Varieties of secularisation in English and Dutch public and international law

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CHAPTER FIVE

SELDEN'S *MARE CLAUSUM:* THE SECULARISATION OF INTERNATIONAL LAW AND THE RISE OF SOFT IMPERIALISM

Imperialism is no word for scholars.
W. K. Hancock, *Wealth of Colonies* (Cambridge, 1950), 1.

Summary

Dutch and English empire-builders had more secularising legal and political categories to draw on than their Iberian and French counterparts. Some of them were crafted by challenging the spiritual monopoly of the clergy or the religious foundation of monarchy, based on doctrinal openings provided by *sola fide*, *sola Scriptura*, and minimalism and toleration anchored in individual responsibility and autonomy and in epistemic humility, a recognition of the universal limitations of human reason. Other practices, such as revisions to sacred cosmology – for instance with Earth at the centre of the universe, and Jerusalem at the centre of Earth – and innovations in navigation and financial instruments supportive of enterprise and less concerned with usury, emerged gradually and relied less on the kind of doctrinal confrontation that is exemplified by the five *solae*. The empire-builders who operated in a secularising intellectual and legal environment had more options to encounter non-European legal systems without having to take a position on their missionary duties and rights, the Christian tradition of just war, forced conversion, slavery, or non-Christians' right to property and sovereignty. Their imperialist method helped to secure non-European co-operation and save economic and ideological costs of commercial and colonial expansion. It enabled, structured, and sustained the British Empire before the possible nineteenth-century retheologisation of imperialism. Long recognised as a landmark in the history of public and customary international law and the law of the sea, Selden's *Mare clausum* is both an iconic and synecdochal case of the secularisation of law that created soft imperialism. This chapter's aim is to propose *Mare clausum* as the beginning of imperialist international law.

V.1 Introduction

V.1.1 Exordium

How did the West move from a condition where theology was the sovereign discipline, able and willing to influence all others, to a state in which the arts, the sciences, law, and politics are self-sufficient in method and cognisance? Turning-points like Machiavelli, Montaigne, Descartes, the Peace of Westphalia and Hobbes, and processes like the centralisation and rationalisation of states, have been posited to explain secularisation. "Premature secularisation," that well-worn phrase, is a salutary caveat against these, but neither an answer nor the start of one.[406]

Early modern imperialism, and its role in the spread of secularism as an ideal, is one of the most important subjects in reconstructing and understanding secularisation as an historical process. This Thesis examines seventeenth-century Dutch and English neutralisations of the Bible in legal discourse, and their unexpected assistance for early imperialism.[407] It is part of a broader project on the intellectual history of Western secularisation.

I hope to adumbrate two specific contributions to the existing literature, then see if they are connected. First, it is still unexplained how two small states, the Netherlands and the

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[406] The phrase comes from Duncan Forbes, *Hume's Philosophical Politics* (Cambridge, 1975).

[407] I try to use "imperialism" advisedly, balancing its seventeenth- and twenty-first-century connotations. For Selden and Harrington, *imperium* could mean power or dominion in general, or overseas commercial and colonial influence. When they meant policy concerning existing and planned holdings abroad, they usually, though not always, qualified the term. This terminological caveat becomes more complicated by their discussions of the checkered history of Roman *imperium* as a source of lessons and even models for England. See some relevant caveats in Quentin Skinner, "Meaning and Understanding in the History of Ideas," in *Visions of Politics I: Regarding Method* (Cambridge, 2002), 57-89. While shifts in *imperium*'s meaning can be crucial for right interpretation, an exhaustive terminological index of all usages would have limited use. Some semantic shifts and deliberate ambiguities of *imperium*, for instance from Roman historians through Machiavelli to Harrington, map onto each other and reduce the need to trace terminological changes in great detail; others increase it. (E.g. in Harrington, *Prerogative*, II.ii.17, where the translation of *imperium* as Empire means both provincial government and political power. The reasons will be explored in chapter VII below, where Sigonius and provincial republicanism are shown to belong to the context necessary to understand Harrington.) Instead of imposing preconceptions, I hope to allow imperium's early modern meanings' relationship to today's connotations, including postcolonial sensibilities, arise from the textual analysis and contextualisation. Cf. Benton, *Search*, 5fn8.

Note, however, that not all shifts can be bracketed. For instance, Livy reports a key speech by Publius Decius Mus, where the plebeian *consular* (ex-consul) derides the patricians for disallowing *imperium* to plebeians, because in the patricians' opinion plebeians have no right to auspices. Livy 10.7.9-8.12. *Imperium* as military command with right to auspices is not normally the early modern legal meaning, yet early modern writers seldom missed this dimension in their reading of Roman history. For an account of shifts within ancient Roman usages, including statistical analyses, see John Richard, *The Language of Empire: Rome and the Idea of Empire from the Third Century BC to the Second Century AD.* (Cambridge, 2008). A good note on a Renaissance debate concerning *imperium* is summarised by McCuaig, "Sigonio and Grouchy: Roman Studies in the Sixteenth Century," *Athenaeum* 74 (1986), 147-73; and *Sigonio*, 175-7, 213. Also see Adolf Berger, *Encyclopedic Dictionary of Roman Law*, Transactions of the American Philosophical Society, vol. 43, part 2 (Philadelphia, 1953), 493-4, incl. s.v. 'imperium,' and 'imperium merum.' Liljegren notes the influence of Selden's tracing of Roman *merum & mextum imperium* to feudal royal jurisdiction on Harrington's history of Norman titles. Harrington, *Oceana*, ed. Liljegren (Lund, 1924), 273. *Imperium in imperio* and the *imperium-potestas* distinction from the Renaissance legal historiography of Rome to the early American constitutional debates are discussed separately in chapter III, Section 1.3 above.

United Kingdom, became able to rapidly outcompete France, Spain and Portugal in creating and commanding global trade (both in terms of volume and value), and seizing and holding territory outside Europe. There is no satisfying explanation why the most globalised legal norms today are originally either Roman or English. Second, the causes, circumstances and consequences of the secularisation of international law in the seventeenth century continue to baffle historians of international law as much as intellectual historians. Although Grotius's *De iure belli ac pacis* (1625) is regarded as the foundation of modern international law, some legal historians exploring the foundation of imperialism, territorially defined nation-states, and modern sovereignty and International Relations under conditions of limited resources, recognise the importance of Selden's *Mare clausum* (1635).[408] While some currently held views on Selden are debatable, both his role in the legal scholarship tradition and in actual legal history foreground *Mare clausum* as the best illustration of the intellectual shift that accompanied and shaped Western imperialism. However, many legal historians of colonialism ignore him, and those who do not, offer starkly different reasons for his importance. This chapter is an attempt to revisit *Mare clausum* with a view to establishing the terms and categories of inquiry required for a comprehensive analysis of Selden's role in the birth of the legal foundations of modern imperialism.

V.1.2 Claim

Eminent lawyers like the Italian Andrea Alciato (1492-1550) and Alberico Gentili (1552-1608), the French Jacques Cujas (1520-1590) and Étienne Pasquier (1529-1615), and the Dutch Petrus Cunaeus (1586-1638) and Hugo Grotius (1583-1645), responded to the seemingly interminable Wars of Religion by gradually deconstructing the theological claim to epistemic authority in all systems of law. The secularising projects built on their work were suppressed after the Council of Trent, St. Bartholomew's Day Massacre, and the Synod of Dordt, respectively. Their legal method, concepts and arguments prompted Selden, Hobbes, Harrington and other English thinkers to reprioritise natural over divine law, and secularise law, the state, and civil society. Their intention was to create domestic political stability; an unintended consequence was an advantage in soft imperialism.[409]

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[408] E.g. T.W. Fulton, *The Sovereignty of the Sea* (Blackwood and Sons, 1911), 338-9.

[409] For influential statements of the softness of British imperialism see Trenchard and Gordon in *Cato's Letters*, ed. Ronald Hamowy (Liberty, 1995), Letter 106 (1722), II.749-50; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, IV.vii, part II, "Causes of Prosperity of New Colonies" ([1776, 1778, 1784, 1786, 1789] ed. Edwin Cannan, Chicago, 1976); and J.R. Seeley, *The Expansion of England* (London, 1883). 'Soft' features of an empire include an organic state; a shared sense of identity; provincial rulers aspiring to emulate metropolitan elite; a continued role for local courts, traditions and government. See the conclusion of J.H. Elliott's majestic *Empires of the Atlantic World: Britain and Spain in America, 1492-1830* (Yale, 2006), 410-11. C.L. Tomlins, "Legal Communications

Contrary to Iberian and French colonial projects, some Dutch and English thinkers worked out a way to encounter native rulers and legal systems without a pressing need to take a position on issues like the Christian traditions of just war, missionary obligation, forced conversion, slavery, or non-Christians' right to property and sovereignty.[410] The new system proved effective in securing non-European co-operation and saving the economic and ideological costs of non-secular commercial and colonial expansion. It created, structured, and maintained the British Empire before a possible nineteenth-century retheologisation of imperialism. Long recognised as a landmark in the history of customary international law and the law of the sea, Selden's *Mare clausum* is both an iconic and synecdochal case of the secularisation of law that enabled soft imperialism. Two features cause this: Selden's secularisation of thirteen centuries of Christian international law, and his formulation of British exceptionalism. Both rely on his unprecedented elevation of history into both the ultimate source and method in finding out what the law is.

This chapter presents *Mare clausum* as the most influential legal statement at the birth of modern imperialism. *Demonstranda* categories include Selden's reformulation of all property as *de facto* private; of state sovereignty as encompassing effective and legitimate control over territorial seas; the possibility of expanding the seas subject to sovereign control indefinitely when reason of state is expanded to include global trade; the formulations of British exceptionalism that became a template for Danish, Swedish, American, Prussian and other claims; and the secularisation of public international law.

Recognition is another pertinent legal category.[411] Although Las Casas (1484-1566), Vitoria (1492-1546) and others were notably humane, 'the other' in their legal system (often called "Saracen" even when referring to New World inhabitants) was inferior in one way or another.[412] Classifications of newly encountered actors, including classifications of sovereignty,

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and Imperial Governance: British North America and Spanish America Compared," in C.L. Tomlins and M. Grossberg (eds), *Cambridge History of Law in America* (Cambridge, 2008), vol. 1, pp. 104-143.

[410] Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500-c.1800* (Yale, 1998). Elliott, *Empires.* For other examples of such dilemmas see C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford, 1967), 71-2.

[411] Tarik Kochi, *The Other's War: Recognition and the Violence of Ethics* (Routledge, 2009).

[412] Compare Greenblatt's account of an Iberian departure from anthropological conventions. While previously, from Herodotus to Mandeville, descriptions of encounters involved "some form of acceptance of the other in the self and the self in the other," from Bernal Diaz (1492?-1584) onward they move from "identification to complete estrangement: for a moment you see yourself confounded with the other, but then you make the other an alien object . . . that you can destroy or incorporate at will." Stephen Greenblatt, *Marvellous Possessions: The Wonder of the New World* (Oxford, 1991), 135. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 2001). Randall Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," *The European Journal of International Law* 16:1 (2005), 25-58 at 45 and *passim*, points out against Anghie that Vitoria's natural law remained Christian.

posed to the Iberians a particular subset of challenges of this type.[413] By contrast, secularised natural law applied to everyone equally, whether immediately or at a future stage of development.[414] In the latter case, the natives depicted as being at a lower stage of development 'imposed' trusteeship and obligations of development on their colonisers.

It is possible to compare this relationship with the non-secularised set of obligations of conversion and Christian re-education. Yet the markers of developmental stages proposed by Christian imperialism – conversion, baptism, specific ecclestiastical institutions, etc. – were less acceptable than the hallmarks of capacity and right for self-governance that were posited by secularised imperialism, including settlement, advanced modes of production, political institutions, and other developmental criteria which, however Eurocentric, were at least tangible and empirical.[415] Such markers seemed less autocratic and indeterminate than those afforded by *ius gentium* tied to Christian principles. The colonial discourse created by secularised natural law thus proved easier to establish and maintain than the colonialism of

[413] Alexandrowicz, *Introduction,* chapter 2. A closely related issue, not examined here, is the development of legal doctrines concerning international corporations. The "delegated sovereign powers" of the Dutch, French and English East India Companies in making bilateral trade and military agreements with non-Europeans powers, as discussed i.a. by Alexandrowicz, *Introduction*, 15, 26 and *passim*, are salient examples. Alexandrowicz argues that this problem was absent from Iberian imperialism, in which sovereigns dealt with each other directly. This fits the view of positive feedback loops between Protestantism, capitalism, and mercantilism in the phenomenal success of seventeenth-century European imperialism. The profit motive and ingenuity of private corporations created a more successful empire than Iberian centralised state Catholicism. Whether this conventional account in this simple form is supported by the evidence remains to be seen, especially as we continue mapping out the profit motive and space for entrepreneurial initiative in Catholic imperialism. See Greenblatt, *Marvellous*. Many thanks to Dániel Margócsy for this point.

[414] The conspicuous shift from the Catholic use of "Saracen" to the Protestant use of "man" in the language of international law had a partly unintended secularising effect. Without questioning the recognised importance of other aspects of Grotius's system of natural law, one could posit that this shift in language further supported his attack on the anti-Moor and anti-Ottoman foundations of Iberian colonial claims. Inversely, one could argue that in the context of Iberian accusations that the Dutch broke Christian international laws by trading and even forming military alliances with Muslims (e.g. Freitas, *De iusto* cap. XIII), the shift from "Saracen" to "man" supported not only Grotius's supra-legal moral rhetoric, and his secularising strategy for reconciling pacifist Anabaptist, militant Calvinist, and *realpolitik* Erastian Dutch agents with Iberian Catholic sensibilities, but it also served immediate VOC commercial interests. Alexandrowicz, *Introduction,* 14, 17-8, 26-9, 41, *passim*. "Unlike the Portuguese, the Companies were not engaged in any anti-Islamic action or missionary endeavour. The Dutch, English and French did not come to the East Indies as subordinates of their governments in Europe but as employees and servants of corporations of merchants specially formed for engaging in East India trade." 27. This may be an exaggeration; see i.a. Alexandrowicz, *Introduction,* 32-5, 39 note G. Furthermore, the Portuguese also found non-Christian allies against Muslims: Alexandrowicz, *Introduction*, 89. Similarly to my theory that Grotius's elimination of "Saracen" as a special category of 'the other' in European international law was partly motivated by short-term, pragmatic considerations, Alexandrowicz argues that Grotius in *Mare liberum* ascribed legal sovereign status to East Indian communities partly to undermine Portuguese legal title claims. *Introduction,* 44-9. Cf. *De iure belli ac pacis*, I.iii.20. However, the likelihood that early modern international law was dechristianised and reformulated due to particular circumstances detracts nothing from the generic, broader historical pattern of secularisation's advantages. Somos, *Secularisation,* chapter I. The tactical particularities in the contexts of *Mare liberum* or *Mare clausum* do not contradict, but fill out the big picture.

[415] Hugo Grotius "Reply to Welwod," in *idem, The Free Sea* (Indianapolis, IN: Liberty Press, [ca. 1615] 2004), 83-87.

Christian divine law.[416] Compared with Iberian and French, it made English and Dutch imperialism highly effective by eliminating the economic and ideological cost of non-secular (whether Catholic or Protestant) commercial and colonial undertakings.

However, a little hindsight is dangerous. Legal historians must entertain the possibility of unintended consequences. The English colonial advantage of secularising law appears less the achievement of omniscient and omnipresent proto-capitalist oppressive states than a corollary of the secularisation first performed to secure domestic stability, including the renegotiation of the powers of clergy, and the contestation of sources of law and the legal theory of property.[417] To analyse the interconnected nature and development of the secularisation of law, the state, and the early modern British Empire, it is insufficient but necessary to trace the secularising techniques in the iconic *Mare clausum*.

V.1.3 Method

Another word of caution is in order. It is counterproductive to reduce secularisation to commercial interests. In a pop-Marxist variant, the moral principles enshrined in Christianity are said to have been abandoned by a greedy military-mercantilist-political nexus skilled in the use of legal ambiguity. Such accounts point to men like John Hawkins (1532-95), Martin Frobisher (1535/9-1594), Francis Drake (1540-96) and Walter Raleigh (1554-1618), who ran discovery, privateering, commercial and colonial adventures under the aegis of both Crown and corporations. The corporation could deflect to the Crown, and *vice versa*, frustrating legal challenges. It has been argued that the semi-public, semi-private nature of their enterprises was eminently suited to early colonialism's evasion of legal accountability.[418]

Additionally to positing efficient long-term conspiracies and revealing a shallowness by assuming, instead of proving, the reducibility of all things to greed, these arguments invert the Whig theory of Protestant progress and preserve its flaws by conflating Dutch and English

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[416] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40:1 (1999), 1-71, esp. 46-51. Another perspective in Thomas McCarthy, *Race, Empire and the Idea of Human Development* (Cambridge, 2009).

[417] It may be useful to note here that *imperium* is more serviceable than "imperialism" insofar as the former considers domestic and foreign affairs as inseparably joined, while the latter does not. While ancient, medieval, Renaissance and early modern thinkers distinguished the homeland from its overseas commercial and colonial interests, they tended to handle them as integrally connected. Livy or Machiavelli saw demographics, form of government, education and the economy as intrinsically linked as the American Founding Fathers did. The ability to consider Western states as imperialist aggressors that act in smoothly-run conspiracies to dispossess the poor and the non-Western for uncomplicated profit probably dates from the nineteenth century. In contrast with two-dimensional usages, the challenge for seventeenth-century theorists was to reinterpret *imperium* in a three-dimensional chess game that combined domestic and foreign policy variables and could even replace pieces altogether (including bishops and kings).

[418] China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2005), 197-224, esp. 200-208.

imperialism. As discussed in chapter I, Section 5 above, Dutch state-formation and colonial and commercial expansion were intertwined from the start; the English had a long, distinctly private phase before the creation of the East India Company (1600-1874) and the Crown grant of monopolies. It is as unhistorical to attribute the success of both English and Dutch early colonialism to the co-operation of governments and corporations as it is counter-productive to overdraw the interaction between secularisation and state-building, or secularisation and successful colonialism, by either state.[419]

We must assume that it is possible to cogently discuss the beginning of European imperialism, if for no other reason than to fail constructively. One popular, and obviously limited, heuristic device for constructing explanations without over-defined origin myths for imperialism is to posit 'moments.' Machiavellian, Gentilian, Vitorian, and Grotian genealogies of international law exist.[420] All have adherents, opponents, and modifiers proposing sub-varieties. This chapter suggests the 'Seldenian moment' as a useful alternative.

