could not exercise this faculty commodiously, God also gave to them the instinct of living together so that together they all are sufficient [*sufficerent*] for one another: But in no way could a commonwealth govern itself, protect itself from enemies, and control malefactors unless it appointed magistrates whom it gave that power to: Because any congregation without order and a leader could not constitute

[11] Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press, 2011), 20–21.

> [*repraesentaret*] a body and neither could it provide for what was expedient for it.[12]

In Soto's depiction, the group is granting the magistrate power over the community as a whole.

The roots of this move seem to be Soto's desire to counter the Lutheran conception of the basis for political authority. A key principle of Luther's attack on the papacy, as Soto understood it, was the rejection of human law as binding on conscience. Canon law, the human positive law of the Church, was thus rejected as a legitimate form of law precisely because it was merely human. This line of attack extends naturally to human civil law, too. So Luther had to bring the domain of civil law back under the domain of the divine law if it were to have any real authority and obligatory force on human conscience. Thus he had to conceive of the legitimate secular authority as God's divinely anointed vice-regent on earth. In a stroke, Luther broke the Thomistic hierarchy of laws by undercutting the significance of the coherence of human positive law with the natural and eternal laws. Soto and many Thomists conceived the central issue between them and Luther in terms of whether or not law is binding in conscience. The issue between the Lutherans and the Dominicans at Salamanca, thus, could be understood as a disagreement on how to read and understand Romans 13:1: "Let every soul be subject unto the higher powers. For there is no power but God: the powers that be are ordained of God."

At stake in Luther's critique of the papacy and canon law would have been the twin specters of antinomianism and legal positivism. Without any continuity between the natural law and human law, and without any obligatory force or binding of conscience in human law, there is no content to human and civil law except social conventions enforced by might. The law has no genuine authority, in other words. Consequently, people infused with grace who know and

[12] Soto, *De justitia*, bk. IV, q. 4, art. 1. Brett describes Soto's use of the concept in terms of an exploitation of notion: "It is this latter notion of right which Soto exploits when he comes to translate into his own language the Aristotelian account of the genesis of the *respublica* or *civitas* though the nature of man, and thereby to legitmate the civic commonwealth and the civil power," (Brett, *Liberty, Right and Nature*, 154).

follow the moral law have no need, morally speaking, to follow and abide by canon or civil law. (Of course prudence may dictate otherwise, but that is not a matter of morality or the law.) Neither position was acceptable to a Dominican.

Allowing individuals to collectively grant and transfer genuine authority to magistrates neatly eliminates both specters. The authority transferred is the commonweal—the common welfare—which is ultimately rooted in each individual's inherent, natural rights of self-conservation and well-being. The magistrates are thus given natural, moral constraints on their authority, the commonweal, and the citizens are thus obliged to follow and obey the magistrates' rulings, not out of fear or prudence but because they are supported by conscience, so long as the magistrates' rulings cohere with the natural law and are licit.

Seventeenth-century thinkers would build on this idea to justify resistance to tyrants, constitutionalism, and, ultimately, the concept of a liberal nation-state, as Skinner and his followers have long emphasized.[13] But Soto himself did not attempt to go so far. His thinking may have given Charles V some comfort and support because of its implications for the independence of civil authority from the papacy. On Soto's analysis, in no way did Charles's authority derive from or depend on the pope's. Yet Soto's conception also grounded the legitimacy of Charles's robust interest in the theological and the natural law as a civil authority, because his authority and rule needed to cohere with God's natural law. Even so, Soto's thinking also may have given Charles some pause because of its implications regarding his dynastic ambitions to stitch together a global empire. Soto, in contrast to Vitoria, denied the possibility of

[13] Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press, 1978). Annabel Brett and James Tully with Holly Hamilton-Bleakley, eds. *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006). Cf. Thomas Schrock, "Anachronism All Around: Quentin Skinner on Francisco Suarez," *Interpretation: A Journal of Political Philosophy* 25 (1997): 91-123, and *Meaning and Context: Quentin Skinner and His Critics*, edited by James Tully (Princeton: Princeton University Press, 1989).

