

With publication of volume 1 of [Quintilian's] *Lesser Declamations*, the Loeb Classical Library has reached the impressive total of 500 volumes (including revised versions of works published earlier). Editors, past and present, should be congratulated on their contribution to making the great range of classical writings available to readers with little knowledge of Greek or Latin, and there have also been Loeb volumes, including Russell's Quintilian, that go beyond this to provide introductions, notes, and indices of great value to professional scholars. Unhappily, the latter cannot be said of volumes 500 and 501 in the series.

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Ius erat in armis: The Roman and Spanish Empires and Their Discontents

David Lupher, *Romans in a New World. Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: The University of Michigan Press, 2003), VI + 440 pp.

Talk of empire is fashionable these days—all too often motivated by an intuition that drawing analogies between past empires and the present-day United States might yield some insights susceptible to being formulated, eventually, as lessons.¹ Regardless of the more than loose terminology that informs most of today's empire talk,² and regardless of how we might judge the merits of particular analogies between, say, the Roman empire and the United States of America of the early twenty-first century, there is a more interesting issue underlying such comparative undertakings: namely the use of history to normative ends. When we compare past polities and their deeds and policies with contemporary cases, the aim, whether implicit or rather outspoken, often is either to justify or to discredit the latter. The argument typically assumes the following form: in the past, *a* did *X*; these days, *b* is doing the same; thus *a* and *b* can in this respect be equated. Now, if *a* was justified in doing *X*, *b* must be equally justified in doing *X*; if *a* was not justified in doing *X*, *b*'s claim of being justified in doing *X* is discredited.

There are two ways to undermine this argument: The factual account can be denied and thus the analogy—*a* and *b* did different things—or the normative claim that the respective polities or their agents were or were not justified can be denied. What is not

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1. See, for example, Charles S. Maier's thoughtful endeavor in comparative history, *Among Empires. American Ascendancy and Its Predecessors* (Cambridge, Mass.: Harvard University Press, 2006), and Harold James, *The Roman Predicament: How the Rules of International Order Create the Politics of Empire* (Princeton and Oxford: Princeton University Press, 2006).
2. See for a concise dismissal of such loose description of the United States as an empire, Alexander J. Motyl's "Empire Falls," a review of Craig Calhoun, Frederick Cooper and Kevin W. Moore (eds.), *Lessons of Empire: Imperial Histories and American Power* (New York: The New Press, 2006), and Charles S. Maier, *op. cit.*, in *Foreign Affairs* 85, 4 (2006): 190–194.

altogether clear is why there should be an appeal to the historical example at all. Surely we can ask ourselves directly whether the actions of some present-day state or institution are indeed justified, without having to draw an analogy with some similar actions that lie firmly in the past. The reason why one would take the detour to historical examples rather than try to assess directly one's contemporary institutions and policies on their normative merits is pragmatic and appears to lie in the respective likelihood to command consent; while people in general may have come to see a particular historical example as a justified institution or deed, there is often widespread disagreement about the moral or legal assessment of the more recent past. A convincing analogy between contemporary circumstances and past examples can thus appear as a persuasive tool in swaying other people's minds, working its way up from an agreed description of some past example to the more recent case in question; if the analogy holds, people who have agreed on the description of the past example as well as on the implicit or explicit moral or legal criteria used to assess it normatively must come to the conclusion that the more recent case is amenable to the same moral or legal estimation.

It was through this manner of comparison that sixteenth-century Spaniards discussed their polity's conduct in the Indies. When the Spanish started to build up their vast empire in Central and South America, they saw themselves confronted with a series of normative issues both of a legal and a moral nature. First there was the question of what kind of rules would govern the distribution among the expanding European powers of the territories newly discovered or yet to be discovered. Second there arose the further question about the rules that governed the relations between the expanding Spanish empire and the newly acquired territories and peoples—what status did the autochthonous American population have vis-à-vis the Spanish crown and how could the acquisition of huge parts of the Americas be justified? Famously, these questions concerning the justification of Spanish rule over the Indies provoked an unprecedented controversy in Spain, culminating in the Spanish crown's staging of a debate in Valladolid in 1550–51 between Bartolomé de las Casas, a Dominican fiercely critical of Spain's rule in the Indies, and the apologetic pro-imperial humanist Juan Ginés de Sepúlveda. Both before and after Valladolid, the controversy about the justness of the Spanish empire in the Indies was conducted with reference to classical, chiefly Roman, history.