V.1.4 Das Selden Rätsel

The distinction between the synchronicity of Dutch and the asynchronicity of English state- and empire-driven secularisation is useful, among other things, in approaching what may be described as The Selden Mystery. Selden is known as an antiquarian, ancient constitutionalist, parliamentarian, international lawyer, and Judaiser. Recent works on his thought often limit themselves to one of these aspects, and the emerging *personae* are sometimes difficult to reconcile.

For over a century (in some accounts, since 1777), *das Adam Smith Problem* denoted apparent contradictions between sympathy in *The Theory of Moral Sentiments* and self-interest in *The Wealth of Nations.*[421] Selden's case is comparable, though arguably worse; he truly is all

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[419] Jonathan Scott, "What the Dutch Taught Us: The Late Emergence of the Modern British State," *Times Literary Supplement*, (16 March 2001), 4-6. *idem*, *Commonwealth Principles: Republican Writing of the English Revolution* (Cambridge, 2004), 41. J.G.A. Pocock, "The Atlantic Republican Tradition: The Republic of the Seven Provinces," *Republics of Letters* 2(1) (2010), 1-10, at 3. See also Alexandrowicz, *Introduction,* 42, and Anthony Pagden, "Law, Colonization, Legitimation, and the European Background," in Tomlins and Grossberg, *Cambridge History,* 1-31.

[420] Machiavellian: J.G.A. Pocock, *The Machiavellian Moment*. Critically examined for early English imperialism: D.B. Quinn, "Renaissance Influences in English Colonization," *Transactions of the Royal Historical Society* (1976), 73-93. Gentilian: B. Kingsbury and B. Straumann, "Introduction," in *idem* (eds.) *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford, 2010). Vitorian: Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law," *Social and Legal Studies* 5(3) (1996), 321-336. Grotian: Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Year Book of International Law* 23 (1946), 1-53; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London, 1977); *idem*, "The Importance of Grotius," in *idem et al* (eds)*, Hugo Grotius and International Relations* (Oxford, 1990), 95-131; Edward Keene, "The Reception of Hugo Grotius in International Relations Theory," *Grotiana* 20/21 (2000), 135-158. Overviews of 'the Grotian moment' are in C. Cutler, "The Grotian Tradition," *Review of International Studies* 17 (1991), 41-65.

[421] J.A. Schumpeter, *A History of Economic Analysis* (ed. from ms E.B. Schumpeter, Oxford, 1954). Leonidas Montes, "Das Adam Smith Problem: its origins, the stages of the current debate, and one implication for our

things to all people. To Pocock and others he is an ancient constitutionalist by virtue of arguing that England is originally an aristocracy, become a monarchy through necessity. For his work on the Arundel marbles, and so many things beside, he is an antiquarian, and a preeminent historian. Ziskind, Berman and others regard him primarily as an English lawyer and scholar of common law history.[422] From Berkowitz and the voluminous work of Christianson on Selden's early career, the figure of a revolutionary parliamentary leader emerges. For Tuck, Selden is a pioneering international lawyer, the English Grotius. Rosenblatt regards him as "Renaissance England's Chief Rabbi," a major English Judaiser. Even if there is truth to all these aspects, recent writers make little attempt to connect the dots. Toomer gives an exhaustive survey of Selden's works, but the conceptual and material links between them are left unexplained. None of these writers attempt to explain the causes and consequences of either the shifts or the coherence in Selden's overall thought and numerous disparate works. To my best knowledge the only recent attempt, valiant if ultimately unsatisfying, to interpret Selden's life and works as a whole, is Sergio Caruso's *La miglior legge del regno* (2001).[423]

After reading his works, some parts of the jigsaw start to align. The anticlericalism of the *History of Tithes* (1618) is relevant to the shift from English to international law, manifest for instance in Selden's treatment in *Mare clausum* (1635) of canon law as void, and the papacy as a regular, if small, state. Selden's fascination with English customary law, evident from his earliest published notes from the 1600s, is a revealing context for the way he crafts an analogous customary and historically rich source in *Mare clausum* for public international law.

However, this is at best a tracing of interests, not a reconstruction of the evolution of Selden's thought. The strong anticlericalism of the *History of Tithes* sheds little light on the sense in which Selden is a natural lawyer, or how his early work informs what seems like a radical shift in *De iure naturali et gentium, iuxta disciplinam Ebraeorum, libri septem* (1640). Does his revival of the Noahide Laws in the same work follow the same twinned methodological lines of legal abstraction and historical reduction that we saw him develop, largely from his contemplation of English customary law, in *Mare clausum* for public

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understanding of sympathy," *Journal of the History of Economic Thought* 25:1 (2003), 63-90. Keith Tribe, "'Das Adam Smith Problem' and the Origins of Modern Smith Scholarship," *History of European Ideas* 34:4 (2008), 514-25.

[422] M.A. Ziskind, "John Selden: Criticism and Affirmation of the Common Law Tradition," *The American Journal of Legal History* 19:1 (1975), 22-39. H.T. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale," *The Yale Law Journal* 103:7 (1994), 1651-1738.

[423] Sommerville, Somerville and many others also give lengthy treatments. C.J. Somerville, *The Secularization of Early Modern England: From Religious Culture to Religious Faith* (Oxford, 1992). Johann Sommerville, "John Selden, the Law of Nature, and the Origins of Government," *The Historical Journal* 27:2 (1984), 437-47. *Idem*, "Hobbes, Selden, Erastianism, and the History of the Jews," in eds. G.A.J. Rogers and Tom Sorell, *Hobbes and History* (Routledge, 2000), 160-88. *Idem*, "King James VI and I and John Selden: Two Voices on History and the Constitution," in eds. Daniel Fischlin and Mark Fortier, *Royal Subjects: Essays on the Writings of James VI and I* (Detroit, 2002), 290-322. Berkowitz briefly connects Erastianism and parliamentarianism in *Selden's Formative*, 95.

international law? Is *De iure naturali* supposed to describe the world's ancient constitution, akin to the Renaissance *prisca sapientia* and *Hebraica veritas* discourses, but based on the principles of customary law instead of mere antiquity or revelation? If not, are there inexplicable breaks between these works, or is there an alternative explanation – for instance, is Selden's reconstruction of the Mosaic foundation of all law supposed to emphasise i.a. the legal discontinuities from biblical times, and the consequent impossibility of maintaining divine legitimacy claims in post-biblical times? Or does it anchor its legal system so deeply in historical Judaism that modern sects become unable to hijack it? And if *De iure naturali* followed the same process of legal abstraction and historical reduction one finds in the transition from the *History of Tithes* to *Mare clausum*, there would still be an unexplained shift in Selden's legal thought between 1635 and 1640 from the customary to the positive, from historical forces explaining historical changes (in England, and for the seas) to divine forces that constitute universally binding norms. A well-known and closely connected discontinuity that remains is his mysterious acquisition of unrivalled knowledge of Hebraica.[424]

While the focus of the following analysis of *Mare clausum* remains the connection between secularisation and soft imperialism, I hope that some elements, such as the role of the Samaritan Pentateuch in Selden's neutralisation of the Bible in public international law, or his analogy from the rules of recognition and legal evolution in English to those of international law – with a consequently unique authority of English law in clarifying the international – also make it easier to answer some of the large questions around this fascinating figure.

V.2 *Mare clausum*: Erastianism, parliamentarianism, soft imperialism and the secularisation of law

The ends of this voyage are these: {	1. To plant Christian religion. 2. To trafficke. 3. To conquer.	} Or, to doe all three.

To plant Christian religion without conquest, wil bee hard. Trafficke easily followeth conquest: conquest is not easie. Trafficke without conquest seemeth possible, and not uneasie. What is to be done, is the question.

Pamphlet for the Virginia Enterprise by Richard Hakluyt, lawyer, 1584. In *The Original Writings & Correspondence of the Two Richard Hakluyts,* ed. E.G.R. Taylor (London, 1935), 332.[425]

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[424] Toomer, *Selden.* Berkowitz, *Selden's Formative*, 15. Rosenblatt, *Renaissance,* 200fn60, 210fn18.
[425] For Selden's and Herbert's involvement with the Virginia Company see Berkowitz, *Selden's Formative,* 55-64.

V.2.1 The four lives of *Mare clausum* (1616?-21, 1630-5, 1652, 1663)

Mare clausum has a remarkable publication history even by seventeenth-century standards. From 1616 to 1663, under James VI/I, Charles I, Cromwell, then Charles II, *Mare clausum* addressed enduring concerns including the Civil War, mercantilism, the government's right to tax for defense, and its right to identify emergency.[426] It was first drafted in response to the publication of Grotius's *Mare liberum* (1609), originally chapter 12 of *De iure praedae commentarius*. The whole *De iure praedae* remained unpublished until 1864. Hakluyt translated *Mare liberum* into English some time before his death in 1616 (perhaps as early as 1609), and this translation, although privately circulated, also remained unpublished until recently.[427] Armitage dates the first draft of *Mare clausum* to 1618; Toomer cites Selden's *Vindiciae* to show that Selden decided to counter *Mare liberum* before 1618; Tuck posits 1616-7.[428] Buckingham, recently made Lord Admiral, had Selden submit the draft *Mare clausum* to James for approval in the summer of 1619 (misremembered by Selden as 1618). Although approved, the court asked Selden to remove the final chapter on British claims in the North Sea, likely to offend James's brother-in-law, Christian IV of Denmark. Selden was unwilling or unable to gain access to Buckingham with the revised version, and *Mare clausum* vanishes from sight for a decade.[429]

Bourgchier updated Ussher several times about Selden's condition in Marshalsea Prison. In one of these letters, dated 12 June, 1630, he informed Ussher that Selden was preparing *Mare clausum* for publication.[430] Nothing more is heard until spring 1635 when, according to his *Vindiciae,* Selden was approached by unnamed noblemen with Charles I's

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[426] On Selden and mercantilism see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), 100.

[427] P.C. Mancall, *Hakluyt's Promise: An Elizabethan's Obsession for an English America* (Yale, 2007), 275.

[428] David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000), 113. Tuck, *Natural Rights,* 116. Welwod in 1613, and even Freitas in 1625, did not name Grotius as the author of *Mare liberum*, perhaps because they genuinely did not know. Fulton regards the second edition of *Mare liberum*, from 1618, as the official disclosure of Grotius's authorship. W.T. Fulton, *The Sovereignty of the Sea* (Edinburgh*,* 1911), 342fn1. Could Selden have known earlier? Armitage argues that seventeenth-century British imperial ideology was built on a secularised, minimally Protestant religion because it depended on the "collision between an Erastian English church and a Presbyterian Scottish kirk." *Ideological,* 9, and 38-40 (though cf. 63-7 and 99). This accords an interesting role to sixteenth- and early seventeenth-century Scottish lawyers, like Craig and Welwod, in the formation of British imperial ideology. *Ideological,* 108-11. An excellent discussion of Welwod's view of *Mare liberum* and its author, and his own contributions to the imperial ideology of James VI and I, is J.D. Ford, "William Welwod's Treatises on Maritime Law," *The Journal of Legal History* 34:2 (2013), 172-210.

[429] John Selden, *Vindiciae… Maris Clausi* (London: Bee, 1653). G.J. Toomer, *John Selden: A Life in Scholarship* (Oxford*,* 2009), 389.

[430] James Ussher, *The Whole Works of Ussher*, ed. C.R. Elrington (Dublin, 1829-64, 1847), XVI.514, cited in Toomer, *Selden*, 390fn12.

order to publish. Toomer confirms the date through diplomatic and academic chatter from April 1635 on, including Samuel Johnson's letter to Grotius in May. The revised manuscript was submitted to Charles I, approved in August 1635, and published in November. Toomer adds,

> Nevertheless, although the preceding account may accurately reflect the formal record of events, we cannot escape the suspicion that an informal agreement about the publication of *Mare clausum,* as a condition of Selden's release from bail, had been reached some time before.[431]

Mare clausum was closely tied to Stuart maritime policies, including claims to the adjacent seas, as well as ship money. As many point out, *Mare clausum* was cited in the 1637 Ship-Money Case by Sir Edward Littleton and Sir John Banks, Crown lawyers and prosecutors of Hampden. Ascribing appeasement of Court as a motive to the imprisoned Selden, Fulton and Toomer agree that Bourgchier's report is credible, and revision may have began as early as 1630.

Toomer's two points on the dating of *Mare clausum*'s revision, namely its connection to Stuart claims to adjacent seas, and Selden's appeasement of the Crown, neither support nor contradict each other. However, Selden's revisitation of *Mare clausum* in 1630 could be connected to Charles's third Parliament, 1628-9, not to Ship Money. A very brief overview of the much-discussed events is in order. The June-August, 1625 so-called Useless Parliament granted Tonnage and Poundage to Charles I for a year, instead of life, as has been customary since the early fourteenth century. After a year Charles continued to collect this levy on wine and other goods, both exported and imported. The second Parliament of 1626 began with a litany of complaints against Buckingham and this illegal collection, leading Charles to attempt to adjourn the session. MPs famously held John Finch, the Speaker, in his chair until three resolutions were read, one of them condemning anyone who paid unauthorised Tonnage and Poundage as a traitor and enemy of England. This was Selden's first Parliament, where he played a prominent role in attempts to impeach Buckingham.

The abrupt dissolution of the second Parliament in June 1626 left Charles without subsidies. Forced loans and customs duties unauthorised by Parliament followed, causing deep resentment. Refusal to pay led to the imprisonment of seventy-six prominent men. They were held but not charged, for fear that the court would find against the king. Five of them applied for writs of *habeas corpus,* starting the Five Knights' Case in which Selden's defense of Edmund

[431] Toomer, *Selden*, 390-1. Fulton, *Sovereignty*, 367-8.

Hampden eventually led to his own arrest. The third Parliament opened in 1628. Led by Selden, John Eliot, Edward Coke, Robert Phelips and Thomas Wentworth, it forced Charles into signing the famous Petition of Right, which limited Charles's absolute prerogatives. The second session opened in January 1629 with parliamentary speeches against Arminianism, and Charles's moderate speech defending Tonnage and Poundage. Parliament passed a resolution against the illegal levying of Tonnage and Poundage. Charles had the MPs who orchestrated this tumultuous process arrested, Selden among them. Selden was arrested on 4 March, 1629 and sent to the Tower, and banned from books and writing materials. This provision eased slightly from the end of July 1629. He was moved to Marshalsea Prison in January 1630, and allowed access to London during the day, and to read and write in prison. There he started *De successione* and the second edition of *Titles of Honor.* Selden remained at Marshalsea until May 1631, when he was finally granted bail, though until January 1635 he had to renew it twice every year.

The tenor and implication of *Mare clausum*'s covert and overt constitutional and ironic attacks on Charles's taxes change, depending on whether their context is Tonnage and Poundage, or Ship Money. To my knowledge, the matter of what the advisable distance was for Selden from an Arminian like Grotius (given for instance the strong anti-Arminian sentiment of the third Parliament), and how this distance influenced Selden's criticisms in *Mare clausum* regardless of his position on Grotius's free sea arguments, has not been raised before. Perhaps it was politic, for instance, to cite *De iure belli ac pacis* strategically, and not to draw too much support from it for his anti-*Mare liberum* arguments, however tempting it was to dwell on Grotius's changes of mind or emphasis from *Mare liberum* to *De iure belli*.

The second life of *Mare clausum*, its first actual publication in 1635, is complex and rich. Three unauthorised reprints appeared in Holland in 1636, prompting Charles to ban their importation to England. The Dutch States General, and Grotius, independently encouraged Cunaeus to respond, but in vain.[432] The States General commissioned Dirk Graswinckel (1600/1-66), who finished his draft by the end of 1636. He was eminently suited to the task. A cousin and student of Grotius, Graswinckel was with him at Senlis when he was writing *De iure belli ac pacis* around 1623.[433] Graswinckel already had a reputation as a polemicist favouring free seas. *Libertas Veneta* (1634) defended Venetian claims to trade freely, countering Welwod's arguments to the contrary.[434] Soon after *Mare clausum*'s appearance, and before the

[432] Fulton, *Sovereignty,* 374-5.

[433] Henk Nellen, *Hugo de Groot. Een leven in strijd om de vrede 1583-1645* (Amsterdam: Balans, 2010), 307. Correcting Jonathan Israel, *The Dutch Republic: Its Rise, Greatness, and Fall 1477-1806* (Oxford, 1995), 483.

[434] Tuck, *Natural Rights*, 89-97.

States General commissioned him to draft an official response, Graswinckel privately sent detailed criticisms to Selden.[435] In 1636 the States General amply rewarded him for the finished work, but suppressed *Vindiciae maris liberi adversus I.C. Janum Seldenum* due to political concerns. The published responses to *Mare clausum* challenged British dominion claims, set forth their own (e.g. Pontanus for Denmark over the Sound), but the genie was out of the bottle: there was no influential counter to Selden's innovative justification of private dominion over the seas. Not only in England, the temptation of the argument proved irresistible. *Mare clausum*'s first appearance in 1635 is as convenient a birthday for the public international law of modern imperialism as one can hope to find.

A letter survives from a William Watts of Northampton from 11 July, 1636 to Selden, concerning an English translation.[436] Watts would have brought the finished draft to Selden "but for the rayny weather." He kept the Preface in Selden's own English translation, left his Epistle to Charles I diplomatically untranslated, and wrote out his translation leaving space between the lines for Selden's corrections. The letter attests to existing arrangements and a nearly completed translation process. Watts refers to his translation of *Mare clausum* in his glossary to Matthew Paris, for which Selden provided some assistance around 1640.[437] Other than these references, this translation disappeared without trace.