a legitimate empire or emperor because the sheer size of any such empire would preclude collective granting of authority.[14] Charles might be able to stitch together something called an empire by convincing different peoples and nations to grant him or his crown authority over them. Or he might accomplish the same thing by conquest, merging different peoples and nations under his rule. But that is not at all the same thing as their coming together as a single group and collectively nominating him as their head and magistrate. Thus the sheer size of an empire, for Soto, prevents the possibility of a legitimate empire.[15] This conception of empire and national unity accords well with the internal structure of the Spanish crown and the extensive Hapsburg dominion presided over by Charles.

The *ius gentium* and the origins of international law

Soto is not as well remembered as Suárez or Vitoria for his direct contributions to the development of international law, yet he played an important role in bringing that idea to life. His notion of an inherent subjective right was an important milestone on the path to Suárez's more developed and complete account of international law as such.

For Soto, as for Thomas before him, the *ius gentium* was supposed to be a part of human law. There was a problem, however. Who makes the *ius gentium*? Who enforces it? And what is its binding or obliging force? In other words, in the absence of a global sovereign, how could international law be law in a proper sense? Soto has interesting and important answers to these questions.

For Soto, individuals are the ones who make the law. Its binding force comes ultimately from its coherence with the natural law and our inherent, subjective rights to self-conservation

[14] Soto, *De justitia*, bk. IV, q. 4, art. 2.

[15] For more see Anthony Pagden *Lords of All the World: Ideaologies of Empire in Spain, Britain, and France c.1500–c.1800* (New Haven: Yale University Press, 1995), 53-63, and Annabel Brett, "Scholastic Political Thought and the Modern Concept of the State," in Brett and Tully with Hamilton-Bleakley, *Rethinking the Foundations*, 143-145.

and well-being. Peace and tranquility for our communities is just as much a necessary condition for our well-being and our pursuit of human perfection as coming together in a community. Establishing and maintaining peace and tranquility require that we derive, recognize, and abide by laws establishing *dominium* over spaces shared by nations and activities between nations.[16] This idea does not lead Soto to anything like Suárez's distinction between the *ius gentium intra se* and the *ius gentium inter se*. It does, however, undergird the concept of the *ius gentium* in an important way. For without these roots in our *ius se conservandi* and our human nature, there would be no legal basis for establishing and maintaining peace and tranquility. Prudence, of course, might dictate peace as an advisable course, but reason and conscience would not be bound by it. Again, we can see here Soto's notion of a subjective right playing a significant role in the development of his jural thinking.

Annabel Brett sees Soto's development of this idea, along with Vitoria's, as "radically reposition[ing] Aquinas's *ius gentium* so that it becomes not simply a first mode of the concretization of natural law and right, but a global system of justice governing all relations between individuals and peoples that involve some claim to ownership or lordship (*dominium* in both senses)."[17] It is a critical moment certainly in the movement from the idea of Christendom toward the idea of a global world shared equally by all humans. Such a fundamental change in the shared domain of human existence requires that we regulate the shared space as well as the property it contains. Such regulation will be for the benefit of everyone. Thus, says Brett, for Soto and Vitoria the *ius gentium* "is a global system of *dominium* and the just which take *dominium* for its object."[18]

[16] Soto, *De justitia*, bk. III, q. 1, art. 3.

[17] Annabel Brett, "Later Scholastic Philosophy of Law," in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, edited by Fred D. Miller and Carrie-Ann Biondi, volume 6 of *A Treatise of Legal Philosophy and General Jurisprudence*, (Dordrecht: Springer, 2014), 355.

[18] Ibid., 356.