The use of the history of the Roman empire in the arguments about the Spanish conquests in America is the topic of David Lupton's highly erudite and original *Romans in a New World. Classical Models in Sixteenth-Century Spanish America*. Very persuasively, Lupton maintains that apart from Aristotle's doctrine of the natural slave, which has received significant scholarly attention,³ there was another classical tradition, the history of ancient Rome, that held the participants in the debate about the legal and moral justification of the Spanish empire of the Indies in a tight grip, giving rise to a very rich and often paradoxical literature. Broadly speaking, two motivations emerge from the book that sparked the vivid interest of sixteenth-century Spaniards in Roman history. First, the Spanish conquistadors aimed at comparing their own achievements with the military exploits of the ancient Romans who served as a rhetorical yardstick in terms of martial virtues. Second, the military expansion and the rule of the Roman empire were used as a model in the normative debate over the morality and legality of the Spanish overseas empire. Associ-

3. See, for example, Lewis Hanke, *Aristotle and the American Indians* (Bloomington: Indiana University Press, 1959); Brian Tierney, "Aristotle and the American Indians—again," *Cristianesimo nella storia* 12 (1991): 295–22.

ated with the normative debate there was also an interest in the comparison between Roman civilization and the level of development of the autochthonous American cultures. It was this second motivation to appropriate Roman history that arguably had the most momentous impact on the subsequent history of political and legal thought. *Romans in a New World* is too multi-faceted and rich a book to be accorded a comprehensive and detailed discussion, in this review essay, of the many points it raises. I will begin by giving a brief survey of Lupher's argument concerning the first, mainly rhetorical motivation, and will then focus on some of the most original insights and most important aspects of the book, namely the uses of the history of the Roman empire in the debate of the justness of Spanish expansion in the Americas.

Romans in a New World is divided into six chapters, the first dealing with Spanish historiography of the conquest and the way it challenged classical models of military virtue. It is this chapter, which deals with what I have termed the rhetorically motivated comparison between Spaniards and ancient Romans, and which, although of great importance in its own right, sits slightly uncomfortably with the rest of the book which is in one way or another concerned with the way a Roman tradition was used in a *normative* context, viz. the controversy of the Indies. According to Lupher's philologically very sensitive argument, Spanish historians of the conquest such as Bernal Díaz del Castillo (c. 1492–1581) and Gonzalo Fernández de Oviedo (1478–1557) were not merely exponents of what Ernst Robert Curtius has called the topos of "*Überbietung*," aiming at an account of the conquest that would show how the Spanish conquistadors in Mexico were besting the ancients with regard to military prowess, but were indeed voicing sentiments specific to the Spanish conquistadors.

Díaz in his *Historia verdadera de la conquista de Nueva España* claimed not merely for Hernán Cortés to have surpassed both Alexander the Great and Julius Caesar with his campaign that brought down the Aztec empire, but also for himself to "have been in far more battles and engagements than the 53 battles writers say Julius Caesar was in." What is more, given that Caesar had not been content with what other "fine chroniclers" had written of him but had actually taken to write his own *Commentaries* about his fighting, Díaz thinks it "not out of line" for himself "to write the heroic deeds of the brave Cortés—and my own deeds" (14). This Lupher takes to express a "foretaste" of a "Creole patriotism" that was to develop in Spanish America, at the expense of all things European, namely the Spanish crown and the ancient Romans. Lupher reminds us that Díaz' account must be seen against the backdrop of the recent *reconquista* and claims that Díaz felt that the deeds of Cortés and his men had been insufficiently appreciated by the crown, especially compared to those of the earlier warriors fighting in the reconquest of Spain from the Moors, who, according to Díaz, had received "great estates and perpetual privileges." Thus the strategy of deflating deeds committed far away in Europe, and thus the comparably favorable view of the Aztec monarch Montezuma in Díaz' work. Lupher's account is sensible and largely convincing, although it could be said that the mere fact that Díaz' way of "besting the ancients" was "fueled by disappointment and wounded pride" is not an argument against its being an example of this well-known rhetorical topos, as Lupher claims. If anything, Díaz' besting of the ancients might rather be considered unconventional and specific because of its factual roots, i.e. the Spanish military campaign itself, a campaign after all that led to the fall of the huge Aztec empire and extended the Spanish rule over approximately 200,000 square miles—surely a conquest worth comparing with Roman precedent.