The third life of *Mare clausum* begins in the 1650s, under a different regime facing similar problems. The war of 1652-54 is known as the first of four Anglo-Dutch Wars, and it is fought by the new Commonwealth of England against the United Provinces. Neither the war's ordinal number nor the new form of government should obscure the continuities from Stuart naval policies and the steady development of Anglo-Dutch rivalries. The first published translation was Marchamont Nedham's (1620-78) in 1652 under the title *Of the Dominion, Or, Ownership of the Sea*.[438] Nedham replaced Selden's dedication to Charles with a dedication to Parliament, and added supplementary materials. This translation is considered generally faithful and accurate. Yet as we will see, it introduces a few important changes to Selden's text to fit the Cromwellian milieu.[439] After the Restoration, James Howell, Historiographer Royal,

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[435] Tuck, *Natural Rights,* 89-90.
[436] Selden, *Correspondence,* 104-5.
[437] Toomer, *Selden,* 345-9.
[438] Blair Worden, Introduction to Marchamont Nedham, *The Excellencie of a Free-State Or, The Right Constitution of a Commonwealth* ([1656] Liberty, 2011).
[439] For the diplomatic rumour that Cromwell used *Mare clausum* to prepare his claim to becoming "emperor of the seas *occidentalis*" see Armitage, *Ideological Origins,* 119-120. The additions Selden may not have readily agreed with include the attachment of Ingenuis's and others' claims for Venetian dominion over the seas, which Selden actually disputed in *Mare clausum*. This tension between the 1635 and the 1652 *Mare clausum* editions may be part of the same ambivalence in the English attitude to the Venetian model that one finds in Harrington's praise of

deleted Nedham's deprecatory comments on Charles, restored Selden's original dedication, and published the reworked translation in 1663.[440]

Mare clausum's direct policy impact can be traced until the 1830s. The above four lives of *Mare clausum* merely illustrate the endurance of *Mare clausum*'s topicality and its continuous use in the policies of otherwise starkly different British governments.

V.2.2 Deconstructing sources of law: the Bible and human reason

Politically, *Mare clausum* is Selden's reply to Grotius's *Mare liberum*, countering the Dutch claim to free navigation and fishing with a clear, powerful and influential statement of British dominion over the seas. Regarding biblical criticism, however, Selden's method is remarkably close to Grotius's. Both lawyers positioned their contribution on a theoretical level above biblical justifications and chosen nation theories, thereby seeking to systematically prevent religious engagement with, and adaptations from, their writings. Biblical criticism is an integral part of their strategy.[441] Selden's claim that all property was originally private is also the part of *Mare clausum* where a close look at his biblical exegesis can tell us the most about the significance of Bible criticism for seventeenth-century legal debates over imperialism. As detailed below, Selden explicitly names and refutes Roman and Christian legal and theological assertions that mankind originally held everything in common; that some things, like air, fish and the seas, continue in common; and that in special circumstances, such as extreme privation or a state's dissolution, recourse may be had to the residual or resurgent legitimacy of common property.

V.2.2.1 Origins of global private property

In Selden's classification the universal laws of nations, or common laws of mankind, are either natural or divine.[442] They are unchangeable, as shown by ancient philosophers (including Aristotle and Cicero); theologians (Aquinas); and lawyers. By contrast positive or civil law,

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Venice, but rejection as a model for England – among other reasons because it is a republic for preservation, not expansion – in the 1656 *Oceana.* Fulton, *Sovereignty,* 351fn1.

[440] D.J. Padwa, "On the English Translation of John Selden's *Mare Clausum*," *American Journal of International Law* 54:1 (1960), 156-159. Reliance on *Mare clausum* to claim British exceptionalism is a striking continuity between these regimes. The discontinuities that form the relief against which this continuity becomes striking include not only the radical changes of regime, but also the Anglo-Dutch Wars and their dissimilar causes. Particularly relevant here is Jones's contention that the first war's cause was not monarchical ambition but the failure to negotiate a union between the two countries. James Jones, *The Anglo-Dutch Wars of the Seventeenth Century* (New York, 1996).

[441] For Grotius's highly controversial exegetical method in *De iure praedae*, chapter 12 of which became *Mare liberum* (1609), see Mark Somos, "Secularization in *De Iure Praedae*: From Bible Criticism to International Law," *Grotiana* 26-28 (2005-7), 147-91.

[442] *Dominion*, I.iii.12.

"ordained either by God or men," can change.[443] It has two varieties: peculiar (to a nation or group), and what is "*received by divers Nations.*" The latter can bind nations either "*jointly, equally, and indifferently, by som common obligation,"* or accidentally. The jointly binding in turn is either imperative, or intervenient. The imperative (common) laws of diverse nations are special commands of an external authority, whether God or man. After citing classical instances in support, Selden adds Deut. 20.10. which, according to him, bound the Israelites by this force, not because God was their ruler. It equally bound the Canaanites, with whom they were to wage war. When several nations submit to the same papal command, they are likewise obeying an Imperative Law of Nations.[444]

Through these distinctions Selden effectively diminishes the universality of all biblical precepts concerning international relations. Even when they apply (or have applied) universally, the reason they cannot be regarded as the universal law of nations is precisely because God ordained them positively, and is recorded in the Bible as having done so (as opposed to, for instance, making His will known through nature or conscience). Grotius uses the same method of subversion against legalistic uses of the Bible that create irresolvable conflicts by grounding their validity in open-endedly debatable exegetical problems. Interestingly, one of Grotius's favourite passages to wreak havoc on is the same that Selden cites here.

Deuteronomy 20:5-17 has always troubled lawyers. Here God tells the Israelites to kill all males in far-away cities, but take the women and children alive. In nearby places they wish to keep, they must kill everybody. This was hard to accept as a straightforward divine law. Vitoria joined a long list of thinkers who argued that this was a special command given under special circumstances.[445] The Deuteronomy commands begin with military service dispensations for the dedication of new houses, vineyards, and sleeping with new wives. Unless women and grapes were to be obligatory considerations before all wars, it was easy to show that the indiscriminate murder in Deut. 20 was *speciali mandato Dei*. Vitoria had no difficulty concluding that what God wanted understood as a universal rule was that civilians and non-combatants are protected, and the maximum reasonable degree of mercy must be shown at all times. By contrast, Grotius took Deut. 20, one of the most discussed and blood-thirsty Bible passages in the theory of war, and presented it as a straightforward law of nations.[446] In *Mare*

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[443] *Dominion*, I.iii.13.

[444] *Dominion*, I.iii.13-15.

[445] Francisco Vitoria, "De Indis Posterior, sive de iure belli," in *Relectiones theologicae XII* (Lyon: Jacob Boyer, 1557), Vol. i, 409-10.

[446] *De iure praedae*, iv, Q II in *Commentary on the Law of Prize and Booty* (ed. M.J. van Ittersum, Indianapolis, IN: Liberty Press, [ca. 1603] 2006), 81. Further cases and details of Grotius's use of Deut. 20.10-17 in Somos,

clausum, his response to Grotius, Selden picks the same passage to make a similar point – even though he has not seen the whole of *De Indis,* only *Mare liberum*. Selden neutralises this key passage in the just war tradition slightly differently from Grotius, by redefining the types and hierarchy of laws it fits into.

Yet Selden's main concern in *Mare clausum* is not international relations but dominion. In I.iv he seems to distinguish between the enjoyment and dominion of property, and define the original community of property as analogous to the former. He starts by citing Lactantius's *Divine Institutes* V.v to explain the classical accounts of an original communality of property as poetic license. Lactantius believes that Cicero, Ovid, Virgil and Aratus were not referring to shared dominion in their descriptions of the golden age, but to a spirit of sharing and the common enjoyment of the Earth. To Lactantius's comparison of these sources Selden adds Gen. 9:1-2, which he interprets not as a divine command, but a figurative donation of the world to Noah and his three sons, Shem, Cham and Japhet, to hold in common. To buttress the point that this was still a community without individual private property, Selden cites Justin on the Age of Saturn, and Cicero's *De Officiis* and Ovid's *Metamorphosis* on the golden days. Although Selden does not give a detailed account of how private dominion came into being before the Earth's division among Noah's sons,[447] the fact remains that it is through a neutralisation of the established biblical *loci* that he presents all property as private. Instead of Grotius's *Mare liberum*, Lauterpacht could have cited Selden's *Mare clausum* to express his disagreement with nineteenth-century positivism and his agreement with the seventeenth-century lawyers who traced all public international law back to the expansion of private law, leaving no room for incompleteness and *non liquet*.[448]

Continuing his extension of Lactantius's comparative and historicising debunking of classical myths to Old Testament passages, Selden cites Gen. 10:5-25, and allocates the three

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"Secularization in *De iure praedae*." Cf. the contrast between Augustine's, Aquinas's and Calvin's reading of Exodus 32, another just war passage. In "Exodus 32 and the Theory of Holy War: The History of a Citation," *The Harvard Theological Review* 61:1 (1968), 1-14, Michael Walzer shows that a similar subversion of Augustine's reading by Aquinas "in effect denied the value of the citation altogether." He also argues that Grotius extended Aquinas's trick into "a modernist parody of the medieval argument about the Old Law." Walzer's account of Calvin's reading of Exod. 32 is also helpful here because it describes methods on which Grotius clashed with the Dutch Calvinists in *De iure praedae*. Compare Grotius, *De iure belli ac pacis*, I.ii.2.

At the same time, note the danger of overrating the analytical advantage of comparisons with Grotius's use of the same biblical reference in his various works, including the *Annotationes*. Carelessly made, such comparisons ignore the specificities of the works' context, and the instrumentality of exegetical decisions. See Walzer's well-taken warning in "Exodus 32," fn22.

[447] Though compare Gerrard Winstanley (1609-76) on common property coming from Genesis; and everyone carrying the same personalities. There are other similarities here with Selden, including Winstanley's view on the Fall ending the idyll, and starting demarcations of private property. Selden's connection between Noah and Janus is similar to Lancelot Andrewes (1555-1626), a friend of Grotius's, in *Apospasmiata sacra* (London, 1657), 3.

[448] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London, 1927), 72-87. Lesaffer, "Argument," 28.

sons to geographical regions over which they "settled themselvs as private Lords." To support this, Selden invokes disparate sources ranging from Josephus and Eusebius to Cedrenus and Zonaras.[449] Like Scaliger and Grotius, it is at crucial points in his argument that he prefers Greek administrators' history-books over Greek theologians, such as this State of Nature moment in his account of the rise of private property.[450] Selden asserts that Noah had private dominion, revived after the Flood in the same form it was granted by God to Adam (Gen. 1:2, 28). Both patriarchs had exclusive, full dominion over the world, which they divided and passed on voluntarily. This is consistent with Selden's earlier characterisation of accounts of idyllic communities as poetic depictions of magnanimity. Cain built a city called Enoch, and settled there. Commerce arose naturally, and in turn required contracts, judges, and boundary marks. Further divisions into smaller units of private dominion followed. Selden argues that universal law, whether natural or divine, neither proscribed nor prescribed but permitted both the emergence of numerous private owners, by the extension of the voluntary bequests of universal dominion-holders (like Adam and Noah), and the transformation of common rights to enjoyment into full-title dominion. Preparing his argument for exclusive British dominion over the seas, Selden thus concludes that universal law is not the source of private property.

Instead, it is popular consent that creates private property. By "the mediation of something like a compact, which might binde their posteritie," public goods turn into private properties. Things that are not public are possessed by first occupation, unless a nation's civil

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[449] *Dominion*, I.iv.19. Delano Smith, "Maps," C.D.S. and E.M. Ingram, *Maps.*

[450] It is at similar junctures in their train of thought, namely in reinterpretations of how biblical and patristic sources relate to contemporary questions of public law and especially imperial expansion, that Cujas, Scaliger, Selden and Bayle prioritise the authority of Constantine VII, the *Chronicon Paschale*, Cedrenus, Zonaras and other Byzantine administrators and historians, over Eusebius and other Greek-language authorities with a long exegetical tradition in the West. In addition to their historical interest, another reason for this wave of rereading and deploying imperial historians and administrators (some of whom were also clerics) is that theology takes a back seat in these books. Moreover, it is Greek, not Latin Christian theology, so even those who sought to maintain theology's epistemic dominance over all other disciplines were less likely to object to historical arguments based upon these sources. That said, Cujas, Scaliger, Selden, and others who fall into this trend often play off such sources against Greek theological *loci* that had an established exegetical tradition in Latin Christianity. Another reason for this new interest is that Byzantine historians and imperial administrators often offered Western Europeans an alternative history of the Roman Empire and its aftermath. It is one thing to figure out the strengths and weaknesses of the Roman imperial model when one is tracing Goths and the rise of feudalism, as Sigonius and Selden also do; it is quite another to look at the aftermath of 376 from the perspective of the tenth- or twelfth-century Byzantine Empire. See e.g. the wonderful chapters 27-29 in Constantine VII's *De administrando imperio* on the history of Venice and other city-states in Italy and Dalmatia.

It is as part of this trend to reconsider historical models of expansion and colonial administration, and the afterlife of the Roman Empire, without theological distractions of Augustinian providence and *translatio imperii*, that the Leiden Circle's and, in *Mare clausum*, Selden's use of *De administrando imperio* (*editio princeps* by Johannes Meursius, Leiden, 1611) relates directly to the theoretical and legal framework of early modern colonialism, including the strategies of choosing and justifying the right legal approach to barbarians and natives. It is in the same context that early modern imperialist thinkers drew on Cedrenus to construct a map and history of mankind's spread around the globe to fit their agenda, including for instance the allocation of Noah's sons and the derivation of national characteristics from them. The use of these central medieval Greek sources is a currently neglected chapter in the history of genealogical and imperial thought that runs straight to Montesquieu and Raynal. Note that Selden already displays intimate familiarity with these Byzantine sources in *Titles of Honor* (1614).

law appropriates them to the Prince.[451] Already in creating and structuring his distinctions, one finds Selden systematically precluding some anti-imperialist arguments, whether by appeal to universal laws governing public goods, or to *terra nullius. Res nullius* are shown to be open to seizure by reference to "the Laws and Customs of the *Hebrews* and *Mahometans,* as well as the *Christians,*" giving "*Misna & Gemara utraque tit. Baba metzia cap. I. & Maimonides tit. Zachia Wemishna cap. I.*," and "*Alcoran. Azoar. 12. de venatu; & Azoari 34.*" in support.[452] In later editions of *De iure belli ac pacis*, at II.ii "De his quae hominibus communiter competunt," Grotius referred to "Selden, the glory of England" and this passage as evidence that Selden found for explicit agreements to transform common into private property.[453] Grotius's celebrated reformulation of both *ius naturae* and *ius gentium* with a pragmatic view to imperialism owes the discovery and occupation of this patch of common ground to Selden.

Selden next directly squares up to the problem of transmission from the original community of property to a state of private ownership. In a speculative tone he posits that original title to *terra* and *res nullius* must have belonged to all mankind; therefore there must have been an original contract of some kind that instituted not so much property as the laws relating to its division, inheritance, and acquisition. This is why Grotius was right to locate the origin of property in express agreement for division, and in tacit agreement for seizure or first occupation.[454] As divine universal law and natural law are both permissive with regard to property, national variations could lawfully emerge after the world was divided into private dominions.[455]

> But by virtue of that Universal Compact or Agreement (before mentioned) whereby things not yet possessed, were to becom the Proprietie of him that should first enjoie them by Occupation; hee that shall so possess them by Occupation, receiv's the Island and Building as it were by a Surrender of Right from former Owners.[456]

Unlike the universal and natural bodies of permissive positive law, the "due observation of Compacts and Covenants" remains a universal obligatory law that continues to underpin the permissive developments in property law, including division, inheritance, original occupation

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[451] *Dominion*, I.iv.19-21.
[452] *Dominion*, I.iv.22.
[453] *De iure belli ac pacis*, II.ii.v.122 in the 1642 Amsterdam edition, author's note. Tr. in ed. Richard Tuck (Liberty, 2005), 426.
[454] *De iure belli ac pacis*, II.ii §2.
[455] *Dominion*, I.v.24, I.vi.41, I.xxi.130.
[456] *Dominion*, I.xxi.130.

and, if so provided in a given state, even appropriation of still undiscovered lands to the Crown.[457] According to Selden, permissive development and obligatory observance of contracts fully account for the regulation of property in both land and sea. One of several sets of evidence for this is the assignment of sea as a boundary to land, as seen in Julius Africanus (from Eusebius's *Chronicle*) for the Sons of Cham.

V.2.2.2 Sources of law: Samaritan Pentateuch vs. established legal *loci*

Selden's next example for the permissive positive law of private property is the land of the Canaanites, within the land of the Sons of Cham, described as stretching from the Nilus to the Euphrates "*and unto the utmost Sea,* or the *remotest,* which is the great or Western Sea.*"*[458] By the latter Selden means not the Dead Sea, but the Persian Gulf. His source is a manuscript of the Samaritan Gen. 10:19 and Deut. 34:3. The cited "*and unto the utmost sea"* is from the latter verse, changed erroneously to 34:2 in Nedham's translation. Conventional biblical geography locates Cham's lands in the Fertile Crescent and limits the Canaanites to modern-day Israel, just stretching into Jordan at the city of Lasha, as mentioned in Gen. 10:19. By replacing the Jordan with the Euphrates as the other river, beside the Nile, which bordered Canaanite territory, Selden ascribes the whole Fertile Crescent to them.[459] The deliberateness of this shift is confirmed when Selden continues by describing the land assigned to Japheth's Sons as being outside the Fertile Crescent, citing Num. 34:6-7 and 34:12 (to which Nedham adds 34:3-5). However, as Num. 34:2 explicitly refers to Canaan, these passages are conventionally interpreted to do likewise. Selden points out that Josh. 15 (:1-5) gives the same description of a region that was parceled out by Joshua; but he fails to mention that this account applies to the land of Judah's progeny, instead. Selden's final biblical support in *Mare clausum*, I.v for using seas as territorial boundaries is Ps. 72:8. Although the best support for his argument, it is the only one that Selden simply includes in the marginalia, without discussion. Nedham's changes can be interpreted as not a combination of mistakes and additions, but attempts to steer *Mare clausum* back toward conventional sacred geography.[460]

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[457] *Dominion*, I.v.24-5.

[458] *Dominion,* I.v.25.

[459] On a secondary level this also broke the link between some views of Eden and Canaan. Calvin, for instance, thought that Eden lay between the Tigris and the Euphrates. Shalev, *Sacred Words*, 168fn73.

[460] For a great survey definition of this term see Shalev, *Sacred Words*, 4-6. For Montano's "Phaleg," interpreting Gen. 10 to reconstruct the spread of mankind after the Flood, see Shalev, 57-8. Like Montano and Selden, Samuel Bochart's (1599-1667) *Geographia Sacra seu Phaleg et Canaan* (Caen, 1646) also builds a geneaology of nations and a reconstruction of their migrations on exegeses of mostly Gen. 10. Peter N. Miller, "The 'Antiquarianization' of Biblical Scholarship and the London Polyglot Bible (1653-57)," *Journal of the History of Ideas* 62:3 (2001), 463-82. Shalev, *Sacred Words*, ch. 4. Bochart was one of Erpenius's students.