The *Conquista* of the New World

Directly related to Soto's conception of international law, and most likely a major driver of the conceptual changes and developments he initiated, was the Spanish conquest of the Americas and the subjugation of their native peoples. This was one of the dominant problems for Spanish thinkers during the early sixteenth century. Concern about the conquest dates to the earliest days of colonization and largely centers on the scope, significance, and legitimacy of Alexander VI's 1493 bull *Inter caetera*. Soto's most extensive treatment of the issue was his *De ratione promulgandi Evangelium* (after 1552), which is unfortunately now lost. As early as 1535, in his *relectio De dominio*, Soto expressed doubts about and discomfort at the legitimacy of the Spanish conquest and forced dominion over the Americas. But absent *De ratione promulgandi Evangelium*, his most mature thoughts stem from his summary of and reflections on the 1550–51 Junta de Valladolid between Bartholomé de Las Casas and Juan Ginés de Sepúlveda.

The junta was not really a debate between Las Casas and Sepúlveda. Rather, it was an information-gathering commission for Charles V, who was concerned about the evangelical mission of the Spanish conquest and the *encomienda* system sustaining it. The junta was to provide different perspectives for Charles to consider. Las Casas pleaded the more radical positions that the *encomienda* system was unjust and ought to be ended, that the enslavement of native and African populations was illicit, and that warring against and conquering the tribes of the Americas was illicit. Sepúlveda advocated for the position that the wars and the *encomiendas* were just and necessary for Spain's evangelical mission of converting the peoples of the New World. The antagonists did not directly engage one another but were given two opportunities to present their respective cases. The panel of theologians, which included Soto, was not there to

declare either a victor but rather to summarize and comment on the arguments and provide Charles with advice.[19]

Soto was naturally sympathetic to the positions of Las Casas, who argued that the evangelical mission was the only legitimate basis for the Spanish to be in the Americas and that the abusive *encomienda* system should be ended immediately. After all, in his 1535 Soto had expressed serious reservations about the Spanish empire in the Americas, exclaiming: "By whaat right do we possess the trans-Atlantic Empire, which has recently been discovered? In truth, I do not know." Soto broadly agreed with Las Casas' positions. Las Casas, however, went further and argued that the evangelical mission could only be conducted peacefully. If Spanish missionaries were threatened or encountered resistance, they had to overcome it by persuasion, or retreat and wait for a safer climate for peaceful engagement. Force or the threat of force could not be used to convert the native populations, nor could it be used to coerce the conditions for evangelism, i.e., the freedom of missionaries to preach, to travel, and to live among the native peoples. Soto agreed that forced conversions were illicit, but he did not agree that war could not be used to force a population to accept the conditions for converting people. If the missionaries were threatened or harmed, war against the community would be justified. So, too, would it be justified if communities refused to allow missionaries to travel, live, or preach among them. Indeed, according to Soto, native peoples could be licitly compelled to attend meetings and services, even though they could not be compelled to believe.[20] Soto's basis for thinking that

[19] For more information about the junta and the arguments used, see: Eduardo Andújar, "Bartolomé de Las Casas and Juan Ginés de Sepúlveda: Moral Theology versus Political Philosophy," in *Hispanic Philosophy in the Age of Discovery*, edited by Kevin White (Washington, DC: Catholic University of America Press, 1997), 69–87; Rafael Alvira and Alfredo Cruz, "The Controversy between Las Casas and Sepúlveda at Valladolid," in *Hispanic Philosophy in the Age of Discovery*, 88-110; and Lawrence Clayton, *Bartolomé de Las Casas and the Conquest of the Americas* (Oxford: Wiley-Blackwell, 2011).

[20] Ramón Hernández, "The Internationalization of Francisco de Vitoria and Domingo de Soto," *Fordham International Law Journal* 15 (1991): 1031–59.

force is acceptable in these cases seems to be largely rooted in his understanding of Christ's commands to evangelize: "And he said unto them: Go ye into all the world and preach the Gospel to every creature"; and "And the Lord said unto the servant: Go out into the highways and hedges, and compel them to come in, that my house may be filled."[21]