Gonzalo Fernández de Oviedo opened the gap between Roman military history and the deeds of Cortés and his men even further in his *Historia general y natural de las Indias*

(1535ff.), basing the superiority of the Spaniards over Julius Caesar and his legions in particular on the newness as well as the daunting distance of the New World. While “Caesar waged his wars in provinces and places that were well peopled and provisioned,” Cortés had to fight in “difficult regions,” in a “strange country” whose “airs and climate” had an “adverse effect [. . .] upon the health of those unaccustomed to them,” and which were “so very distant from Europe” (20ff.). Indeed, “[a]ll the sailing Ulysses did in his life is much less than the journey from Spain to our Indies” (25f.), which goes to show the Spaniards’ superiority over classical examples. Furthermore, the Spaniard juxtaposed with and superior to Ulysses here is not Cortés or another Spanish aristocrat, but a simple merchant by the name Francisco Hernández—surely, as Lupher claims (26), an indication of a “process of democratization,”⁴ “facilitated by a deflation of the classical models that had been a staple of aristocratic encomia.”

Oviedo did not just relate classical to modern-day agents, but also compared himself on a literary level with his fellow natural historian, the elder Pliny. Oviedo, as opposed to his avowed model Pliny, had actually lived through and bore witness to the events and phenomena he reports, besting the Roman writer by the “heroic sufferings he had undergone in order to gather, to *experience* his material,” all the while carefully omitting the fact that Pliny had actually lost his life in pursuit of his own natural history (28). In line with this emphasis on giving a first-hand report, Oviedo underlines that his is a truthful account, setting him apart from classical poetic accounts of myths such as Ovid’s and others’ description of the Argonauts and their search for the Golden Fleece. In an almost Thucydidesian manner, Oviedo addresses his audience thus (30): “Listen, then, you who take no pleasure in empty and fanciful books, you who wish to be informed of true histories [. . .]. [Y]ou will learn how deeply involved I was in these toils, and you will see that these are not metaphors but a history [. . .].”

Yet the comparison with the ancient world, both of words and deeds, did not just serve to satisfy the topos of “besting the ancients,” nor the growing “Creole patriotism” of men like Díaz or Oviedo; it also served *justificatory* purposes. Both Díaz and Oviedo saw an analogy between the fall of Tenochtitlan in 1521 and the fall of Jerusalem in 70. In a way clearly influenced by the Christian Iberian Orosius’ early-fifth-century universal history, *Historiae adversum paganos*, which rendered the destruction of Jerusalem by Titus as a divinely ordained vengeance for the blood of Jesus Christ (Orosius 7, 3, 8), the conquistadors recording the destruction of Tenochtitlan were eager to “don the shining armor of divine agents,” thereby justifying the conquest by reference to the obstinate resistance of both Jews and Mexica to accept Christianity. Lupher shows that Bernal Díaz even suggested that the Mexican indigenous population was not only analogous to, but in fact descended from the Jews expelled in 70 from Jerusalem, something he inferred from golden objects the Spanish retrieved from Yucatán in 1517 which were said to be “the work of the Jews whom Titus and Vespasian exiled from Jerusalem and had cast forth onto the sea in boats that had come to port in that land” (40). This allowed for the conquest of Tenochtitlan to be classified within sacred history, alongside the conquest of Jerusalem and the more recent reconquest of Spain; “the Spaniards projected themselves,” in Lupher’s words (41), “as simultaneously super-Romans and latter-day Crusaders.”

4. A term Lupher borrows from Ramón Iglesias, who uses it to describe the work of Bernal Díaz; R. Iglesias, *Columbus, Cortés, and Other Essays* (Berkeley and Los Angeles: University of California Press, 1969), 48.

The fact that Lupher deals with this fascinating aspect of the use of Roman history in his first chapter on “Conquistadors and Romans” points to the somewhat unnerving structure of *Romans in a New World*. As mentioned, the first chapter seems concerned with a differently motivated use of the Romans than the rest of the book, and the analogy between Jerusalem and Tenochtitlan could have profitably been treated in one of the chapters dealing with the justification of the Spanish conquest and rule—as it indeed is, when Lupher takes up the topic again in chapter four (187f.) in his discussion of the work of a seventeenth century lawyer, Juan de Solórzano Pereira’s *De Indiarum iure* (1629/39). One might have wished for a tighter organization of the topics, grouped more systematically around the individual writers discussed, or around the various titles that were thought to justify the Spanish conquests. More analytically-minded readers, accustomed to the systematic approach brought to the history of ideas mainly by historians of the so-called Cambridge School, may be bound for confusion after having been lead from Francisco López de Gómara to Díaz back to Gómara, on to Cervantes de Salazar back to Díaz, then on to Fernández de Oviedo and so on. Nonetheless, this criticism merely testifies to the dazzling array of sixteenth-century Spanish source material that Lupher brings to the fore and interprets, a task he discharges with impressive historical erudition and philological astuteness.⁵