Mare clausum, I.vi is a much longer chapter dedicated to showing "That the Law of God, or the Divine Oracles of holy Scripture, do allow a private Dominion of the Sea. And that the wide Ocean also, which washeth the Western Coast of the holy Land, or at least a considerable part of it, was, according to the Opinions of such as were learned in Jewish Law, annexed to the Land of Israël, by the Assignation or appointment of God himself." This historical statement, and its use in Selden's treatise on closed seas, is an important part of the thread we follow through Cunaeus's, Harrington's and others' reconstructions of biblical Israel, and the uses to which they put these reconstructions to argue for or against seventeenth-century constitutional reforms concerning the agrarian, armed, commercial, and maritime reform of England and the United Provinces.

Selden's use of the Samaritan Pentateuch for Genesis and Deuteronomy here is striking not only for his revision of sacred geography. Although Jerome, Eusebius, Diodorus of Tarsus, Procopius, Cyril of Alexandria, Syncellus and others used and cited this Pentateuch, it gradually fell into oblivion in the West. Scaliger reasserted the Samaritan Pentateuch's importance in *De emendatione temporum* (1583), but his own prized manuscript was the Samaritan Chronicle, not the Pentateuch.[461] Peiresc tried to obtain a copy, but the ship carrying it was captured by pirates.[462] In modern times the first complete copy, dating from 1345/6 CE and known now as Codex B, was finally acquired in 1616 in Damascus by the redoubtable Pietro della Valle (1586-1652) and sent by M. de Sancy, then French ambassador to Constantinople, to the Oratorians in Paris in 1623. Its *editio princeps* is by Joannes Morinus (1591-1659) in LeJay's 1628-45 Polyglot (in vol. 6, 1645), from which Walton's famous Polyglot reproduced it in 1657.[463]

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[461] Grafton, *Scaliger.* Leiden's first Samaritan Pentateuch manuscript is from Jacobus Golius's collection, registered in the Leiden University Library in 1629, now known as Or. 6. Based on a letter from Golius, Gassendi published this catalogue in 1630 (P. Gassendi, *Catalogus rarorum Librorum...* [Paris: Antonius Vitray, 1630]). See J.J. Witkam, *Inventory of the Oriental Manuscripts of the Library of the University of Leiden* (Ter Lugt, 2007), I.11, 17. When Golius acquired it, and whether Or. 6 was in the Library or kept by Golius in his house (despite being purchased with University funds) before it was auctioned off by his successors in 1696, remain to be seen. See the discussion in J.J. Witkam, *Jacobus Golius (1596-1667) en zijn Handschriften* (Brill, 1980). On balance, Golius probably acquired it on his 1625-9 Oriental travels (i.e. when or just after Ussher obtained his copy) rather than on his first visit to the East in 1622 with the Dutch embassy to Morocco.

[462] P.N. Miller, "A Philologist, a Traveller and an Antiquary Rediscover the Samaritans in Seventeenth-Century Paris, Rome and Aix: Jean Morin, Pietro della Valle and N.-C. Fabri de Peiresc," in H. Zedelhaimer & M. Mulsow (eds.), *Gelehrsamkeit als Praxis: Arbeitsweisen, Funktionen, Grenzbereiche* (Tübingen, 2001), 123-146. Avner Ben-Zaken, "From Naples to Goa and Back: A Secretive Galilean Messenger and Radical Hermeneutist," *History of Science* 47:2 (2009), 147-74.

[463] These editions are now regarded as somewhat unreliable. Gen. 10:19, the first passage Selden cites from the Samaritan Pentateuch, was deemed by as near a contemporary as Leclerc to have been altered by a critical hand. *Comment. in Pentateuch, Index, ii.*

For a description of the Walton polyglot in the context of the others see Adrian Schenker, "The Polyglot Bibles of Antwerp, Paris and London: 1568-1658," 774-84 in ed. M. Saebø, *Hebrew Bible/ Old Testament: The History of its Interpretation,* Vol. 2 (Göttingen, 2008), esp. 779-81. The project for this Polyglot was conceived by Cardinal du Perron and Jacques de Thou. Morin was invited in 1628. P. Gibert, "The Catholic Counterpart and Response to the Protestant Orthodoxy," in Saebø, *Hebrew Bible,* 758-73, at 768. Miller, "'Antiquarianization.'"

The Samaritan Pentateuch played several roles in political and legal controversies until the nineteenth century. It was understood that the Samaritans arose from Jewish and Gentile intermingling, and that Jews and Samaritans entertained cordial hostility to one another.[464] Samaritans rejected all Jewish sacred texts except the Pentateuch, and raised a temple on Mount Gerizim to worship according to Mosaic law. It was popular among early modern biblical scholars to argue that the mutual hostility between Samaritans and Jews stopped all interaction; therefore the insignificance of textual variants between the Torah and the Samaritan Pentateuch was another proof of Moses's authorship and the text's faultless preservation through the millennia.[465] Others focused on the differences and turned them to sectarian use.[466] (Unusually, Selden rejected the historical accounts of this hostility, thereby avoiding this controversy.) In his edition, Morinus praised the Samaritan Pentateuch and even the Greek Septuagint at the expense of the (Hebrew) Masoretic text, and joined to this eclectic reprioritisation of sources a systematic attack on Protestant biblical exegesis. Many contemporaries recognised the extremity of his view. Their impression was confirmed by the posthumous and often reprinted *Exercitationes biblicae de hebraeici graecique textus sinceritate* (1660) where Morinus, following and going beyond Louis Cappel (1585-1658), demolished the theory that the Hebrew text, including the vowel points, remained unchanged and uncorrupted since Moses.[467]

Cunaeus was a professor law at Leiden when Grotius, his former fellow student, asked him to respond to *Mare clausum*. Though nothing came of this, it is worth noting Cunaeus's contribution to the re-evaluation of the Samaritans that occupied many scholars after the humanist clarion call of *ad fontes* and the Protestant embrace of *sola Scriptura*. In his 1617 *De republica Hebraeorum,* reissued in Elsevier's famous *petites républiques* series in 1631, Cunaeus described the Samaritans as neither idolators nor proto-Protestant believers who stayed closer to the true religion than the Jews, but a mixed bag of Gentiles, confused colonists, and inept syncretists.[468] One can read Selden's defence of the Samaritans, and his unusual denial of Jewish-Samaritan animosity, as a rehabilitation of the value of religious syncretism during colonisation.

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[464] The usual early modern reference for this trope of Jewish-Samaritan hostility is Flavius Josephus. As he does with the Druids in his "Notes on Fortescue," Selden positions Flavius as a lawyer. *Dominion*, I.xxiii, 149. Nedham describes the Druids as in charge of the republican education of children. *Excellencie*, 93.

[465] Toomer, *Selden,* 245. This is another context in which the radicalness of Grotius's stance on the same issue in *De veritate* becomes apparent. See "The Bible's textual integrity," Section 5.1 in chapter IV above.

[466] E.g. Johann Heinrich Hottinger (1620-67) derived Protestant justifications from the Samaritan Pentateuch in *Exercitationes Anti-Morinianae* (Zurich: Tiguri, 1644). Also see Noel Malcolm, *Aspects of Hobbes* (Oxford, 2002), 418-9.

[467] Gibert, "Catholic.." Shalev valuably names this "the 'Cappel' turn." Sacred Words, 201.

[468] *De republica Hebraeorum libri III* (Elzevier, 1617), II.16, 17.

We established the importance of the Samaritan Pentateuch in Selden's innovative construction of the aetiology and law of global property rights. How does Selden fit into these controversies, and where did he get his references from? As discussed above, dating parts of *Mare clausum* is complicated by the fact that the initial draft and the 1616?-19 version (cleaned up for Buckingham and James VI/I and perhaps improved until 1621) are lost. Selden may have left the manuscript lie fallow until 1630. Despite the abovementioned evidence of his re-engagement with the text, including Bourgchier's June 1630 letter to Ussher, we can only speculate about Selden's expansions and revisions before the first publication, in 1635. Comparing the two editions of *Titles of Honor* in detail is one way of trying to narrow the gap between 1621 as *terminus a quo* and 1630 as *terminus ad quem* for the start of Selden's revision.

Another, tentative way is to examine possible inspirations for his incorporation of the Samaritan Pentateuch into *Mare clausum*. The two main possibilities are Ussher in or after 1622, and Morinus around 1631. Morinus studied at Leiden before converting to Catholicism, joining the Oratory, and taking orders. He visited England in 1625 in the retinue of Henrietta Maria. Beyond these and similar tenuously possible personal connections, Selden's source could also have been Morinus's 1631 *Exercitationes ecclesiasticae in utrumque Samaritanorum Pentateuchum,* even though it predates the Samaritan Pentateuch's *editio princeps*. Furthermore, Selden occasionally shares Morinus's distinctive hierarchy of sources, mentioned above. In addition to the preference for the Samaritan Pentateuch over others, in *Mare clausum*, I.vi Selden attributes greater credibility to the Greek translation of Esther than to the Hebrew version, before he returns to Num. 34:5 and offers his own translation from the Hebrew of *erunt exitus ejus in Mare*, instead of the *magni maris littore finietur* of Jerome.[469] The Greek translators, he continues, provide a superior text to the Hebrew original because they follow the Samaritan Pentateuch, "after their usual manner."[470]

Despite features in common with Morinus's work after 1631, Selden's substantive engagement with the Samaritan Pentateuch probably began with his exchanges with James Ussher (1581-1656), who had a considerable interest in this source. Eventually Ussher acquired six copies of the Samaritan Pentateuch, of varying quality, and attempted to arrange for a Protestant edition and publication before Morinus's. Ussher also generously provided extracts, lists of variants, transcripts and even loans of his copies to other scholars, including Loius de

[469] Except Selden transposes Jerome's "maris magni".
[470] *Dominion,* I.vi.32.

Dieu in 1629,[471] and of course Selden. In a letter to Selden, dated 16 April, 1622, Ussher writes that he is eager for news from France concerning an edition of the Samaritan Pentateuch.[472] This letter is a reply to Selden's from 24 March, 1621/2 OS. Selden's letter begins with an apology for not returning Ussher's *Nubiensis Geographiae,* presumably al-Idrisi's *Nuzhatul Mushtaq*, a twelfth-century book of travels and systematic geography, translated and abbreviated from a Marionite version and published in Paris in 1619 with a short appendix on Arabian cities, geography, history, manners, languages and religions.[473] The unadorned tone, lack of introduction, and references to prior business make it clear that this is not Selden's and Ussher's first exchange.[474] Toomer dates their acquaintance and mutual, life-long admiration as early as 1609, but it is unclear whether 1622 was the first time they discussed the Samaritan Pentateuch specifically.[475] On balance, we can assume that Selden developed his remarkable role for the Samaritan Pentateuch before 1631. Another piece of circumstantial evidence for Selden's access to parts of the Samaritan Pentateuch before Morinus's edition is the end of Selden's 1631 *De successionibus,* ch. XXIV, entitled "Discrepantes Pentateuchi Samaritani, in Legibus de Iure successionis, Lectiones, quae ab observationibus ac interpretamentis aliquot Magistrorum sunt dissonae." It is a short, three-page but trenchant exposition on the Samaritan Pentateuch's significance.

However, it is worth noting that while Ussher's, like Scaliger's, interest in Samaritan sources was chronological, Selden's use of the Samaritan Pentateuch in *Mare clausum* is closer to Grotius's neutralisation of the Bible in legal debate in *Mare liberum*. The similarity between Selden's and Grotius's legal, rather than chronological interest in the diverse biblical exegetical traditions also suggests that it is worth keeping open the possibility that Selden revisited the *Mare clausum* draft before 1630. 1625 saw the appearance of Grotius's *De iure belli ac pacis*. In parts of *Mare clausum*, Selden used *De iure belli ac pacis* to refute Grotius's own *Mare liberum*; therefore he certainly revised his draft between 1625 and *Mare clausum*'s first appeareance in

[471] Letter CLIV in ed. Elrington, *Works of Ussher*, XV.451-3. Cited in J.G. Fraser, "Ussher's Sixth Copy of the Samaritan Pentateuch," *Vetus Testamentum* 21:1 (1971), 100-2, at 100. Interestingly, Fraser conjectures that Ussher's sixth copy passed from de Dieu to Denis Nolin at the same Paris Oratory where Morinus worked, and is currently known as MS Samaritan 4 of the Bibliothèque Nationale.

[472] Ed. R. Parr, *The life of the most Reverend father in God, James Usher […] with A collection of three hundred letters […] collected and published […] by Richard Parr* (London: Nathanael Ranew, 1686), Letter XLIX, 81. The *Life* and the *Letters* are paginated separately, and the *Letters'* pagination is erratic.

[473] M. ibn-Muhammad al Idrisi, *Geographia nubiensis: id est accuratissima totius orbis in septem climata divisi descriptio* (ed. and trans. G. Sionita and J. Hesronita; Paris: Hieronymus Blageart, 1619), an abbreviation and translation of *Kitab nuzhat al-mushtaq fi'khtiraq al-'afaq* (twelfth century CE). Selden cites this work in *Dominion,* I.vi, 37; I.xxii.137; etc.

[474] Selden's letter is XLVI in Parr, *Usher,* 78-9.

[475] Toomer, *Selden*, 804.

1635.[476] Moreover, had his opening discussion of private property been inserted earlier, then the whole *Mare clausum* would have required a serious structural transformation. The key role of *De iure belli ac pacis* in *Mare clausum*, I.iv, and of the Samaritan Pentateuch in I.v-vi, both suggest that the Samaritan Pentateuch sections were put in after 1625. At the same time, the neutralisation of the Bible that Selden develops in *Mare clausum*, I.v-vi, using the Samaritan Pentateuch (which he discussed with Ussher at least as early as 1622), is so close to *Mare liberum* that it is worth keeping an open mind about the possibility that Selden had recognised the potential of the Samaritan Pentateuch for a new argument on private property already before 1625. Another avenue worth pursuing is Ussher's reference: what made him expect a French edition in April 1622, before della Valle's copy reached Paris?

Another clue for a pre-1631 (if not pre-1625) revision comes from Selden's 1628 edition of the *Marmora Arundelliana.* This description and academic apparatus for the Arundel Marbles was eagerly awaited throughout the republic of letters. By 1625 Ussher owned a manuscript Samaritan Pentateuch that he hoped to have someone edit and publish. As Selden was preparing *Marmora,* he asked Ussher for the Samaritan Pentateuch variants for Gen. 5 (the genealogy from Abraham to Noah) and Gen. 11 (the Tower of Babel). As Toomer points out, these passages seem to "have no relevance to anything in the Marmor Parium."[477] Selden may have been planning a broad chronological introduction that he later abandoned or, alternatively, he may have been revisiting the 1618/9 *Mare clausum* draft and constructing the stages in the biblical accounts of the transformation of universal rules of dominion, including Noah and the Tower of Babel. In any case, Ussher's learned reply concerning the Samaritan Pentateuch was gratefully acknowledged in the *Marmora* – which also contains excerpts from the Samaritan Pentateuch. Ussher expressed his hope that Selden could have Samaritan types made for these excerpts and use them for a pioneering Protestant edition of the Samaritan Pentateuch. When this failed, he sent a manuscript to de Dieu in Leiden.[478] That attempt also failed and, as we saw, the eventual *editio princeps* was Morinus's contribution to the Paris Polyglot Bible.

Merely publishing the Samaritan Pentateuch, let alone attributing authority to it, remained highly contentious in England, as well as on the Continent, in Selden's time and long after his death. Selden's use of the Samaritan Pentateuch, his claim for its superiority in *Mare*

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[476] E.g. in *Mare clausum*, I.xxvi Selden explicitly mentions, compares, contrasts, and responds to both *Mare liberum* and *De iure belli ac pacis*. *De iure belli ac pacis* is mentioned many times, incl. *Mare clausum*, II.ii. Other interactions are detailed above. Richard Tuck, *Natural*, 86 shows that *Mare clausum* is a response to *De iure belli ac pacis* as much as to *Mare liberum*. Also see Fulton, *Sovereignty,* 348-9, and Christianson, *Discourse,* 249.

[477] Toomer, *Selden,* 364.

[478] Toomer, *Selden,* 806.

clausum, and his radical reformulation of property as not communal but *ab initio* private, should be seen in this context. A case in point is Walton's great Polyglot, in many ways a fruit of the work of Selden, Pococke and Ussher on the Samaritan Pentateuch.[479] Selden and Ussher were the key early patrons of the project. Ussher, Pococke and many of Selden's friends, allies and admirers, including John Lightfoot and Patrick Young, made direct contributions to this Polyglot. The first volume appeared in 1654, the year Selden died.

Walton justified the inclusion of the Samaritan Pentateuch in a critical overview of the textual traditions in his famous Prolegomena to the Polyglot, originally published in 1657 but also reprinted separately for almost two centuries. Indeed, the inclusion of this source was another reason why the Vatican placed Walton's Polyglot on the *Index Librorum Prohibitorum*, while the nonconformist John Owen (1616-83), among others, accused Walton of aiding atheism. Walton's rejoinder to Owen, *The Considerator Considered* (1659), details his reliance on Selden's manuscripts and help, and again addresses and defends the use of the Samaritan Pentateuch.[480] Unlike Selden in *Mare clausum*, Walton regards the Samaritan Pentateuch as inferior to the Hebrew in terms of divine inspiration. At the same time, he demolishes Owen's objections to the Samaritan Pentateuch's use, namely that the Samaritans' true knowledge of the pristine version of the Torah, their creation of a rival temple on Mt. Gerizim, and early Christians' use of the Samaritan Pentateuch, are unhistorical fabrications. Walton even defends the Samaritans from the Rabbis he cites in the Prolegomena, who "out of their innate hatred they forge many calumnies and untruths against them."[481] To Owen's proposition that no copy of the Samaritan Pentateuch survives, Walton counters that he himself consulted one that belonged to a Samaritan priest in Damascus "about four hundred years ago."[482]

In light of these loaded debates surrounding the Samaritan Pentateuch, Selden's reliance on the Samaritan version of Gen. 10:19 and Deut. 34:3 is indicative of both his philological and non-sectarian self-positioning, especially in an applied legal work like *Mare clausum*.[483] Unlike hundreds of seventeenth-century sects and thinkers, Selden avoided

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[479] *Biblia Sacra Polyglotta, complectentia Textus Originales Hebræum (cum Pentateucho Samaritano), Chaldaicum, Græcum, Versionumque Antiquarum, Samaritanæ, Græcæ lxii. Interp., Chaldaicæ, Syriacæ, Arabicæ, Æthiopicæ, Persicæ, Vulg. Latin. quidquid comparari poterat. Cum Textuum et Versionum Orientalium Translationibus Latinis. Cum Apparatu, Appendicibus, Tabulis, variis Lectionibus, Annotationibus, Indicibus.* Levitin argues that "the very idea of a polyglot implied that the existing biblical texts were by themselves insufficient, and that a critical-philological approach was necessary to get closer to an original version. This contradicted the exegetical rules set out in the sixteenth century on both Protestant and Catholic sides." "From Sacred History," 1125.