It might look as if Las Casas and Soto shared significant theoretical parallels beneath their respective positions, since Las Casas appears to attribute an intrinsic, universal subject right to the native peoples of the Americas as the basis for rejecting the *encomiendas* and the use of force in converting native peoples or establishing the conditions for evangelizing. There is much to indicate, however, that Las Casa and Soto were not thinking of the same thing. Las Casas was using a completely different set of sources and assumptions in his defense of the native peoples.[22] Las Casas approached the question from the perspective of the medieval legal tradition rather than Soto's theological one. Las Casas used Roman and canon law to build his positions and to animate his arguments. If anything, his arguments are closer to Vitoria's than to Soto's because they seem based on the legitimacy and authority of native tribes as nations rather than on inherent subjective rights of individuals. Thus, Las Casas tends to argue about what is licit and illicit for established, independent nations to do to one another and the consequences of those engagements for the citizens of those nations, and he understands nations and those rules in a traditional, medieval way. Soto's arguments and positions, however, are based on his new idea of a subjective right, and he conceives of the American tribes and the rules and regulations obtaining between them and Spain as built up from the subjective rights inherent in universal human nature. The differences between Las Casas and Soto are more philosophical than theological, and their differences are greater than their agreements might suggest. Of course

[21] Mark 16:15 and Luke 14:23.

[22] See chapter 5 in this volume for more about the medieval and legalistic basis for Las Casas's thinking and arguments.

Soto's theoretical innovations might well be put to use in defending Las Casas's more radical positions. But it appears that Soto declined to push in that direction, because he wanted to preserve the importance of the evangelical mission for individual, spiritual well-being.

Soto's Contributions and Achievements in Economic Thought

The notion of subjective rights that was central to Soto's jural contributions also underlies his economic thinking and largely determines its development. Subjective rights are, for example, central to his defense of private property. They are also vital to his understanding of our obligations to the poor. In both cases, the significance of subjective rights arises because of how he factors them into his conception of the commonweal, its ultimate sources, and its importance as a necessary condition for human flourishing. For Soto, the commonweal is a collective notion, but it is not an aggregate in which individuals with greater well-being trump or outweigh the impoverishment of others, as it is for contemporary utilitarians. Rather, the commonweal is a collective in which the well-being of each member contributes to the formation of an organic unity from which a collective value emerges.[23]

This notion of the commonweal that combines both an overall value for the commonwealth and its economic system with an inherent value for the well-being of every individual stands behind Soto's drive to embed virtue and justice into the definition of licit economic activities. The civic virtues and distributive justice necessary to this commonweal temper the sorts of contracts and deals that agents can licitly enter into or push onto others as well as constrain the ways individuals can use and dispose of their private property. The intrinsic worth of an individual and her *ius se conservandi* require such limits on economic activity. In this way, then, the natural law and human law must be brought into the economic realm and

[23] The notion here is similar, I think, to G.E. Moore's appeal to the emergence of value from an organic unity. See his *Principia Ethica* (Cambridge: Cambridge University Press, 1993).

provide structure to economic activity. The economic realm is thus continuous with the systems of natural and human laws and must cohere with them as they cohere with one another.

Private property

Soto's analysis of private property begins with the Fall into sin: being expelled from the Garden of Eden, humanity was forced to rely on a harsh and unfruitful world for all its needs. Individuals could no longer expect the conservation of basic life, to say nothing of the prospects of flourishing and other, greater levels of well-being. Dependent on a harsh material world after the Fall, humanity was forced to consider the best means for managing and developing the world's limited resources. According to Soto, private property is the best means.

On the one hand, common ownership within a context of scarcity is inefficient and fraught. This is the so-called tragedy of the common. Sloth and indifference are endemic to fallen human nature. While most people are happy to help themselves to satisfy their needs and wants, few seem willing to contribute their time and energy to clean up, cultivate, or ready the resources that we all need and use. It is natural, then, that in our fallen state, where we are corrupted and the world is limited, common property will be neither respected nor as fruitful as private property.[24]

Better, Soto indicates, would be a world in which individual attention is aligned with resource production. Such a world is one in which private property is the norm. Individuals will work hard and respect the integrity of property necessary for resource production because it is theirs and their private well-being depends on it. Thus, a harsh and barren world will be more productive, produce more quickly, and produce more sustainably when the user has a vested

[24] Soto's analysis is in *De justitia* bk. IV, q. 3, art. 1. For discussion and more detail about Soto's conception of the origins of and justification for the privatization of property, see Alejandro Chafuen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (Lanham, MD: Lexington Books, 2003), Alves and Moreira, *The Salamanca School*, and Ángel Manuel Fernández Álvarez, "The *institucional* Evolution of Property and Subjective Rights in XVI and XVII centries in Spain," *Esic: Market Economics and Business Journal* 45 (2014): 327–56.

interest in its development. Everyone thereby will benefit from greater abundance of resources, and the commonweal will appreciably rise.