Each of the remaining five chapters of *Romans in a New World* deals in one way or another with the normative question of the justice of the Spanish conquests. Chapters two, three, and four center on the Valladolid debate—its forerunners, the debate itself, and its aftermath, respectively—while chapter five focuses on parallels between the Mexican Indians and the ancient Iberians on the one hand and between contemporary Spaniards and ancient Romans on the other. These parallels were fostered by a comparison between the ancient Roman conquest of Spain and the modern conquests in America, and in turn—as the anti-imperialist writers identified the Romans’ Iberian victims as authentic Spaniards—nourished a growing Spanish national identity. Lupher gives an original account of how writers like Bartolomé de las Casas combined the patriotic view of ancient “Roman rule as an alien imposition upon a more authentic Spanish substratum” (224) with criticism of their compatriots’ conquest of an overseas empire. Chapter six shows that it was not only the Jews that the Mexicas were compared to (and, in the case of the Jews, occasionally identified with)—the ancient Romans and their culture also served as a yardstick, especially in gauging the Mexicas’ civilizational level. In what follows I will focus on some of the most salient aspects of the Valladolid debate and its forerunners.

After the brutal proceeding of the conquistadors in America had become increasingly known in Spain, a vigorous opposition movement emerged; indeed, no other country has experienced similar opposition to its overseas activities until the nineteenth or even the twentieth century. This opposition originated mainly from ecclesiastical circles, and both

5. One important omission, however, is Fernando Vázquez de Menchaca (1512–1569), a secular lawyer who in his *Controversiae illustres* (1564) took a stance highly skeptical of empire. See for an excellent treatment of Vázquez’ political and legal thought Annabel Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 165–204; for accounts of his stance on empire and the law of nations, see Anthony Pagden, *Lords of all the World. Ideologies of Empire in Spain, Britain and France, c. 1500–c.1800* (New Haven/London: Yale University Press, 1995), 56–62; Jörg Fisch, *Die europäische Expansion und das Völkerrecht, Beiträge zur Kolonial- und Überseegegeschichte* 26 (Stuttgart: Steiner, 1984), 243f.

academic theologians and practicing missionaries played a pivotal role in it.⁶ In the vast scholarly literature dealing with the Spanish debate of the sixteenth century⁷ it is customary to identify the origins of the controversy over the justice of the conquests and Spanish rule with two very influential lectures given in 1539 by the neo-Thomist Dominican theologian Francisco de Vitoria.⁸ However, in an original contribution to the study of the political thought of the Salamanca neo-Thomist school, Lupher has unearthed an earlier, hitherto neglected lecture by a disciple of Vitoria's, the theologian Domingo de Soto, which, although not published until 1964,⁹ was circulated widely in manuscript and marked in effect, as Lupher persuasively shows, the beginning of the academic controversy of the Indies (61). This lecture, the *Relectio de dominio*, delivered in the spring of 1535 before an academic audience at Salamanca, represents an early challenge to the legitimacy of Spanish dominion in the Indies and is based crucially on an attack on the legitimacy of the ancient Roman empire as precedent and legal foundation for Charles V's overseas empire. Whether in its use of the Roman example or in its treatment of the possible Spanish titles to dominion in the Indies, Soto's lecture in effect anticipated and obviously influenced the main currents of the whole debate, and he therefore deserves indeed to be called the "true public initiator of the great phase of the controversy of the Indies" (67). Lupher claims that it was Soto who "established the Roman model at the very heart" of the controversy (62)—a persuasive claim in light of the works of the many more writers and thinkers subsequently discussed in *Romans in a New World*, and warranting some more attention.

By what right, Soto asked, "do we retain the overseas empire that has just been discovered? The fact is, I don't know. (*Re vera ego nescio*)." There was in particular one title to empire which can be termed a "Roman title" and which owed its soundness to both factual and normative claims about the ancient Roman empire. This was the title of the Roman emperor to world dominion. A title preset by the medieval tradition and claimed mainly by the Teutonic Order in the fifteenth century in Eastern Europe, it became important for the Spanish Habsburgs after Charles I in 1519 had received the imperial crown as Holy Roman Emperor Charles V. Charles' title to the overseas empire by virtue of being *dominus mundi*, lord of the world, rested thus on an interpretation of the status of the ancient Roman emperor as well as on a theory about how that status came to be validly transferred to the Spanish king. Soto, unlike his successors in the controversy of the Indies, doubted even the legitimacy of the succession of the imperial title,¹⁰ as we shall see, but most of the debate over the validity of Charles' claim to the Americas was fought over whether the ancient Roman emperor had been, *de iure* or *de facto*, lord of the world, a claim usually discussed on the basis of the *lex Rhodia*, where Antoninus Pius de-