[480] B. Walton, *The Considerator Considered* (London: Thomas Roycroft, 1659; repr. in H.J. Todd, *Memoirs of the Life and Writings of the Right Rev. Brian Walton…*; London, 1821), IX.viii-xi,

[481] Walton, *The Considerator Considered*, II.1-351, at 191.

[482] Todd, *Memoirs,* II.193.

[483] The pecularity of this move is also pointed out by Toomer, *Selden,* 398. The Samaritan Pentateuch had about 6,000 differences from the Masoretic text: Levitin, "From Sacred History," 1126.

replacing one mythic text with another and placing equal emphasis and legitimacy on his favoured alternative.[484] His reliance on the Samaritan Pentateuch to redraw sacred geography and reformulate the origins of private property effectively side-stepped contemporary uses of the Bible in imperial debates. Had Selden proceeded to trace a genealogy of the British back to one of Noah's sons, like many French lawyers did for the French, he could have easily constructed biblical justifications for the claim that Britain and Britain alone ended up – through inheritance, for instance – with full dominion over the seas. This, however, would have made him a chosen nation theorist, albeit of an expansionist, imperialist variety.[485] Instead, Selden made the biblical foundation of his account of property critical of existing biblical imperialisms, yet so contentious as to be unusable for chosen nation arguments, before he proceeded to build the justification of closed seas on carefully chosen aspects of Roman law.[486] From the perspective of the legal issue under consideration – sovereignty over the sea and Dutch *versus* British rights of passage and fishing – one should note that William Welwod criticised Grotius's *Mare liberum* for its treatment of the Bible as a source of law on par with pagan sources.[487] Selden's *Mare clausum*, supposedly in the same political camp as Welwod's *Abridgement*, was unlikely to be seen as more orthodox.

In sum, in *Mare clausum*, I.v-vi Selden went to great lengths to establish biblical evidence for the use of seas as boundaries within which dominion applies, and then to make this biblical evidence as radically different as possible from the biblical exegeses used in the established framework of legal disputation over territorial sovereignty; and finally to make the equation of the boundaries with the territory, which is his clinching argument for possible dominion over the seas and which he derived from his unique biblical exegesis, depend not on established biblical, but on new and tangential biblical texts, and Roman legal commentaries. As the Samaritan Pentateuch has just become available for insertion into legal reasoning, Selden's choice signaled that he regarded his treatment as original and previous treatments (and therefore the conventional applications of the Bible to this issue) as inadequate, and that his interpretation was deliberately as controversial as possible. Had this not been his intention, he could have chosen to position his argument in the existing framework of the Christian legal

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[484] Geoffrey of Monmouth's *Historia Regum Britanniae* (1136) shaped centuries of mythological, at best quasi-Christian English identity claims, usually centering on Brutus, a refugee from the Trojan wars. Selden explicitly makes fun of this and similar claims and adds: "Scare indeed is there a nation in Europe, whose deduction from a like name of the first autor, is of sufficient credit." "Notes upon Fortescue," 16. See also Selden's hostility to 'Druidic' claims to British *prisca theologia*.

[485] For such seventeenth-century English examples see Armitage, *Ideological Origins*, 81-90, i.a. on Samuel Purchas (1577?-1626).

[486] Cf. Grotius's techniques for neutralising the Bible in *De iure praedae*, in Somos, *Secularisation,* chapter V.

[487] Welwod gave Christian theology a prominent role in his legal doctrine. British rights over fisheries were proven from divine ordainment, etc. Fulton, *Sovereignty,* 355. Ford, "Welwod's Treatises."

tradition, engaging the arguments by Cajetan, Vázquez, Vitoria, Freitas, Welwod or others through a philological disputation of the well-established biblical *loci* that these lawyers used to frame the debate concerning the use of seas as boundaries. Instead of putting the Samaritan Pentateuch variants to such polemical use, on this key issue he replaced all other versions (Hebrew, Greek, Latin) with it.[488]

V.2.2.3 Non-transferability

On such contentious biblical foundations, Selden argues that seas have long been used to define territory. This becomes particularly important when, like Cunaeus and later Harrington, he identifies a range of reasons for the non-transferability of the biblical chosen nation. They include the uniqueness of Jerusalem, the abrogation of Old Testament laws after Jesus, irreparable legal discontinuities already in the Old Testament between God's divine polity and its successors, and other reasons why God's commands to the Jews cannot be translated to territories outside the Holy Land. The Sabbath, tithes, and other "precepts and laws belonging to the Land of Israël" likewise lose force elsewhere.[489] This method of refuting all medieval and early modern chosen nation claims is based on identifying and emphasising a compelling number of discontinuities and non-transferabilities of legitimacy in the Bible itself, often drawing on claims of exclusivity and uniqueness in the Old Testament. The secularising implications of this refutation of all 'chosen nation' claims are tremendous, as we already saw in Cunaeus, and shall come back to again with Harrington. In Selden's case, aside from neutralising competing claims to wholly or partly religious legitimacy, it also made *Mare clausum* an equally semi-useful double-edged sword for James VI/I, Charles I, Cromwell, and Charles II, who all often had to walk a fine line between surrendering their imperial agenda to those who supported them on some form of the chosen nation theory, and between alienating such supporters. Like Grotius in *De iure praedae, Mare liberum, Defensio Maris Liberi,* and *De veritate*, Selden actively subverted the biblical foundations of established legal discourse. This *leitmotiv* runs from at least *The Historie of Tithes* (1618) to *De iure naturali* (1640). It is also a

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[488] Delano Smith and Ingram showed that including maps in Bibles was primarily a Protestant, not a Catholic practice in the sixteenth century. *Maps in Bibles.* Shalev agrees and adds welcome nuance to this finding in *Sacred Words*. The point is that Selden's sacred geography – not discussed in either of these books – is notable for his conscious effort to distance himself from both. A confirmation of this picture of secularising sacred geography is that it remains valid to understand Bochart's sacred geography as Protestant (Shalev, 146ff.) largely because he broke with both Selden and Scaliger (Shalev, 176-8, 187-90.)

[489] *Dominion*, I.vi.34-39; *passim*. Legal discontinuities of paying tithes to the priests already occur within the Bible, therefore seventeenth-century claims of divine legitimacy are unfounded: *The Historie of Tithes* (1618), chapter II. Compare Cunaeus, *De republica Hebraeorum*, I.ix-xi and *passim*. For the same in Grotius see Somos, *Secularisation*, chapter V. For Harrington, see chapter VII below. Similar discontinuities in Selden's *De iure naturali* and their influence on Chief Justice John Vaughan (1603-74) are described in Rosenblatt, *Renaissance*, 235-7.

major factor in *Mare clausum*'s influential legal support for the maritime component in British sovereignty and imperialism.

V.2.2.4 Natural-permissive: the unreasonable and irreligious common law of nations

Book I, chapter vii of *Mare clausum* is about method. Therein Selden constructs an extraordinary source for what he calls the natural-permissive law, or common law of nations. He showed earlier that positive laws, whether divine or natural, permit private dominion over the sea. The right use of reason (*recto humano rationis*; *rectum Humanae rationis*, *Mare clausum* I.29) reveals these laws. He now wants to show that natural-permissive laws, where reason has no place, equally permit private dominion over the seas. Selden clarifies and strengthens his distinction between these types of law by explaining that customs of several nations, which constitute the source of natural-permissive laws, are arbitrary, haphazard, and unrelated to reason. Correct natural-permissive laws can be deduced from an observation and comparison of customs, which vary across nations and the ages.[490] Religious truths, however, cannot. After citing Antisthenes from Cicero's *De natura deorum* I, "that there are many national gods, but only one natural," Selden continues,

> So that as of old in the *Jewish* Church, so also in the *Christian*, the use of humane Reason among the vulgar, though free in other things, yet when it dived into the contemplation or debate of Religious matters, it hath often been most deservedly restrained, by certain set-Maxims, Principles, and Rules of holy Writ, as Religious Bolts and Bars upon the Soul; lest it should wantonize and wander, either into the old Errors of most Ages and Nations, or after the new devices of a rambling phansie. And truly, such a cours as this hath ever been observed in Religious Government.[491]

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[490] See also Selden, "Notes upon Fortescue," to chapter XVII, 7-22, esp. 17-19, incl. "all laws in generall are originally equally ancient. All were grounded upon nature, and no nation was, that out it took not their grounds; and nature being the same in all, the beginning of all laws must be the same. […] But the divers opinions of interpreters proceeding from the weaknesse of mans reason, and the several conveniences of divers States, have made those limitations, which the law of Nature hath sufferd, verie different. And hence it is that those customs which have come all out of one fountain, *Nature,* thus varie from and crosse one another in severall Commonwelths." The unique features of a civil society, and the state erected from it, determine what limitations are imposed on natural law. Natural laws thus limited are a state's civil laws. Unlike in *Mare clausum*, however, in these 1616 Notes Selden argues that antiquity is no proof of superiority. 20: "Little then follows in point of honor or excellency specially to be attributed to the laws of a Nation in generall, by an argument thus drawn from difference of antiquitie, which in substance is alike in all. Neither are laws thus to be compar'd. those which best fit the state wherein they are, cleerly deserve the name of the best laws." Next, Selden refutes arguments based on Roman law's antiquity, showing how it was forgotten, then rediscovered under Lothar. He refers back to *Titles of Honor* for the detailed argument.

[491] *Dominion*, I.vii.43.

Since religious lawgiving is necessary, and works by putting bolts and bars upon the soul to regulate behaviour, all religious laws must be ignored when one sets out to discover natural-permissive law. Reason must likewise be ignored, because religious lawgivers are correct about reason being fallible. All that is left to deduce natural-pemissive law from is history.[492] From history one can glean the common law of nations by examining customs, which in turn might be best reflected in bodies of civil law – as long as these are not religious. With reason, religion, and antiquity shown to be unreliable sources, one wonders what natural law Selden allows for.[493]

Yet on closer inspection, the permissive natural laws that regulate non-religious affairs are not much simpler, either. Selden reverts to the skepticism we find in *The History of Tithes* when in *Mare clausum* he cites Justinian and Gaius, who posit a "natural reason" that manifests in the law of nations, followed by all.[494] Selden retorts: where are these nations, which laws are in common, and how can natural reason accommodate the necessary evolution of laws? For instance, landbound states have no customary law that informs the natural law of the sea; and the enslavement of prisoners is no longer practised by Christians, though it is by Muslims. No law can be reliably gathered from inspecting and comparing the customs of nations.[495] Selden's skepticism is unlike Montaigne's, Charron's, or their many readers'. From accounts of civilisations radically different than their own, including ancients and *in extremis* cannibals, they stoically surmised the contingency of their moral and religious norms.[496] Selden's maxim in *Mare clausum* about the inapplicability of laws derived from comparing however many civilisations belongs not to this brand of early modern skepticism, but to the rise of a body of affirmative, imperialist positive law of nations, justified, as we will see, with reference to the best legal practices in historical situations and nations that Selden deems civilised. Selden's claims in *Mare clausum* that legal history shows that British common law applies globally follow from this skeptical blow to natural law. It was appreciated by Selden's

[492] Compare Scaliger's elevation of history into a master discipline, and its effect on the Leiden Circle, including Grotius, as discussed in Somos, *Secularisation.*

[493] Tuck, *Natural Rights*, 84-85 and 95, for the secularising implications of this move, both in terms of Erastianism and vacating divine law.

[494] John Selden, *The Historie of Tithes…* (London: William Stansby, 1618), Preface xiii, and *passim*.

[495] *Dominion*, I.vii.43-5.

[496] M. Montaigne, "On cannibals," in *idem*, *Essays* ([1580] London, 1958), 105-19. M. Hodgen, *Early Anthropology in the Sixteenth and Seventeenth Centuries* (Philadelphia, 1964), pp. 358-382. Anthony Pagden, *The Fall of Natural Man* (Cambridge, 1986), 1-14, 27-38, 51-103, 114-135. Richard Tuck, *Philosophy and Government, 1572-1651* (Cambridge, 1993), chapters 2-4.

non-English followers as such when they adopted his reasoning to vindications of their own exclusive dominions over the sea.[497]

The importance of this point cannot be overemphasised. It is often noted that the fifteenth century saw a shift away from Christianity due to lawyers' invocation of Roman law as the model for, virtually the entire content of, reformulated natural law. [498] Three well-known instances are the genealogical and analogical connection stipulated between private and public property and contract; occupation of *terra nullius*; and acquisitive prescription. *Non liquet* may be added to these three cases of Roman law being used to distance early modern natural law from Christian dogma. Many, including Grotius, argued that international law arose from Roman private law.[499] Related to this development, it has also been argued that the Renaissance and early modern resurrection of the Roman law gradually institutionalised an advantage for strong unitary sovereignty.[500] Though somewhat liberating from post-Reformation Christianity, the model and laws of ancient Rome could become stifling. As Lesaffer points out,

> With time, the writers of the modern law of nations as well as their civil law counterparts became more critical of Roman law and found more instances of situations in which Roman law did not provide the most reasonable or just solution. A new criterion for the application or not for Roman law emerged: reason. Though Roman law often proved to encompass this, it not always did.[501]

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[497] This is a key part of the legal theory that matched – whether caused or was caused by may be a moot point – the role common law played in the evolution of colonial legal systems. Common law, it is often pointed out, seems to have an elective affinity with the recognition of custom, flexibility, and adaptative mechanisms required to create and sustain colonies. For its role in American colonialism see Jack Greene, "The Cultural Dimensions," 15-21.

[498] P.C. a Vlissingen, *De evolutione definitionis juris gentium: Studium historico-juridicum de doctrina juris gentium apud Auctores Classicos Saec. XVI-XVIII* (Rome: n.a., 1940). Laurens Winkel, "Problems of Legal Systematization from *De iure praedae* to *De iure belli ac pacis,*" in Hans Blom (ed.) *Property, Piracy and Punishment* (Brill, 2009), 61-78, esp. 73-74.

[499] Famously, this inspired Hersch Lauterpacht. Schmitt points out that the early modern lawyers who handled the problem of land appropriation along these lines missed the point that unlike the French, Dutch and English conquests, the Spanish "was not at all private and, to this extent, was purely a matter of public law." Carl Schmitt, *The Nomos of the Earth* (New York, NY: Telos, [1950] 2006), 138 n7. Lesaffer, "Argument," 28.

[500] This draws on, but can also stand irrespective of, the old historiographical convention of describing the centralising uses of Roman law by "new monarchs" like Charles VII of France, Henry VII of England, or Ferdinand and Isabella. See e.g. C.J. Friedrich, *The Age of the Baroque, 1610-1660* (Harper & Row, 1952). A.J. Slavin, *The New Monarchies and Representative Assemblies* (Boston, 1964). R.H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990). A balanced account is G. Butler, "Roman Law and the New Monarchy in France," *English Historical Review,* 35:137 (1920), 55-62. Although they are reconcilable, to an extent the "Military Revolution" *topos* in the post-1960s historiography of early modern states displaced this account of Roman law as the chief instrument of centralisation. Gerhard Oestreich, *Neostoicism and the Early Modern State* (Cambridge, 2008), chapter 5.

[501] Lesaffer, "Argument," 37.

These are the stakes and the context in which Selden here rejects Roman lawyers[502] and demolishes natural reason as a potential source for international law, given the diversity of customs, the limited sphere of laws (e.g. maritime laws in landlocked countries are unhelpful, however reasonable those countries may be), and his observation that the natural reason that may emerge from a collation of customs cannot provide secondary rules whereby laws can be created, altered, or extinguished.[503] In *Mare clausum* I.xxiv, Selden surveys post-Roman legal opinion on the matter. He agrees with Cujas, who finds some Roman law superseded by later custom, and rejects Gentili's view in *De iure belli* of Roman law as the law of nations and of nature. Selden's arguments against Gentili, an Oxonian law professor and fellow defender of English imperial interests, follow Cujas's *mos gallicus* in showing abiding changes in custom from history.[504] As he does with Rome, Selden at the end of *Mare clausum*, I.xxiv denies that the tradition of legal opinion and scholarship is a viable source of law, due to its incoherence and carelessness.[505]

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[502] In *Dominion*, I.xxiv 151 he cites Cujas's rejection of Roman law when superseded later by custom.

[503] H.L.A. Hart, *The Concept of Law* (Oxford, 1961). This is not to say that Selden's limitation of the applicability of *terra nullius* informs all parts of the imperialist law built on *Mare clausum*. Trade and colonisation in the East Indies, for instance, were not discussed in terms of *terra nullius*, as indigenous regimes were generally perceived to be valid negotiating partners. See e.g. charters in M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, 1926), 94-8. However, given Selden's emphasis on customary law, the historical genealogy of private and public property carries more weight in imperial justifications built on his legal theory than they do in those that rely chiefly on Grotius. The genealogy of *terra nullius* is thus more important for English than for Dutch imperialism. *Terra nullius*, however, was used to justify British occupations of America, Australia and Africa. James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge, 1993). Lesaffer, "Argument."