It is significant that Soto's case for private property is consequentialist and part of a discussion of the means of production only. Nothing in Soto's discussion suggests that private property and its rights are absolute or intrinsically valuable. Where scarcity or corruptibility are non-issues, as in the Garden of Eden, Soto's argument for private property simply does not apply. It is also inapplicable if communal ownership did not lead to the tragedy of the common or private ownership did not lead to indivudal exertions. Indeed, Soto's recognition that in certain circumstances the consequences of ownership are in fact different is what undergirds the limitations to private property and private property rights that Soto explicitly expounds.

The tragedy of the common, for example, does not typically arise for a small, simple, and relatively homogeneous community. The small size and relatively uniform character of the community undercut the thought that someone else will take care of the conditions and means for resource production. When the community is small enough, we recognize that there is no one else to take care of it. Additionally, the small size of the community makes it much more likely that our own shirking of work will be noticed and that we will be called out for not contributing. Those "protections" fade, however, when the community reaches a certain size or complexity (and experience shows that it does not take a great degree of complexity or a large size for this to occur).

Cases of extreme public need and want also undermine the context that supports private property. If the need is so great as to threaten people's *ius se conservandi*, private property can be licitly seized and redistributed. The seizure, however, is to be modeled in terms of a forced loan, and the property is to be returned (if possible) to the rightful owner after the emergency has

passed. Furthermore, appropriate compensation must be provided to the owner for the use or consumption of her property. Although the context undercuts the property rights of the owner in favor of the rights of self-preservation of others, the importance and value of private property rights are recognized through the requirement that proper compensation be awarded to the owner.

Soto also recognizes that peace and social harmony, which are necessary conditions for human flourishing, are better served by the privatization of property. Even though experience shows that the privatization of property can lead to nasty disagreements, common property often leads to even nastier and more numerous disagreements. Simmering resentments against freeloaders seem much less resolvable and more caustic to individuals and to the fiber of society than disagreements about property rights and access.

Another consequentialist argument against common property that Soto seems to accept is that it undermines civic virtue. Without private property and the uneven distribution of it, which seems to be an inescapable characteristic of it, there would be no destitute people needing the empathy and charity of the more fortunate. And without such unfortunates, there would be no need to cultivate the virtues of liberality, generosity, hospitality, and gratitude (among others). These are civic virtues rather than cardinal or theological virtues, of course. Nonetheless, they are essential in binding a community together and are valuable for that reason alone. But for a Thomist such as Soto, they are also necessary for an individual's development of the cardinal and theological virtues. Without being generous, hospitable, liberal, and grateful within a civic environment, one could not cultivate prudence, justice, temperance, courage, faith, hope, or charity. Although this argument may be debatable, it nicely illustrates the consequentialist structure underneath Soto's thinking about the privatization of property.

Our obligations to the poor

In the sixteenth century, the consensus held that our obligations to the poor were not a matter of justice but of charity. Nothing was owed to the poor, but the wealthy were obliged to show empathy, benevolence, and generosity (as all are obliged to show to all people). The well-off are not obliged to be charitable to each impoverished person, mind you, but only to the ones deserving of charity. Central, then, to sixteenth-century discussions was the concept of legitimacy and the means of distinguishing between the poor who legitimately deserve charity and the loafers and hucksters who do not. One dimension of legitimacy concerned being unable to work and contribute to the community: those demonstrably unable to earn their keep, so to speak, should be provided for; those unwilling to earn it should not be. Another dimension was localness—communities have an obligation to care for their own first and are not obliged to extend charity to paupers from other communities within their state or to foreign paupers. Both factors contributed to a repressive and hidebound system of poor laws, immigration policies, and poverty relief in the sixteenth century.