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6. Anthony Pagden has, however, correctly stressed that there was, besides the theologians' horror at the suffering inflicted by the colonizers, also a theoretical reason for the neo-Thomist members of the so-called School of Salamanca to be critical of the Spanish empire: the "threat which [. . .] all extended empires posed to what they conceived to be the true nature of the civil community." See Pagden, *Lords*, 49.
 7. Lupher, in his otherwise catholic bibliography, omits the most important work concerning the legal aspects of the debate: Silvio Zavala, *Las instituciones jurídicas en la conquista de América*, 3rd ed. (México: Editorial Porrúa, 1988).
 8. See, for example, Fisch, *Expansion*, 212.
 9. Domingo de Soto, *Relección "De Dominio"*, ed. Jaime Brufau Prats (Granada: Universidad de Granada, 1964).
 10. For the medieval theory of *translatio imperii*, see Werner Goetz, *Translatio imperii: ein Beitrag zur Geschichte des Geschichtsdenkens und der politischen Theorien im Mittelalter und in der frühen Neuzeit* (Tübingen: Mohr, 1958).

clared: *egô men tou kosmou kurios*.¹¹ Soto did not doubt the universal aspirations implicit in this phrase, nor that the Romans had indeed subjected most of the world known to them; his argument was rather that, as a matter of historical fact, the “Romans never possessed the empire of the whole world, for it has never been recorded that Romans came to the antipodes or to these lands that have just been discovered. Therefore, the Romans could not hand over the rule of these nations to anyone, because they did not possess it, any more than the French can create a king of Spain” (66).¹²

Soto’s argumentation is interesting and sophisticated in that it uses a Roman private law argument to counter the Roman public law argument based on the *lex Rhodia* passage made by the advocates of the imperial claim to world dominion—an important aspect Luper neglects. By invoking the rule from the *Digest* that “no one can transfer greater rights to someone else than he possesses himself”¹³ as the most basic rule of the argument, Soto effectively undermines the literal claim made by Antoninus Pius in the passage mentioned. Furthermore, in determining whether dominion over the Americas could have validly been transferred from the ancient Romans to the Spanish emperor, Soto implicitly relies on the condition laid out by the Roman private law of the *Digest* for the lawful *ab initio* acquisition of ownership (*dominium*), namely that of possession. The most important model here is clearly that of *occupatio*,¹⁴ that is the acquisition of an unowned thing according to the *ius gentium*, where the thing, after having been seized, must also constantly be held in order to be owned—ownership of such *res nullius* was thus limited by possession, a condition the Romans could not meet with regard to the overseas “lands that have just been discovered.” It is worth mentioning that this Roman mode of acquisition was to play an important role not only with regard to *dominium* in the sense of sovereignty—what Soto calls *dominium iurisdictionis*¹⁵—but also, in keeping with the Roman sense, with regard to the acquisition of private property (*dominium rerum*). Vitoria, for example, would adduce the pertinent passage from the *Institutes* in his attempt to show that even granted the autochthonous population’s sovereignty over the territory, it would still be legitimate for foreigners to acquire privately things which do not “belong to anyone:” “therefore, if gold in the ground or pearls in the sea or anything else in the rivers has not been appropriated, they will belong by the law of nations [*iure gentium*] to the first taker, just like the little fish of the sea.”¹⁶

Soto made a further original argument which also ultimately relied on the basic Roman law maxim that *nemo plus iuris ad alium transferre potest quam ipse habet* (“nobody

11. *Dig.* 14, 2, 9; in Mommsen’s translation: *Ego orbis terrarum dominus sum*.

12. Vázquez de Menchaca was to use this argument of Soto’s in the *Controversiae illustres: Nam ut Sotus ubi supra recte ait, non eis concessit imperium universi orbis, sed tantum partis eius*. I have used the following edition, which is transcribed from the 1564 *editio princeps*: F. Vázquez de Menchaca, *Controversiarum illustrium aliarumque usu frequentium libri tres*, ed. F. Rodríguez Alcalde, vol. 2 (Valladolid: Talleres tipográficos “Cuesta,” 1931), c. 20, 31. See also c. 20, 37.

13. *Ulp. Dig.* 50, 17, 54: *nemo plus iuris ad alium transferre potest quam ipse habet*.