Alternatively, one could argue that the distinction between "civilised" non-Christian and unoccupied lands was irrelevant, and *terra nullius* was a legal norm that emerged into *lex lata* from the practice of conquerors who claimed the lands even of peoples whom their lawyers deemed civilised, using symbolic acts and land markers that were theoretically appropriate only in *terra nullius*. Grotius's distinction between *dominium,* (private) property, and *imperium* (jurisdiction), served as a bridge to move from the occupation of vacant land to the seizure of land that was uncultivated, but already owned by others (e.g. the Irish, or non-Europeans). *De iure belli ac pacis*, II.ii§17, II.iii.§4, II.iii§19.2. To my knowledge, this possibility of legal emergence (even constructivism), which dissolves the prized but simplistic conundrum of the self-contradictions, hypocrisy and injustice of early imperialism, has not been raised elsewhere. F.A. von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law," *American Journal of International Law* 29 (1935), 448-471, at 453-460. A.S. Keller *et al, Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800,* (Columbia, 1938). Spanish, Portuguese, Dutch and English practices are compared in Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge, 1995). Note that this way of framing the issue implicitly refutes Fulton and others who regard pertinent details concerning historical acts of taking possesion in *Mare clausum* as mere digressions. Lesaffer, "Argument," 49 posits a similar legal transformation, of acquisitive prescription into effective occupation. Cf. similar trajectories in von der Heydte, "Discovery."

[504] In *Mare clausum*, I.xxv Selden sides with Alciato, as he did earlier with Cujas, in rejecting both Roman law and most of legal scholarship. This supports Berman's point that the gap between the legal philosophies of sixteenth-century common lawyers and civil lawyers has been exaggerated lately. H.T. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale," *The Yale Law Journal*, 103:7 (1994), 1651-1738, esp. 1657fn10. Berman's criticism of Kelley's emphasis on this gap parallels the criticism Ziskind levels at J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (Cambridge, 1957), for over-emphasising the insularity of English legal philosophy. M.A. Ziskind, "John Selden: Criticism and Affirmation of the Common Law Tradition," *American Journal of Legal History*, 19:1 (1975), 22-39. Helmholz, *Roman,* offers a fine refutation of the thesis that common law replaced Roman law in early modern England.

[505] Note that this and the preceding passage seems absent from the first Latin *Mare clausum* edition.

Despite Selden's skeptical onslaught, the natural-permissive law turns out not to be an empty category after all. Instead of consent and a comparative study of customs, Selden proposes to draw only on civilised nations of the past and present, and only on the expert testimony of historians and lawyers. In this context, "the people of Rome, the most noble precedent of all both for Law and Custom,"[506] is a compelling source of customary international law. The practice of ancient Rome is a valuable historical precedent even when ancient Roman legal doctrines are fallacious.[507] Roman Emperors were regarded as lords of both land and sea, hence a valuable precedent for closed seas.[508]

It is important to establish the perimeters Selden sets for the right use of reason. As we saw, reason cannot be "gather'd from the Customs of several Nations," partly because "it hath often been most deservedly restrained" by religious precepts.[509] Justinian and Gaius are wrong: the law of nations, observed by all, is not established and sustained by "natural reason." Hence the need for expert testimony. Although Selden begins this chapter by moving from positive law (natural or divine) to permissive natural law only, when he includes nation-specific religious laws and the two Roman legal authorities in his discussion of the correct sphere of reason, he also moves the category of law that is under examination back to positive divine and natural law. This is done in an orderly manner that makes it unlikely to be the result of confusion. Having refuted reason's role in natural-permissive law, he continues by refuting it in the rest of natural law.

What are the consequences of this move? Four considerations jump out. Selden is not widely known for removing natural reason from the possible list of law's sources. I suggest, however, that this tallies with his installation of Noahide precepts as a positive source of international law. Moreover, it does not contradict his statements regarding the desirability of lawyers following the *mos geometricus*.[510] Secondly, Selden's presentation of Noahide precepts

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[506] *Dominion*, I.xiii.76.

[507] I disagree with Christianson, *Discourse,* 254-5, 260-1, that Selden "deflated Roman law to a status inferior to international treaties and equal to other national laws" (255). In Selden's system of international common law, Rome was the most important precedent. (Despite his powerful advocacy of emulating Rome, even Machiavelli had misgivings about the possibility and practicability of imitation: *Discourses,* I.19, III.27.) Compare eds. Kingsbury and Straumann, *The Roman Foundations of the Law of Nations* (Oxford, 2010) on the difference between the role Gentili and Selden assigned to Rome. Lesaffer's emphasis in "Argument" on medieval and early modern uses of Roman law as *ratio scripta* underlines Selden's equidistance from the other end of the spectrum of Roman law's authority as a source of law. Selden neither "deflated" Roman law, nor treated it as straightforwardly authoritative *ratio scripta*. Harrington adopts Selden's paradigm and assigns a unique status to Rome as a model for modern imperialism. See *Oceana*, 259, 261-5, and Harrington's advice to Oceana to divide and conquer, and install its own manners and laws benignly. See also 266: Rome in the end failed, where England will not. More on this in chapter VII below. Cf. Locke, *Essays on the Law of Nature*, Q. 5 (An lex naturae cognosci potest ex hominum consentu? Negatur).

[508] *Dominion*, I.xxii.143-5.

[509] *Dominion*, I.vii.42-3.

[510] *Mare clausum* I.xxvi, the end of Book I where Selden directly addresses Grotius's *Mare liberum* and *De iure belli ac pacis*, ends with "quod erat demonstrandum." For a charming metaphor of history as distance, and triangulation

in *De iure naturali* as a constitution for international law by virtue of their divine ordainment on the one hand, and hallowed historical observance on the other, owes much to Selden's use of Noah and his sons in his imperialist redefinition of global property rights in *Mare clausum*.

Thirdly, popular sovereignty is another central feature for Selden in the precedent set by Rome for customary international law.[511] In the light of *Mare clausum*'s original context as legal support for James VI/I, then to Charles I, this is unexpected, though given Selden's parliamentary work, unsurprising. Several times throughout *Mare clausum*, Selden states and strongly restates Rome's power as precedent, and popular sovereignty as the foundation of Rome's power. He weaves the two together subtly, powerfully and inextricably into a legal foundation for early modern imperialism that is broadly negotiated, e.g. in Parliament, rather than directed, as in Spain by Philip II, or as desired by several English monarchs. The foundation of popular sovereignty is a vital connection in the narrow and specific trajectory of imperial theory sketched here, from Xenophon and Cicero through Sigonius to Selden and Harrington. This is also why it is important to note that the limits Selden sets on reason also apply to public reason, which is limited by *opinio iuris* and parliamentary representation. Even a vehement emphasis on popular sovereignty should not be mistaken for an argument against the artificial reason needed for government and the common law, or against the role of counsel and expert opinion; just as a prominent role for artificial reason and counsel should not distract from the significance of a striking insistence on the foundational character of popular sovereignty.[512]

The fourth inference concerns secularisation. The reduction of the correct sphere of reason in identifying divine positive law inevitably reduces the scope of theology, as well. Selden's criticism of "natural reason" in specifying the content and cognisance of positive divine laws in public international law is very similar to the epistemic humility that Cunaeus and Grotius formulated and put to the same use.[513]

Assuming infallible universal reason, and appealing to it, is an obvious way of side-stepping religion. Revelation and universal reason can be compatible, if reason is God's or the gods' gift. If *a priori* superiority is given to reason in case they clash, then reason is assumed to

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as a way to overcome optical illusion and uncertainty, see *Mare clausum* II.ii (*Dominion,* 189). John Dee famously promoted triangulation as a technical tool for expanding the British empire. Lesley B. Cormack, *Charting an Empire: Geography at the English Universities, 1580-1620* (Chicago, 1997).

[511] Many thanks to Alain Wijffels for raising the question whether this insistence on popular sovereignty is an integral part of soft imperialism. Based on the evidence used here the answer is yes; but at least the chapter on millenarian imperialisms, mentioned in the Conclusion as a discourse rival to secularising soft imperialism, must be written before I can approach this seminal question.

[512] Pocock, *The Ancient Constitution.* Note again that Selden refrains from establishing popular sovereignty on biblical exegeses unlike, among others, Henry Ferne (1602-62), *The Resolving of Conscience…* (London, 1642), Section III, or the radical republican and translator of *Mare clausum*, Marchamont Nedham in *The Excellencie of a Free-State Or, The Right Constitution of a Commonwealth* ([London, 1656] ed. Blair Worden, Liberty, 2011), 72-3.

[513] Somos, *Secularisation,* s.v. 'epistemic humility.'

be infallible. Geometry and logic are often cited as paradigmatic in these models. Proponents of a strong theory of reason face a set of problems particular to them, ranging from the absence of empirical evidence for such reason (which can be countered by discussing the physiology of cognition shared by all men, or by the self-evidentiality of mathematics) to man's necessary deceptions by God (which cannot really be countered, unless to call them possible but insurmountable, therefore irrelevant, if true). In the passages Selden cites, Justinian and Gaius appeal to empirical evidence for infallible universal reason, namely the set of axioms common to all nations. Weaker varieties of the aggregate reasonableness theory include Machiavelli's and Madison's People, who are often wrong about small things, but never about the great; and some eighteenth-century formulations of "common sense" that posit a similarly omnipotent universal reason with a similarly limited sphere of applicability.[514] All versions of this theory, however, assume that infallible universal reason is indeed universal, therefore it can serve as the foundation for negotiation. The secularising effect of Grotius's *De veritate*, for instance, derives from this assumption, which can only be maintained and extended to savages by rejecting rationalist arguments that support Christianity proper.[515] Unlike today, however, seventeenth-century thinkers could argue that most men believe in one god or at least multiple gods, and those who do not are such aberrations that they, like the mentally disabled, can be ignored in reconstructing the nature and right sphere of reason.[516]

Selden is suspicious of all this. His skepticism toward reason is shared by many believers, but given what he writes about religious laws in *Mare clausum*, that comparison does not say much about him. It is more revealing to note that the same skepticism led many others, including Cherbury, to "skeptical fideism."[517] While Bedford, Serjeantson and others point to problems with this term, as used by D.P. Walker, on balance it remains useful.[518] It describes a category of thinkers who resolve any contradiction between reason and religion by accepting the irremovable irrationality of religion. This position contrasts sharply with those

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[514] Conal Condren, *Argument and Authority* (Cambridge, 2006), 290-313.

[515] Compare Selden calling Erastus a new Copernicus. Tuck, *Natural Rights*, 95.

[516] E.g. John Locke, *Letter Concerning Toleration* (London: Awnsham Churchill, 1690).

[517] D.P. Walker, *The Ancient Theology: Studies in Christian Platonism from the Fifteenth to the Eighteenth Century* (Cornell, 1972). Note that the term has been applied to figures as varied as Chaucer, Montaigne, Benjamin Rush and Alvin Plantinga. See e.g. S. Delany, *Chaucer's "House of Fame": Poetics of Skeptical Fideism* (Florida, 2nd ed., 1994). C.I. Switzer, "Benjamin Rush's Skeptical Fideism," *Journal of American Culture* 6:4 (1983), 84-90. R. Askew, "On Fideism and Alvin Plantinga," *International Journal for Philosophy of Religion* 23:1 (1988), 3-16, esp. 7-10. See also J.R. Maia Neto, *The Christianization of Pyrrhonism: Scepticism and Faith in Pascal, Kierkegaard, and Shestov* (Kluwer, 1995); R.H. Popkin, *The History of Scepticism from Savonarola to Bayle* (1960; 3rd ed., Oxford, 2003). Also see Haydn, *Counter-Renaissance.* Selden and Herbert became close friends at a young age. Berkowitz, *Selden's Formative,* 24, 37, 99, etc.

[518] R.D. Bedford, *The Defence of Truth: Herbert of Cherbury and the Seventeenth Century* (Manchester, 1979). R. Serjeantson, "Herbert of Cherbury Before Deism: the Early Reception of the *De veritate*", *The Seventeenth Century* 16:2 (2001), 217–38.

who found harmony between reason and religion, and evidence for religion in reason, even if a part of religion remained outside the proper sphere of reason.

It also differs from Selden's position. Selden does not argue that an examination of the religious laws of states, other than Israel's, can indicate what the natural law is. Neither does he argue that natural law can be deduced from a comparative study of religious laws, which allows for the imperfection of all states' particularity, and focuses on their commonalities as expressions of universal truth.[519] Nor does he rely on reason, which must be deceived and contained by religion for the sake of public order.[520] Unlike the syncretists and the ecumenists, or even the skeptical fideists, Selden removes both reason and religion from the list of the reliable sources of natural law. The most obvious corroboration of his secularising reformulation of natural law is what he does with natural religion.

The range of *adiaphora*, things indifferent to salvation, began to be extended during the Reformation for several reasons. As shown in the chapter on Grotius above, irenicism was one motive for the resulting trend toward minimalist definitions of Christianity; the ideal of a priesthood of all believers was another.[521] A third reason was the commitment to reunite as many Christian sects as possible. These motives can combine in different configurations, but the distinctions remain useful. An advocate of extending *adiaphora* further could be, for instance, a skeptical fideist, and hope for a reunification of sects due to some sort of eclectic syncretism, probably neoplatonic. Bruno, Mirandola and even Cherbury may be thinkers who whittled Christianity down to a hardly recognisable minimal core that it shared with all religions. Those who insisted on more specificity, for instance on the unique particularity of Jesus as the Messiah, or on some of the divine revelations, held positions that were irreconcilable with eclectic syncretism. An irenicist extender of *adiaphora,* by contrast, could hide his belief that certain articles of faith were inessential, or even his disbelief in some of them, make peace with his opponents, and remain coherent in his adiaphorism. (Two closely related thought patterns from this period are Christian Stoicism and Nicodemism.)[522] The

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[519] In Bedford's summary of this stance: "No religion is entirely devoid of truth." *Defence,* 181.

[520] *Dominion*, I.vii.43. Because of the role he ascribes to reason and Roman law, Selden is a counter-example to the legal pluralist genealogy of early modern British imperialism. See e.g. Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (Cambridge, 2011), 10-12; although note that the supposed return to reason in imperialist English law also "led to a downplaying of scriptural claims in legal debates" (Yirush, *Settlers*, 12).

[521] I see Melanchthon's extension as primarily irenicist, and Luther's as primarily levelling. For a case of supporting adiaphorism from a use of history as the master discipline, see Vossius's argument that all traditions decay in the Christian churches over time. N. Wickenden, *Vossius and the Humanist Concept of History* (Van Gorcum, 1993), 169-70. To see one secularising implication, contrast Christian positions that hold that God guarantees the constancy of, or periodic returns to, true church government.

[522] Nicodemism: Eugénie Droz, *Chemins de L'hérésie*, t. 1 (Geneva, 1970). C. Ginzburg, *Il Nicodemismo: Simulazione e dissimulazione religiosa nell' Europa del 1500* (Turin, 1970). C.M.N. Eire, "Calvin and Nicodemism: A

salient point is that it matters whether one arrived at "natural religion" by extending *adiaphora* or via comparative religious anthropology, and whether the journey was motivated by irenicism, human reason, or skeptical fideism.

From this perspective, natural histories of religion fit uneasily with other historiographical genres. It is true that it was common to combine the arguments that ancient and contemporary pagans, New World savages and heretics fell into worshipping the sun, stars, rivers, trees and other natural phenomena (let us call this Pausanian, or "natural revelation"), and that they also turned their founders and heroes into gods (Euhemerian).[523] It is also true that it was possible to condemn pagans for doing either or both, and assign them to hell; forgive their error and acknowledge that it was the best they could do before Christ; or to praise their efforts.[524]

In the last case, however, the new scientific spirit relativised the approbation of pagan religions from the perspective of natural history of religion. It was one thing to say that Egyptians worshipped the sun as the next best alternative to Christ, and that the sun is still a strikingly compelling argument in favour of God's might, intelligence and benevolence: it remains an error for Egyptians to mistake the sun for God. It was something else to argue, in the seventeenth century, that the non-Christian ancient monotheists and philosophers who realised that the sun is not God, but a sign of His power, were right, but for the wrong reason. They identified the correct Creator, and did so correctly from Creation, but were mistaken to take Creation as the chief source of evidence or the Creator, instead of relying also on revelation – admittedly, an historically specific event, unavailable e.g. to pre-Mosaic Egyptians – and from faith. The scientific spirit, inverse to Protestant epistemology not in all but in this particular sense, imbued another sense of superiority and respectful disregard for tradition.[525] No Pythagorean or Egyptian, in this example, could understand the sun, and the underlying order of Creation, as well as a seventeenth-century natural philosopher. Even if their monotheism was correct, and their inference from natural phenomena to monotheism

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Reappraisal," *Sixteenth Century Journal* 10:1 (1979). P. Zagorin, *Ways of Lying: Dissimulation, Persecution, and Conformity in Early Modern Europe* (Harvard, 1990). A. Pettegree, "Nicodemism and the English Reformation," in *idem*, *Marian Protestantism: Six Studies* (Aldershot, 1996), 86-117; and chapter VII below. On Christian Stoicism see Jan Papy, "Lipsius' (Neo-)Stoicism: Constancy between Christian Faith and Stoic Virtue," 47-72 and Christopher Brooke, "Stoicism and Anti-Stoicism in the Seventeenth Century," 93-116 in eds. H. Blom and L. Winkel, "Grotius and the Stoa," Special Issue of *Grotiana,* 2002.

[523] Hodgen, *Early Anthropology*, 358-82. Pagden, *The Fall*.

[524] E.g. Cherbury, *The Antient Religion of the Gentiles and Causes of their Errors Consider'd* (ed. and tr. W. Lewis, London, 1705), XIII, 262.

[525] Francis Bacon (1561-1626), the unfinished *Instauratio Magna* project. Nienke Roelants, *Lutheran Astronomers after the Fall (1540-1590): A Reappraisal of the Renaissance Dynamic of Science and Religion* (PhD, University of Ghent, 2013). Sachiko Kusukawa, *The Transformation of Natural Philosophy: The Case of Philip Melanchthon* (Cambridge, 2006). This scheme helps to explain why ancient philosophers, virtuous statesmen, American savages, heretics and unbaptised children raised similar theological problems in the sixteenth and seventeenth centuries.

admirable, at the same time they could still make (wholly or partially) wrong inferences about God from the phenomena.[526] Importantly, this was not Selden's position, either.[527] His recognition of necessary deceit by "religious government" to contain arrogant reason is tantamount to a rejection of both natural religion and natural reason as a valid source of universal natural law. What later turns out to be a valid source, particularly in *De iure naturali*, is the Noahide Laws.