Soto's was a more liberal voice in these debates.[25] He argued against both the possibility and the justness of attempts to distinguish between the legitimate and the illegitimate poor. He also argued against restrictions on migration and immigration, including what we now call economic migration, and the exclusion of foreign paupers from communities and their charitable activities. At the bottom of his more liberal thinking was his concept of the subjective right of self-conservation. Specifically, Soto's thinking about these economic matters was driven by his vision of the extent of this right, and considering them illuminates what was included in his *ius se conservandi* and what was not. What was included in this right was not just one's life and

[25] See Andreas Blank, "Domingo de Soto on Justice to the Poor," *Intellectual History Review* 25 (2015): 133–46.

immediate physical well-being but also one's moral and psychological well-being and the conditions necessary to pursue and maintain them over the long run.

Soto was rightly skeptical that the nature and extent of legitimizing infirmities were as obvious and identifiable as proponents generally portrayed (and needed) them to be. But Soto went further in recognizing that in some cases, the inability to find appropriate work was not a fault of an individual's character or qualities but of bad luck or the economic system itself. And those circumstances, Soto suggested, were also legitimate grounds for receiving charity. Soto's bigger conclusion, however, was that the very process of investigating the legitimacy of one's poverty was an imposition on one's dignity and well-being. An individual's well-being and flourishing are directly connected to her reputation and honor, according to Soto. They are so closely connected that we cannot expect to flourish unless our honor and reputation remain intact. Thus, we have a right and need to protect our public reputations and retain our honor and dignity. The legitimacy of the poor—*all of the poor*—should be granted prima facie, and investigations into delegitimizing factors should be opened only if there is significant prima facie evidence of them. Forcing the poor to routinely submit to an investigation into their legitimacy, or forcing them to prove it, is a demeaning violation of their inherent *ius se conservandi*. This conclusion also thereby pushes the withholding of relief into the domain of a punishment that can be licitly meted out only to those deserving it. Soto is thus transforming access to charitable relief from poverty into a derivative subjective right.

This was (and in many ways still is) a fairly radical notion. But it leaves open the question whether foreignness genuinely delegitimizes poverty relief. Soto argued that it does not. Soto developed his thinking here along two fronts. On the one hand, he expanded the notion of a community to include the totality of a state, the totality of Christendom, the domain of

monotheistic religions, and ultimately all of humanity. There is no principled division between groups within each of these domains and no principled division across them—therefore any restrictions on the movements among them is relevant with regard to the natural rights of the poor and the obligations of the wealthy to receive them and show them charity.

His more interesting idea is that everyone has a natural right to seek betterment outside of their homelands; thus no state or community has a basis for excluding them or closing their borders to them. Freedom of movement, according to Soto, is yet another derived natural right that can be restricted only as a punishment for other misdeeds. And poverty is not in itself a misdeed. Neither is the desire and drive for economic advancement or opportunity. Criminality or being an enemy of the state would be legitimate grounds to override the prima facie right to free movement, Soto emphasized. But such a designation requires clear and evident grounds. If such grounds are absent, states and communities have no basis for barring or deporting anyone. Thus states and communities cannot consider foreignness a delegitimizing condition for receiving charitable aid; communities are obliged to provide foreigners with relief just as they do their own members. The only limit to this obligation is when the extent of poverty relief threatens the ability of the community to meet its own legitimate needs (a point open to many interpretations, of course). Up to that point, however, the community has an obligation to provide support and relief to all impoverished peoples who appear in its community, native born or not.

Other economic issues

Scholarship on Soto's contributions to commerce and economic theory is still emerging. Nevertheless, a few points and themes are worth briefly noting.