14. For this mode of acquisition of ownership *iure gentium*, see *Inst.* 2, 1, 12ff.; *Dig.* 41, 1, 3–6.

15. Soto, *De dominio*, 74.

16. Vitoria, *De Indis*, q. 3, § 4. Cf. *Inst.* 2, 1, 12: *Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in terra mari caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur*. (“Wild beasts, birds, fish, that is, all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner.” Tr. Thomas Collett Sandars, *The Institutes of Justinian*, with English introduction, translation, and notes [London: Longmans, Green and Co., 1922; repr. Westport, CT: Greenwood Press, 1970], p. 95.)

can transfer to someone else more of a legal title than he himself possesses”) and which was aimed at undermining the legitimacy of the transfer of the imperial crown. The claim is a constitutional one: the empire (*imperium*), far from having been acquired by the Roman emperors legitimately, had in Soto’s view been usurped by Julius Caesar, a fact which contaminated the imperial title. Thus, even “granted that the Romans had a right over some nations, nevertheless Julius Caesar, as one learns in his *Commentaries*, obtained the empire tyrannically and by means of civil discord.”¹⁷ This is quite remarkable an argument, effectively implying that Charles V’s imperial title was tainted and therefore ultimately illegitimate, and resting on a selective reading of the Roman sources. Soto disregards evidence pointing to the constitutionally legitimate transfer of power by the Roman people to the emperor, although both the famous and highly influential so-called *lex regia*¹⁸ and the *lex de imperio Vespasiani*,¹⁹ discovered in the fourteenth century by Cola di Rienzo, were well-known to early modern humanists.²⁰ Instead, he prefers to base his claim on Caesar’s own account in the *Bellum civile*. Both arguments, the one undermining the Holy Roman Emperor’s claim to world dominion as well as the constitutional one assaulting the validity of the *translatio imperii*, are historical arguments, depending on historical facts and open to historical criticism—that is to say that if it turned out that the Romans had in fact possessed the whole world including “the lands that have just been discovered,” the Roman imperial title to the Indies was indeed to be regarded as valid.²¹

By contrast, in the discussion on the one major remaining title to the overseas territories, just war,²² the Romans and their imperialism come in by way of example and

17. Soto, *De dominio*, 150.

18. Ulp. *Dig.* 1, 4, 1 *pr.*: *Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.* (“A decision given by the emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the *lex regia* which is passed anent his authority.” *The Digest of Justinian*, Latin Text edited by Theodor Mommsen with the aid of Paul Krueger, English translation ed. by Alan Watson, vol. 1 [Philadelphia, PA: University of Pennsylvania Press, 1985], confronting p. 14.) The term *lex regia* might be interpolated. For the arguments in sixteenth- and seventeenth-century humanist scholarship concerning the *lex regia*, see Fabrizio Lomonaco, *Lex Regia: Diritto, filologia e fides storica nella cultura politico-filosofica dell’Olanda di fine seicento*, Studi Vichiani 19 (Napoli: Guida editori, 1990), 137–151.

19. See the classic article by P. A. Brunt, “Lex de Imperio Vespasiani,” *The Journal of Roman Studies* 67 (1977): 95–116, esp. 110ff.

20. For the (much neglected) influence of Roman public law on later political and legal thought, see the survey by David Johnston, “The General Influence of Roman Institutions of State and Public Law,” in D. L. Carey Miller and R. Zimmermann (edd.), *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays* (Berlin: Duncker & Humblot, 1997), 87–101.

21. As Lupher points out, the claim that the Romans had in fact been to the Indies was actually made by the Sicilian chronicler Lucio Marineo Sículo on the basis of an anecdote that a coin of Augustus had been found in Darién (167).

22. Leaving aside papal donation, a title which none of the academic neo-Thomists thought valid. This was the claim that pope Alexander VI, with his Bulls dividing Spanish and Portuguese spheres of influence in 1493, had bequeathed title to the Americas. This title too was of course “Roman,” in that the *imperium* claimed by the popes was thought to stem from either Constantine’s donation (known to be a forgery since 1440) or from Christ’s own *imperium*. As Lupher shows, the title was accepted by Bartolomé de las Casas (128ff.). Grotius’ attack on the title through papal donation in his *Mare liberum* (1609) owed much to the Spaniards’ treatment; the title was reasserted by Serafim de Freitas in his *De iusto imperio Lusitanorum Asiatico* (1625). For the medieval use of the *constitutum Constantini*, see Domenico Maffei, *La donazione di Costantino nei giuristi medievali* (Milan: Giuffrè, 1964).