Selden's introduction of Noahide Laws as the historical font of all legal systems is one of the most striking cases of secularisation discussed in this Thesis, with tremendous significance for soft imperialism.[528] Selden did not try to normatively endow legal systems with divine authority by positing Noahide Laws as their common core (which is not to say that he denied that historically, religion and law often invoke one another for support). Nor, importantly, did he propose Noahide Laws as the shared historical core of all laws primarily to bring together most of the sects with a chosen nation self-image. Tracing all legal systems Noah does accomplish this, but only if the sectarians are not paying close attention. For first of all, by substituting Noahide Laws as the historical standard for the Decalogue or Christ's commandments, both of which had volubly and irresolvably contested self-appointed heirs in the seventeenth century, Selden side-stepped a zero-sum debate the same way he did by inserting the Samaritan passages into the legal tradition of debating property rights. Moreover, to the introduction of Noahide Laws Selden joined a philosophy of legal evolution and differentiation, adopted from the common law, that gave great authority to the Noahide Laws, but did not exclude the possibility that they are validly transformed in part or in whole by particular polities in the course of history. Those armed with Selden's justifications of imperialism, as found i.a. in the authoritative *Mare clausum*, can use the Noahide Laws to identify commonalities with native non-European legal systems and use those established commonalities to negotiate, as well as to justify to themselves the permissibility and validity of the negotiation and their negotiating partners' legal system (which derives from Noah, just as the secularising trader's, colonist's, or administrator's) but, given Selden's rules of legal transformation, without being able to ascribe higher authority to their own laws, let alone impose them as superior. These rules of recognition, embodied in the common law, are also why Selden cannot accept Roman law as an authority higher than what is warranted by Rome's

[526] E.g. Cherbury, *Antient,* ch. VIII on modern vs. ancient astrology and astronomy.

[527] This may answer Toomer's question as to why Selden – note, unlike Grotius in *De veritate* – omits references to Plato, Aristotle or the Stoics at the end of *De diis Syriis*, in the section on pagan monotheism. Toomer, *Selden,* 219.

[528] For an excellent discussion of the debts of Selden's secularising formulation of Noahide Laws to Grotius see Rosenblatt, *Renaissance*, chapter 6, with a useful caveat on 222; and chapter 8 on its development by Stubbe into "a deistic minimum."

standing as an historical paradigm of civilisation and imperialism, with failures and problems and some irrelevance.[529] It is perhaps also why Selden needed to add to natural laws the Noahide Laws, as another tier of source for all nations' laws. Natural laws can be limited and transformed, like Theseus's ship, by "the conuenience of ciuill societie."[530] However, unlike the Noahide Laws, which are equally limitable, natural laws do not enable Selden or other seventeenth-century secularising theorists of empire to side-step thirteen centuries of legal tradition concerning Christians as the true knowers of natural law, or the relative powers of revelation and history in settling a conflict or a contested hierarchy of laws.

Selden's support for English mercantile capitalism rested on the secularisation of international law by displacing legal problems, like prescription or the types of private property, from the realm of divine law into the historical constitution of law, encompassing all religious laws. To Adam and Noah, among others, God revealed his will, and the prospect of eternal life. According to Tuck this information, transmitted by the "historical continuity of human societies," changed the cost-benefit calculus of "the rational egotist," and turned *pacta sunt servanda* into a universal law.[531] There are two problems with this account: Selden's above-mentioned subversion of the link between *ratio recta* and *ius naturale*, and the implication that Selden's system of law allows no colonial negotiation that depends on contract to be conducted without verifying the parties' genealogical relationship to OT figures. Before entering a commercial or defense treaty, an English merchant or conqueror would need to know the native party's place in the historical continuity of human societies, and whether or not the native ruler who can guarantee compliance has historically inherited the *pacta sunt servanda* awareness. In effect, the Iberian lawyers' puzzle of diplomatic and commercial relations with non-Christians is replicated, albeit in a Judeo-Christian, not a Catholic form.

Had Selden offered a systematic genealogy of all nations in order to categorise applicable and non-applicable legal instruments, he would have followed others on a well-worn path.[532] The fact that he did not suggests a calculated openness on the matter. It is also worth noting that Selden's curtailment of reason can be easily accommodated by deleting the word "rational" from Tuck's account. It is enough to assume that people seek their self-interest ("egotist"), and the good news about eternal life will convince them to suspend disbelief in rewards and punishments for keeping promises. It is one thing to appeal to reason with a rhetorical strategy (whether about reason, God, or both) and argue that society collapses

[529] See Selden's extraordinary "Notes to Fortescue," De laudibus, capt. xvii, 9-22.
[530] "Notes to Fortescue," 19.
[531] Tuck, *Natural Rights*, 89-90.
[532] See the Curse of Ham – going back to Josephus! *Antiquities* I, VI, 1-4, 36-43. *Jubilees* VIII, 10-30.

without it, and another to appeal to individual self-interest. It is yet another thing to use either as a load-bearing component of a legal and political theory, as opposed to deploying them in service of a rhetorical strategy designed to persuade the reader.[533] If Selden assumed the priority of self-interest, as Tuck suggests,[534] then it is not the appeal to reason that will convince the soldier not to desert, but his belief in duty, love of *patria* over self and family, and/or the ability of the organised state to protect his family best: eminently irrational beliefs, in short. The only thing an imperialist must convince his negotiating partner of, the *unum necessarium* in his rhetorical pilgrim's purse, is neither the particularly Christian revelation nor universal reason, but the possibility of eternal life.[535]

Selden's displacement of the legal puzzles of early modern imperialism away from universal divine or natural law toward an historical account of the emergence and evolution of laws has several secularising consequences. First, it allows him to dismiss the Ten Commandments as natural law, and reclassify them as historically specific to the Jews at a given time.[536] This is a notable *coup* in the context of seventeenth-century imperial legal debates. Selden's disagreement in *Mare clausum* with those who saw Judaism as superseded by Christianity, and with those who thought that formulations of universal truths pre-date the Rabbis,[537] set up perfectly Selden's *leitmotiv* in *De iure naturali*. *Das Selden Rätsel* of apparent breaks and puzzling departures in his work continues to dissipate. Second – and further connecting the 1635 *Mare clausum* to the 1640 *De iure naturali* – it also leads Selden to identify the Noahide Precepts as an historically recognisable instance when divine positive laws were revealed and applied to all men, before human expansion across the world and the fog of history made property relations complicated, creating the need to revisit this historical

[533] Evrigenis, *Images*.
[534] *Natural Rights,* 96-7.
[535] This is the underlying message of Grotius's *De veritate,* and a key to its efficacy as a sailors', merchants' and administrators' manual for imperial encounters.
[536] Cf. Grotius, *De veritate,* 1627 ed., V.vii. *Idem*, *De iure belli ac pacis*, I.xvi, and J. Barbeyrac, note 11 to *De iure belli ac pacis*, I.xvi.4, in ed. Barbeyrac, Grotius, *Le droit de la guerre, et de la paix* (Amsterdam, 1724), 60-1. Recent edition of the 1738 English translation is Richard Tuck, Grotius, *The Rights of War and Peace* (Liberty, 2005), I.170-1. Also see Somos, "Irenic," II.3.
[537] For the same idea in Cherbury see Bedford, *Defence,* 183.

instance for guidance.[538] Thirdly, given Selden's notion of legal evolution, the Noahide Precepts may not be always binding, either.[539]

Appreciating Selden's view of customary law as the ideal receptacle for the live force that is history sheds light on his move from Roman, to comparative, to English, to international law. Selden regards binding international law as the set of laws in force at a given time due to historical traditions, ranging from the effectiveness of their enforcement (which is a realist argument[540]) to the reformulation of Roman law as binding due to the prudential lessons of past achievements. *Mare clausum* is a good starting point for the international law of mercantile capitalism and the British Empire not only because historical events bear out this association, but also because it is a self-aware announcement of an historical moment when England comes to uniquely embody, and become the source of, right international law. The originality of Selden's transposition of the doctrine of the uniqueness and superiority of English law into the realm of international law is unaffected by pointing out that he drew on a great tradition of presenting English common law as unique and superior to others, due to its self-aware historical and customary nature. Among other such praises, Chapters 15 ("That all Lawes are the law of nature, customes, or statutes"), 16 ("The Law of nature in all countries, is all one") and 17 ("The Customes of England are of most ancient antiquitie, practised and received of v. [5] severall Nations, from one to another, by succession") of Fortescue's *De laudibus legem Angliae* (1463?), which as we saw was republished with an English translation and Selden's commentary in 1616, foreshadows Selden's proposal of historical British sovereignty over all seas as the most compelling law of nations.[541]

This is why, after *Mare clausum*, Book I ends with Selden's rejection of reason, Roman law, and *opinio iuris* as valid sources of international law, he stakes his proof of exclusive British sovereignty over the seas on the historical claim that such effective dominion has always existed, uninterrupted. Selden's is a modern framework for assessing sovereignty and

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[538] One should also note Selden's simultaneous concern for time and space. The legal category of universal divine laws can only be emptied if all, or most, divine laws are positive. To be able to trace all property relationships to a specific divine command, the part of Creation where legal relationships apply (the Earth, including seas and the stratosphere) must be finite. The argument for closed seas and finite resources, discussed below, dovetails perfectly with Selden's historicisation of the Bible.

The unique authority of English common law as a source of international law; the immemorial custom of English rule over the seas; the historical documents that establish its priority; are among Selden's arguments for British exceptionalism.

[539] This is the direction taken in Henry Stubbe, *An Essay in Defence of the Good Old Cause* (London, 1659), 15 and 106-32.

[540] See Fulton, *Sovereignty,* 371 for Selden's realism. In *Mare clausum* II.ii (*Dominion*, 188) Selden agrees with Grotius's *De iure belli ac pacis*, II.iii.11 on the necessity of an external act in legitimate occupation, and the insufficiency of the mental act alone. However, this is far from being the sum of Selden's realism.

[541] Selden, "Notes upon Fortescue," in Fortescue, *De Laudibus Legem Angliae, with Ralph de Hengham, Two Summes* (London, 1616).

statehood, endogenising historical, even ethnic change. It differs from chosen nation theories as much as from ancient constitutionalist models. Book II.i promises that

> Then it shall bee shewn, from all Antiquitie, down to our times without interruption, that those, who by reason of so frequent alterations of the state of Affairs, have reigned here, whether *Britains, Romans, Saxons, Danes,* and *Normans,* and so the following Kings (each one according to the various latitude of his Empire) have enjoined the Dominion of that Sea by perpetual occupation, that is to say, by using and enjoying it as their own after a peculiar manner, as an undoubted portion either of the whole bodie of the estate of the *British* Empire, or of som part thereof, according to the state and condition of such as have ruled it; or as an inseparable appendant of this Land.[542]

The sovereign *imperium* over the seas that Selden sets out to prove is attached to the land, not to a dynasty, race, language group, or a chain of successive polities that claimed continuity. Selden was content to propose an history-based legal argument that even encompassed regimes, like the Normans, that were keen to emphasise discontinuity from their predecessors. It is here, at the beginning of *Mare clausum* II, that we learn that Selden defines "British" from historical usage (starting with Caesar's), regardless of the changing sovereignties of England, Wales, Scotland and Ireland. Similarly, his definition of Britain's territory combines a geographical description with a survey of Greek, Roman, Arabic, Byzantine and other historical sources discussing the coastline, seas, and associated islands. Having thus established the state's territorial contours, Selden promises that in the rest of Book II he will

> set forth the antient Occupation, together with the long and continued possession of every Sea in particular, since the *Norman*'s time; whereby the true and lawful Dominion and Customs of the Sea, which are the subject of our Discours, may bee drawn down, as it were by a twin'd thred, until our own times.[543]

Selden's method of establishing both British geography and law relies on collating sources in several languages along a continuous historical timeline. Berman describes this as Selden's "historicity:" "He carried Coke's historicism one giant step beyond the conception of an

[542] *Dominion*, II.i.182.
[543] *Dominion,* II.i.187.

immemorial past and an unchangeable fundamental law to the conception of an evolutionary past and an evolving fundamental law."[544] While true, this fails to capture Selden's radical emphasis on the constructive and limiting potentials of history. His method owes more to Scaliger's elevation of history into a master discipline than either to Coke or the *mos gallicus*.[545] In *Mare clausum* in particular, Selden consistently offers historical arguments for naval defense, fishing, and trade, as *ab initio* and uninterrupted British customs of sovereign *imperium* over the seas.

To appreciate the exact character and subtle yet momentous originality of Selden's view in *Mare clausum*, one should bring in at this point his *De diis Syris Syntagmata* (London, 1617). The title page motto is "Primus Sapientiae gradus est FALSA intelligere," from Lactantius, *Div. Inst.* I.xxiii. Works that systematically compare religions, including Scaliger's *De emendatione temporum* (1583), Selden's *De diis Syris*, Mersenne's *Quaestiones celeberrimae in Genesim* (1623), Vossius's *De theologia gentili* (Amsterdam, 1641), Cherbury's *De religione gentilium* (1645), etc., superficially seem similar, but their differences are important. Scaliger's and Selden's main concern is the historical genealogy of religions, Vossius and Cherbury develop their historicisation into some sort of deism, while Mersenne catalogues religious parallels and influences to bring out Christianity's unique features and to explicitly disprove Mirandola, Ficino, and other pantheists and eclectic syncretists.

Selden's adaptation of history as a master discipline to his scheme of law's sources is the reason why his attribution of particular degrees of historical credibility to particular sources is significant.[546] The historicisation of biblical precepts, for instance, that Grotius uses in *De iure praedae* to transform universal into particular commands, becomes less available to Selden as a secularising technique, the more he invokes the causal connection between history, precedent or custom, and law. Without exaggerating the starkness of the separation between Grotius's civil law and Selden's common law thinking,[547] a comparison of their secularising

[544] Berman, "Origins," 1695. Also see Berkowitz, *Selden's Formative,* chapter 3. Another role for Selden's historical method, and elevation of history into a master discipline, namely the coupling of this new imperialism with popular sovereignty, is suggested by Berkowitz, 77: "It was the genius of Selden to solve this dilemma [i.e. James trying to establish "imperial absolutism as a deliberate action of the people"] by transferring the arena of combat from theories of law to the forum of constitutional history."

[545] Somos, *Secularisation,* chapters I-II. This book also explores the importance of French New Historians and the *mos gallicus* for Scaliger's elevation of history into a master discipline. For an Italian example see Sigonius, *Oratio de laudibus historiae* (Venice, 1560). A comparison of Sigonius's, Heinsius's, and Vossius's orations on this same subject would be excellent fun. Oddly, Selden seems to think that Cardano and Scaliger both lived in Britain for a while: *Dominion*, II.ii.194-5.

[546] Compare Grotius's attention to establishing the credibility of various historical sources in *De veritate*, in chapter IV above.

[547] Recall, for instance, the discussion in chapter III above of Sir Thomas Smith and other Englishmen who studied civil law and Padua, and the contribution they made to the English legal system in addition to its pre-existing civil law

techniques in neutralising or removing the long tradition of biblical exegesis in legal reasoning suggests that the historicisation of a biblical precept may be a more easily secularising legal strategy in a civil law context than in a common law environment, where historicisation makes a situation differently, rather than less, relevant to a case. This is not to say that the same outcome cannot be achieved: but first, in a common law framework the historical reasons for the irrelevance of the biblical passage in question must be shown. Nevertheless, what Selden chooses to deploy in this case is another secularising technique to which the Leiden Circle made a defining contribution, namely the relegation of aspects of Christianity, including the Creation, Abraham and Noah, to the realm of myth. Myths are valuable, but require an historian to apply interpretative techniques beyond the historical range, such as the evaluation of an author's veracity, bias, method, proximity to events reported, use of sources, and so forth. Assessing Christian stories as myths in turn allows Selden to debunk exclusive Christian legitimacy claims, including papal cognisance over discoveries, and rulers' right to send missionaries and to build garrisons to protect them.

V.2.2.5 Fables and history

Selden's strategy in *Mare clausum*, I.viii is first to rehabilitate the value of fables and myths, address and refute the accusation that this opens the door to atheism, and then to turn Genesis, including the account of the origins of private property he earlier based on it, into a fable. While this secularises insofar as it denies the literal truth of the Bible, one should note that Selden's insistence that fables are subject to rigorous historical analysis leads him not to reject, but to re-examine the historical foundations of the Bible.[548]

Mare clausum, I.viii begins by establishing criteria that allow the addition of poets and myths to the range of sources from which the natural-permissive law of nations can be drawn. Like Scaliger, Hobbes and Vossius, Selden divides history into the Fabulous and the Historical Age. By the former he means not Varro's pre-Olympic times, but "that which is obscured onely by the most antient Fables, at least under a fabulous Representation."[549] He first tackles the Fabulous.

> But in applying our selvs unto the *fabulous Age,* wee do not ground Arguments upon Fables, as they are meer Fables; but wee manifest Historical Truth out of the most

features. Smith in particular worked hard to compare the common and civil law, and render them mutually intelligible. See e.g. *Commonwealth*, III.ii.

[548] Although see Selden, *Table-talk,* and short treatise on Christmas, on Jesus' historicity. Compare Scaliger's remarks on the same, *Scaligeriana* vol. II.

[549] *Dominion*, I.viii.47.

> antient Historians, though wrap't up in the mysteries of Heathen Priests and Poëts.[550]

While this view is best known from Augustine, Selden cites Lactantius instead in both *De diis Syris* (1617) and *Mare clausum*. Lactantius is notoriously more forgiving than Augustine toward not only pagan philosophy, but also pagan religions.[551] It is worth recalling here the earlier distinction between Selden and skeptical fideists. Renaissance and early modern Neoplatonists, including skeptical fideists like Ficino, Mirandola and Cherbury, chose Lactantius as their patron saint because his appreciation of pagan religions extended a shield against theological objections. Lactantius was something of an untouchable for Luther, Calvin and other reformers, whose extensive commentaries on Augustine informed potentially always and actually often violent sectarian debates among Protestants.[552] Seventeenth-century Englishmen were equally susceptible to charges of wandering beyond the acceptable, even into atheism.[553]

Yet the approach to pagan values, schematised above, is not the same as the method used to uncover them. The method followed has profound consequences for secularisation. Lactantius and Augustine were engaged in theological polemic. Despite Lactantius's relative tolerance, neither of their accounts of pagan religions meets the dispassionate technical criteria for mythography that grew out of Renaissance philology and palaeography, ranging from provenance verification to full-scale comparative religious anthropologies. Selden's willingness and focus on obtaining reliable historical information from even the oldest and most obscure fables and myths is inspired partly by Scaliger, his role model.[554] The historicising renegotiation of the boundaries between pagan and Christian, fable and superstition, or historical memory and damnable idolatry, was a secularising technique that reached maturity with the Leiden Circle.[555] Selden's admiration for Scaliger's and Grotius's historicising methods is amply documented. In this particular instance, his transformation of poems and myths into historical sources that can inform legal arguments is patterned more directly on Grotius, who in turn builds on the Scaligerian foundations completed by Vossius. To understand the distinctive

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[550] *Dominion*, I.viii.47.