Overall, Soto understood commerce and economic activity as continuous with the natural and human law, and thus he conceived of economic activity as necessarily shaped by the virtues

and vices.[26] He rejected purely profit-driven analyses of it because they fundamentally mischaracterize the end of the activity, which ought to be the commonweal and the building up the commonwealth. Moreover, conceiving economic activity as fundamentally profit-driven opens it to improper and unvirtuous activities. For Soto, risks and profits are a part of commerce and economic activity, but a mere part; they cannot come at the expense of an individual's virtues or of the common good.

Soto contributed to the sixteenth-century debate about the just price. The topic seems to be relatively unpopular among contemporary scholars, but it was an important consideration in Soto's day. His contribution was a step toward a more modern conception of value. He maintained that transactions which did not properly value the exchanged items (by valuing them too dearly or too cheaply) were illicit. Central to Soto's understanding was the so-called market theory of value, which maintains that the proper value of an item is the price it would command on an open market. He presents this in terms of the common estimation of the consumers in purchasing the item.[27]

Soto also defended the practice of fractional-reserve banking as opposed to full-reserve banking. He understood deposits in terms of a loan that entitles the bank to use those deposits to generate more money. That money can then be used to pay interest and be distributed as additional loans.

Finally, Soto also defended the state's right to tax residents for just and proper public expenditures and not simply for waging war. The same virtues that applies to individuals and businesses in conducting their financial affairs, however, also applies to the state. The state must

[26] André Azevedo Alves and José Manuel Moreira, "Virtue and Commerce in Domingo de Soto's Thought: Commercial Practices, Character, and the Common Good," *Journal of Business Ethics* 113 (2013): 627–38.

[27] Juan Manuel Elegiod, "The Just Price: Three Insights from the Salmanca School," *Journal of Business Ethics* 90 (2009): 29–46.

be moderate in its expenditures and never use taxation as a means of tyranny. The expenditures should be for the public good and not to satisfy any individual's greed. And they should be proportional to the needs of the state and never excessive, nor too light to create unsustainable debt. Soto recognized furthermore that this framework for legitimate taxation obliges residents to pay their fair share of taxes and not to cheat or wheedle lower rates for themselves. In all these cases the commonweal, understood as a collective public good, underlay Soto's conceptual moves regarding economic theory and policy.

Conclusion

Soto's Christianity and, in particular, his Thomism are inseparable from his jural and economic thinking. Indeed, his major contributions to jural thought generally are directly tied to his theological background. The centerpiece of his thinking was his move toward a subjective conception of rights, which was rooted directly in his Thomistic anthropology and his understanding of the integration of the natural law and human nature. Soto's conception of political authority and his rejection of absolutism follows from his anti-Lutheranism and his conceptions of the inherent subjective rights of self-conservation and well-being. These conceptions also underlie his revisions to the notion of the *ius gentium* and the idea of a global system of nations. His discomfort with the Spanish domination of the native peoples of the Americas was also rooted in his conception of these subjective rights and his understanding of the theological basis and justification for the Spanish evangelical mission in the Americas. His understanding of the obligations we owe to the poor rests directly on their inherent subjective rights. The other aspects of Soto's contributions to economic theory rest indirectly on the notion of subjective rights, in so far as those rights play important roles in framing his conception of the

commonweal and the limitations that the pursuit of the common good impose on individual activities and individual goods.

Recommended Reading

The standard edition of Soto's *De justitia et jure* is the Madrid 1968 facsimile reproduction of the 1556 Salamanca edition. There is no published English translation of Soto's works. There is a recent translation of *De natura et gratia* in Stephen Gaetano's Ph D dissertation *Fides quae per haritatem operator: A Study and Translation of Domingo de Soto's De natura et gratia* (Notre Dame, 2015). There is also a minor English translation of only bk. VI, q. 2, art 3 of *De justitia et jure* in Marjorie Grice-Hutchinson's *The School of Salmanaca: Readings in Spanish Monetary Theory 1544-1605* (Oxford: Clarendon, 1952), 83-88. There are, furthermore, no recent monographs or much scholarly work in English on Soto's jural and economic thought. Annabel Brett is one of the most important English-language scholars working on Soto and incorporates much about his jural and economic philosophy in her works.

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