analogy. Lupher is very successful in showing that from Soto onwards, the Roman empire and its expansion by use of force were used as a prime example in the debate over the justification of the Spanish empire, both for proponents and adversaries of the Spanish conquest and rule. For a historian it is interesting to see that the view and interpretation of Roman imperialism in the controversy of the Indies was drawn not primarily from historiography, but to the largest part from a few chapters out of the fifth book of Augustine's *De civitate Dei*. Augustine's ambiguous account of the justice of the Roman empire served as the main battleground, with both parties of the controversy trying to enlist him on their side. Augustine's "unimpeachable" authority (65) made it difficult for anti-imperialist writers such as Domingo de Soto and Bartolomé de las Casas to eschew his views as to why "the ancient Romans gained the favour of the true god, so that he increased their empire."²³ Lupher describes how Soto in his lecture *De dominio* just sidesteps Augustine, declaring: "I do not dare to make any assertion contradicting the opinion of Augustine [. . .]. But nevertheless I do not know what right (*ius*) the Romans had to the lands they conquered. From their own historians we learn that their right was in force of arms (*ius erat in armis*), and they subjugated many unwilling nations through no other title than that they were more powerful, and one can't find where God gave them such a right" (65).²⁴

The proponents of Spanish and Roman imperialism were conscious of Augustine's value in this regard. Sepúlveda, in his controversial dialogue *Democrates secundus sive de iustis causis belli apud Indos* (which nominally gave rise to the debate in Valladolid), combined Aristotle's theory of the natural slave²⁵ with Augustine's exemplary account of Roman imperialism to assert a civilizing mission as a just cause of war. After quoting from *De civitate Dei*, beginning of chapter thirteen, book five, Sepúlveda interpreted Augustine as saying that the Romans, "in order that by means of the excellent laws they observed and the virtue in which they excelled they might abolish and correct the barbaric customs and vices of many peoples." The conclusion is that this sort of war, "against both beasts

23. Aug. civ. 5, 12: *Quibus moribus antiqui Romani meruerint ut Deus verus, quamvis non eum colerent, eorum auget imperium.*

24. Vázquez de Menchaca in his *Controversiae illustres* explained Augustine's account by saying that the Romans were granted their empire by God not on grounds of their showing virtue in conquering it, but rather because, quite apart from their warfare, they were excelling other peoples in terms of other virtues; see vol. 2, c. 20, 31: *Neque ad rem quoque pertinet quod divus Augustinus de civitate Dei lib. v. c. xii. & c. xv. ait imperium Romanis ob morales virtutes suas datum fuisse. [. . .] Rursus non in praemium virtutum moralium, nam ipsi [Romani] pugnabant non tam virtutis quam inanis gloriae cupiditate, sicque illae actiones tam longe aberant a praemii remuneratione ut poena potius digniores forent, sed tamen interea Deus optimus maximus id permisit quod adhuc virtutibus aliis moralibus caeteras gentes excellabant, & tyrannidem Assyriorum aut Medorum aut Graecorum ad Romanos transferri permisit.* ("Nor is it relevant to this issue what the divine Augustine in *City of God*, book 5, chapters 12 and 15 claims, that the empire had been granted to the Romans by reason of their moral excellence. [. . .] On the contrary, not for the reward of moral excellence—for the Romans were fighting not so much out of a desire for virtue but for vainglory, so that their actions were so far away from the remuneration of a reward that they were rather more deserving of punishment—but still, God in the meanwhile permitted it because hitherto the Romans were excelling the remainder of peoples with regard to other moral virtues, and He allowed the despotic rule of the Assyrians, Medes, and Greeks to be transferred to the Romans.")

25. See Hanke, *Aristotle* (above, n. 3).

and those men who, though by nature fit to be ruled, prove unwilling, [. . .] is just by nature" (114f.)—a phrase of course taken straight from Aristotle's *Politics*.²⁶

The adversaries of both Spanish and Roman imperialism, such as Soto, Las Casas, and—on some readings—Vitoria were well aware of the force of this title.²⁷ Some of them did acknowledge that, if the conquered peoples were in fact on a much inferior civilizational level than the conquering power, war against them might be justified as a civilizing mission. Vitoria for instance does count "defence of the innocent against tyranny" (what we would call a "humanitarian intervention") among his just titles, stating that "the Spaniards may prohibit the barbarians from practising any nefarious custom or rite."²⁸ He and others were not prepared, however, to concede that the Indians were in fact civilizationally inferior in all respects, let alone that they were natural slaves. One strategy to counter Sepúlveda's claims was therefore to engage in what Lupher calls "comparative ethnology," a comparison between European and Indian civilizations, using Roman civilization as a yardstick. In Las Casas' treatment, this results in the Indians' besting the ancients and in a display of the New World's civilizational superiority (256ff.). But Las Casas attacked Sepúlveda not only on grounds of the factual cultural achievements of the Indians; he also undermined the humanist's Aristotelian claims about human nature. This the Dominican missionary did by drawing upon Stoic ideas as recorded by Cicero. Lupher of course knows this and writes that Las Casas tried to demonstrate "that the inhabitants of these comfortable lands reveal a rational capacity that confirms Cicero's contention in book 1 of *De legibus* that human beings the world over share a fundamental nature informed by reason" (257).²⁹ However, the importance of Ciceronian political and legal theory might be one of the most underrepresented points in *Romans in a New World*.

While Lupher is certainly right in stressing the overwhelming authority of Augustine in the controversy of the Indies and the Roman empire, he does not pay sufficient attention to the debate for and against the justice of the Roman empire in the third book of Cicero's *Republic*, which is looming large behind the relevant passages of *De civitate Dei* and—to the extent that these passages took center stage in the Spanish debate—behind the controversy of the Indies. Whether we look to Soto and his argument, cited above, that the Romans' right to the lands they conquered "was in force of arms (*ius erat in armis*)" alone and that "they subjugated many unwilling nations through no other title than that they were more powerful,"³⁰ or whether we read Sepúlveda's interpretation of Augustine, both views seem heavily indebted to—if not taken straight from—Augustine.

26. Aristot. *pol.* 1, 1256b23–26.

27. For an interesting account of the "civilization title" in later natural and international law thinking, see Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), esp. 120ff.

28. Vitoria, *De Indis*, q. 3, § 15. I have used the translation in Vitoria, *Political Writings*, ed. A. Pagden, J. Lawrance (Cambridge: Cambridge University Press, 1991), 287f.

29. See for the Stoic and Ciceronian influence Richard Sorabji, "Just War from Ancient Origins to the Conquistadors' Debate and its Modern Relevance," in id. (ed.), *The Ethics of War* (Aldershot: Ashgate, 2006), 13–29; id., *Animal Minds and Human Morals. The Origins of the Western Debate*, Cornell Studies in Classical Philology 54 [The Townsend Lectures] (Ithaca: Cornell University Press, 1993), 135ff.

30. Soto, *De dominio*, 150.

tine's and Lactantius' renderings of the so-called Carneadean debate between Philus and Laelius in *De republica* 3.³¹ Soto's point has the distinct flavor of Lactantius' summary of Philus' argument in the *Divine Institutes*: "The Roman people [. . .] by declaring war through the fetials and by causing injury under the guise of law, by constantly desiring and seizing others' property, obtained possession of the entire world."³² And Sepúlveda in his defense of the civilization title draws upon Augustine's brief summary of Laelius' speech: "The answer made by justice is that empire is just because slavery is useful for such men and that when it is rightly done, it is done on their behalf, that is, when the right to do injury is taken away from wicked people: the conquered will be better off [. . .]."³³ This Ciceronian background is crucial, because it allows us to see why referring to natural law (*ius naturale*) and the law of nations (*ius gentium*) seemed so attractive to the early modern Spaniards who were defending the Spanish conquests on grounds of just war, waged according to the rules of the *ius naturale* and *gentium*: in *De republica*, Cicero made Laelius avail himself of these very concepts in his defense of the justice of the Roman empire, against the skeptical assaults of Philus.³⁴

While one might have liked to read more about the influence of Roman law, the just war doctrine and Cicero's political and legal thought on the controversy of the Indies, this cannot by any means detract from David Lupher's substantial and highly readable achievement—it is rather to be seen as an expression of the curiosity *Romans in a New World* is able to stimulate. Lupher has very successfully mined a huge subject matter and, what is more, shown what classical erudition, applied to more recent sources and expanded beyond the sixth century A.D., can achieve—an innocuous kind of expansion that will hopefully yield fierce controversies in its own right.

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31. For the relation between Cicero and the original Carneadean debate, see James E. G. Zetzel, "Natural Law and Poetic Justice: A Carneadean Debate in Cicero and Virgil," *Classical Philology* 91 (1996): 297–319; for the anti-imperialist stance in the *Republic*, see Karl Büchner, *M. Tullius Cicero: De re publica. Kommentar*, ser. Wissenschaftliche Kommentare zu griechischen und lateinischen Schriftstellern (Heidelberg: Carl Winter, 1984), 303–307.

32. *Lact. inst.* 6, 9, 4; the translation is taken from Cicero, *On the Commonwealth and On the Laws*, ed. J. E. G. Zetzel (Cambridge: Cambridge University Press, 1999), 66.

33. *Aug. civ.* 19, 21 (5 *Cic. rep.* 3, 36).

34. This was to have a lasting impact on early modern accounts of natural and (proto-)international law; for an appraisal of this Roman tradition in Hugo Grotius' work, see B. Straumann, "Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius' *De iure praedae*," *Political Theory* 34, 3 (2006): 328–350; id., *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht*, Studien zur Geschichte des Völkerrechts 14 (Baden-Baden: Nomos, 2007).