[551] In contrast with Lactantius, Augustine criticises several times the justifications of pagan poets as historical or prophetic precursors to Christianity. See e.g. *City of God,* XVIII.14. One possible reason is that the period between these two Church Fathers saw Julian's turn against Christianity. F.E. Yates, *Giordano Bruno and the Hermetic Tradition* (London, 1964), 58-60.

[552] See e.g. Yates, *Bruno,* 6-9, 18, 26-7, 36, 42-3, 83, 85-6, 143, 310, 364, 384-5, 399, 401, for Lactantius as an inspiration, vehicle and shield for Renaissance ascriptions of high authority to Hermes Trismegistos, the Sybils, and even Kabbalism.

[553] Michael Hunter, "The Problem of 'Atheism' in Early Modern England," *Transactions of the Royal Historical Society* 35 (1985), 135-157.

[554] Selden was, aimed to be, and/or aimed to be seen as, the English Scaliger. Tuck, *Natural Rights,* 85.

[555] Somos, *Secularisation,* chapters II-III.

features of Selden's method, and its secularising implications, the oft-noted similarities between Selden and Scaliger and between Selden and Grotius must be augmented with a Selden-Vossius comparison on their use of fables and myths.[556]

Vossius's remarkable rehabilitation of pagan myths strongly suggested that the thousand-year-long Christian polemic to turn Socrates, Aristotle and Seneca into proto-Christian figures, to present pagan religions as the devil's work, and to refute pagan philosophy as contradicting Christianity, were equally wrong-headed and misguided attempts, however defining of Christian civilisation they have become between the early Fathers and the seventeenth century. According to Scaliger, Vossius and other Leiden thinkers, the worship of trees, heroes, deified reason, and the pursuit of non-Christian philosophy, are all valuable on their own terms, not only as stages leading up to the Christian enlightenment.[557] Instead, they are historically and culturally contingent, yet valid forms of genuine approaches to the true divinity, comparable to perfect Christianity and, despite some of them having no access to Christian revelation, not necessarily epistemically inferior (especially given the unchangingly grave epistemic limitations of man's understanding of God), just as Jewish OT figures are not inferior.[558] This was the re-evaluation of paganism, whether historical, heretical or American, that made Vossius the true father of comparative anthropology.[559] Unlike the naturalistic and/or historicising explanations of pagan religions by Cyprian, Arnobius and others, Vossius's Christian, but philologically and historically founded, secularising adaptation of the tools and premises of ancient comparative religious anthropology, including Euhemerus, Plutarch, Pausanias and others, was not predicated on an inductive bias against non-Christians' facts and methods.[560]

Vossius's *De theologia gentili et physiologia Christiana; sive de origine ac progressu idololatriae ad veterum gesta, ac rerum naturam, reductae; deque naturae mirandis, quibus homo adducitur ad Deum,* first appeared in 1641 in Amsterdam. It was dedicated to the Church

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[556] The two probably never met, though they correspondend and referred to each other's works. Vossius's Oct.-Dec. 1629 visit to England, to accept a canonry at Canterbury from Charles I and negotiate (unsuccessfully) a professorship at Cambridge or Oxford, coincided with Selden's strict confinement in the Tower. Rademaker, "Gerardus Joannes Vossius and his English Correspondents," *Lias* 19:2 (1992), 173-213, at 190-4.

[557] C.S.M. Rademaker, *The Life and Work of Gerardus Joannes Vossius (1577-1649)* (Dutch orig. 1967, tr. H.P. Doezema, Assen, 1981), 317ff. on an unpublished Vossius fragment on Manichean, neoplatonist and Stoic influences on Christianity. Wickenden, *Vossius*, 88-9, 102-10, 155, *passim.*

[558] For Vossius's application of Euhemerism to the Judaism-Christianity transition with Paul, see Wickenden, *Vossius,* 113.

[559] C.S.M. Rademaker, introduction in Vossius, *Geschiedenis als wetenschap* (Baarn, 1990), esp. "Inleiding," 11-47, at 16-7. Wickenden, *Vossius.* Compare Selden, *Mare clausum* I.viii.47.

[560] Minucius Felix in *Octavius* (Migne, PL iii.659-674C) adapted Cicero's *De natura deorum* to debunk pagan religions in favour of Christianity. Cyprian, *De idolorum vanitate* (PL iv.563-582A). Tertullian, *De idolatria* (PL i.661-696B). Arnobius of Sicca, *Adversus nationes* (a.k.a. *Adversus gentes*, PL v.713-1288C), esp. Books III-V. Such rationalising deconstructions of pagan religions laid much of Christian doctrine open to the same.

of England, as negotiations about Vossius's appointment to a post were ongoing. Admiration for this book has not ceased since its first publication. Richard Westfall and Richard Popkin continue a line of praise that is uninterrupted since Cudworth, Newton or Edward Gibbon. Popkin describes it as "first, a taxonomical listing and analysis of the varieties of polytheism and, second, an attempt to show that the personages and activities of ancient pagan religions are degenerative fictions derived by a variety of reductive processes from the original of all religions – the Mosaic religion."[561] Rationalising all Jewish and Christian characters, after and including Moses, had an obvious secularising effect. The reception and afterlife of *Theologia Gentili* confirms that much. However, there is a consistent "physiological" and natural scientific aspect to the book that should not be neglected. Vossius declared that

> it became clear to me that divine providence, which I knew to be mirrored in history, shines forth in every age; from which I inferred that the human mind also, which is created in the image of God, should range through the whole of history.[562]

Vossius's announcement of *Theologia Gentili*'s agenda has a double meaning. First, Vossius draws on the humanist tradition of anthropology, highly sophisticated by his time, to systematically describe man and man's mental operations (as manifest from history), as a part of nature. Second, in so doing he follows the Baconian and Scaligerian commitment to the comprehensive overview, and to the construction of a method that accommodates future additions of natural, historical and theological facts. Given the combination of natural science, observation, history, and the history of religions, and this new methodology's commitment to comprehensiveness, Vossius's demystification of Judeo-Christianity claims and acquires the authority of science, in a sense that is recognisably close to its current meaning.[563] Vossius systematised the natural or intellectual variety observed in man, and put Christianity squarely inside the system that emerged; not above, outside, of another kind, or otherwise special. Compared to previous historicisations of Christianity, Vossius's had the approval of the natural sciences, including the science of human epistemology and religion, as one of its indices and consequences.[564]

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[561] R.H. Popkin, "The Crisis of Polytheism and the Answers of Vossius, Cudworth, and Newton," in eds. J.E. Force and R.H. Popkin, *Essays on the Context, Nature, and Influence of Isaac Newton's Theology* (Kluwer, 1990), 27-42, at 28.

[562] Wickenden, *Vossius,* 124-5.

[563] Rademaker, *Vossius.*

[564] Another inference is that any man can examine the State of Nature through introspection. Wickenden, *Vossius,* 160. Simplified, the structure runs: If we collect all or many historical accounts, and use them to historicise all religions, then the resulting totality and schematics of faith will show the mind in operation. This is a natural science

Theologia Gentili was accompanied by his son's translation and edition of Maimonides's work on idolatry. To my knowledge, the connection has not been well explained. It is not simply the case that Vossius called his otherwise dispassionately or even approvingly given account of pagan religions a 'progress of idolatry,' and attached his son's translation of a loosely connected text on the same subject. Rather, Maimonides's account of idolatry as a mental falling-away from God that is both an historical and an ever-present danger, caused by man's ignorance and epistemic hubris, informs *Theologia Gentili* directly. (On a controversial Arminian note, Vossius, like Grotius in *De veritate*, points to those who mistake ritual and dogma for religious truth as suffering from one of many forms of the same falling-away.) Like Cunaeus famously did with *De republica Hebraeorum*, albeit more politically, Vossius's *Theologia Gentili* also energised the early modern study of Maimonides on a subject that connected naturally with Selden's *De iure naturali*, published the year before (1640).[565] Popkin's comparison of *Theologia Gentili* to Selden's *De diis Syriis* (1617) makes valuable connections, but these are limited to techniques of demystifying Christianity through historical comparisons. In this study, Vossius's works function as an invaluable exemplar for the complex early modern evolution of the historical anthropology of religions, which sheds light not only on Selden's Noahide Precepts in *De iure naturali*, but also on his puzzling use of the figure of Noah in *Mare clausum*.

As mentioned, Selden's strategy in *Mare clausum*, I.viii is to rehabilitate the value of fables and myths, refute the accusation that this opens the door to atheism, and turn Genesis – including the account of the origins of private property he earlier based on it – into a fable. Though he draws heavily on Lactantius, he does so for a different purpose than neoplatonic syncretists. He quotes from *Div. Inst*. I.xi:

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operation, like everything else; therefore to find the source of all religion let us 1, look for the kernel of religion or 2, inspect the source and nature of faith inside ourselves from a newly created critical distance.

To my knowledge, only Vossius does this - but it explains a lot of Hobbes. Before *Theologia Gentili*, starting in the early 1620s, Vossius wrote *De historicis Graecis* (1624) and another of Latins (1627), all literature and all philosophy. Those were read the same way, since they also provide historical overviews of developments, repetitions, interactions between cultures, boiling everything down in the end to the physiological operations of the mind. Under persecution till the mid-1630s, he tackled religion last; but it seems to be part of the same project.

For the connection to Hobbes see J.R. Collins, *The Allegiance of Thomas Hobbes* (Oxford, 2005), 48-51. J.P. Zappen, "Aristotelian and Ramist Rhetoric in Thomas Hobbes's *Leviathan*: Pathos versus Ethos and Logos," *Rhetorica* 1:1 (1983), 65-91, at 75-8; although the originality of Vossius's combination of the historical, anthropological (including religious), and natural aspects of man, and its effect on Hobbes, is not mentioned in these studies.

[565] Popkin, "Crisis," 28.

> Nam etiam *Vera sunt quae loquuntur Poetae* (ut rectè Lactantius) sed obtentu aliquo specieque velata. Et sic veritatem mendacio velaverunt, ut Veritas ipsa persuasioni publicae nihil derogaret.[566]

This passage is interesting for two reasons. First, it never appears in Lactantius in this form. Beside minor adaptations, Selden moves the second sentence, originally in *Div. Inst.* I.xi.4, after the first, originally in *Div. Inst.* I.xi.5.[567] The context of the first sentence (the second in Selden's citation) is Lactantius showing that the poets must be transmitting an obscured but truthful fact about Jupiter, Neptune and Pluto, who agreed to a division by lot to hold the heaven, the sea and the nether regions, respectively. As land is not mentioned, Lactantius argues, the deal must have taken place on land. Heaven, sea and the underworld must refer to geographical regions, and the gods emerged from historical figures. The parallel with Noah's sons, whom Selden discusses immediately earlier and after this Lactantius mis-citation, is not spelled out yet in *Mare clausum*, I.viii, but it is clear and irresistible. Selden indicates from the start the historical kernel and fabulous character of the biblical story. (As discussed below, he later goes on to state these features explicitly, after lengthy pre-emptions of inevitable charges of atheism.) It also reminds the reader of the start of the previous chapter, where Selden wrote that both Jewish and Christian religious government is necessarily deceitful, in order to protect public order from the inquisitiveness of all human reason.

Selden summarises Lactantius's argument, and concludes that both land and sea were distributed with an historical agreement. He cites Euhemerus in support, recorded and translated by Ennius, and also referenced by Lactantius. Next, Selden inserts a longer passage from Lactantius. This passage is also significantly reworked, although Selden's purpose is not always obvious. For instance, Lactantius compares Neptune's kingdom to the unlimited maritime powers of Mark Anthony (83-30 BC). Selden changes the name to Pompey the Great (106-48 BC), which is historically more plausible, but constitutes another odd case of silent and purposeful mis-citation.

According to Selden, the writings of Euhemerus and Ennius's translation were destroyed by the priests, who also accused Euhemerus, Diagoras and others of atheism. The echo of Selden's own treatment after the scandalous *History of Tithes* is hard to miss in this bitter passage. Selden also defends Euhemerus from Plutarch's charge that he made up the

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[566] *Mare clausum*, I.viii, 33. In Nedham's translation: "For (as *Lactantius* saith well) even *Those things whcih the Poëts speak are true, but cover'd under a certain veil or Figure. And yet they have so veiled the Truth with Fiction, that the Truth it self might not take off from the common belief of the People." Dominion*, 47.

[567] The originals read: "Sic veritatem mendacio velaverunt, ut veritas ipsa persuasioni publicae nihil derogaret." And several sentences down: "Vera sunt ergo quae loquuntur poetae, sed obtentu aliquo specieque velata."

nation of Panchaeans, upon whose island the Triphylian temple to Jupiter once stood. This temple houses the inscription on the golden column on which, according to Euhemerus, Jupiter recorded his deeds. As Selden points out, the existence of this place is central to Euhemerus's, and therefore Lactantius's story.[568] The next key move, the application of these mythographical instruments to the Bible, happens not under the aegis of Lactantius but a lawyer, Selden's contemporary.

As briefly mentioned above, early modern approaches to the long-standing tradition of biblical exegesis in legal reasoning had a twin context, namely the debate over the status of natural reason and Roman law. Joannes Gryphiander (1580-1652) is seen as a pioneer both in adapting Roman law to modern conditions, and pointing out its limitations.[569] His advocacy of reforming law through a better knowledge of nature, including the mutability of rivers and seas, has been contrasted with Bartolus's use of geometry as the right pattern for legal science. This was, however, a practical point, rather than an act of giving up on reason in the face of mysterious and uncontrollable nature. In *Tractatus de insulis* (Frankfurt, 1623) Gryphiander argues that prescription requires discovery (*invenire*) and actual occupation (*corporalis apprehensio*), reducing the complexity of the matter which, according to some of his contemporaries, also involved mental occupation and hierarchies and types of signs of the will, and the ability, to occupy and own. Selden first touched on this undesirable complexity of the legal debate around prescription when he referred to Aerodius's discussion of the controversy surrounding the capture of Acanthus, where one Greek ran bodily to the gate to claim the abandoned city, while the other threw a javelin into it.[570] Much of *Mare clausum*, as indeed Grotius's *Mare liberum*, is taken up with distinguishing legitimate from illegitimate occupation and prescription. Gryphiander's position has the advantage of being relatively simple, which may be why ch. XIV of *De insulis* is cited often, whether in agreement or dissent.[571]

Another reason could be that *De insulis* is a dense collection of learned *loci* organised to cover issues connected with islands from a lawyer's point of view. It is a method, in the sense of a handbook or guide, occasionally interspersed with Gryphiander's own arguments. Grotius's *De iure belli ac pacis*, Vázquez de Menchaca's *Controversiarum* (1564), and many other works relevant to *Mare clausum* provide numerous *loci* to support their arguments.

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[568] Selden's gloss (f) refers to Vossius, *De Graecis,* I.xi.55-56 (1624 ed.), as the pertinent authority, without noting that Vossius here actually quotes from Lactantius, *Div. inst.* I.xi.

[569] Pioneer in adapting: J. Goebel, *The Struggle for the Falkland Islands* (Yale, 1927), 115 ff. Showing its limits: C. Schmitt, *The* Nomos *of the Earth* ([1950] Telos, 2006), 138 n7. A.S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton, 2011), 222-5.

[570] *Dominion*, I.iv.21-2.

[571] From Grotius, *De iure belli ac pacis* (1625), to the International Commission of Jurists, *For the Rule of Law,* issues 24-31, 28.

Despite their number, they support their arguments more directly than Gryphiander's *loci* do. Gryphiander's book seems closer to a 'method' than to a systematic legal treatise.[572] One should therefore exercise caution when tracing Selden's inspiration to Gryphiander. For instance, *Mare clausum*, I.xiv draws heavily on *De insulis,* but the selection of *loci* and their legal interpretations are Selden's. Selden uses the clear categories expressed in *De insulis'* chapter headings as Gryphiander intended, i.e. to mine classical and contemporary *loci* from which to construct his own argument. Selden's engagement with Grotius, by contrast, is about the argument itself. *Mare liberum* can conceivably be used as a small repository of legal *loci,* but unlike *De insulis,* its primary function is to advance a specific argument.

Discussing the fabulous age, Selden invokes Gryphiander's use of Homer's lines on Neptune.[573] Selden here reveals that following Lactantius's debunking of fables it is not he, as implied earlier,[574] but Gryphiander who equates the three Greek gods, Jupiter, Neptune and Pluto, with Noah's three sons.[575] Selden can now explicitly call Gen. 10 a fable (*in fabula illa*).[576]

Peter Pett's (1630-99) *The Happy Future State of England* (1688) puts Gryphiander to similar use, but with instructive differences. Pett cites *De insulis* XXXII, "De mirabilibus insularum," to defend St. John from the charge that, like other island-dwelling soothsayers, he wrote Revelations on Patmos due to its noxious vapours. Pett confesses that he dares not speculate on the meaning of Revelations, decries English "*Fanaticks,*" and predicts that those "drunk with *Enthusiasme* will not be again allowed to make all things reel into Confusion."[577] Pett actualises the debunking potential of Gryphiander's mythography for *politique* irenicist aims, whereas Selden does it to support a legal argument. They both secularise; but Selden's equation of Noah's sons with Jupiter, Neptune and Pluto does so unapologetically. In Selden, both sets of brothers fall prey to the debunking principle:

> Other matters there are in the *fabulous time,* which beeing spoken of the Gods, may seem to shew, what opinion the Antients were of touching the right and custom of

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[572] On early modern 'method' as handbooks and guides see intro to Bodin, *Methodus ad facilem historiarum cognitionem* (Paris, 1566, rev. 1572). N.W. Gilbert, *Renaissance Concepts of Method* (Columbia, 1960). W.J. Ong, *Ramus, Method, and the Decay of Dialogue: From the Art of Discourse to the Art of Reason* (Harvard, 1958).

[573] Gryphiander, *De insulis tractatus, ex iurisconsultis, politicis, historicis et philologis collectus* (Frankfurt, 1623), XXXI §74, p. 490.

[574] *Mare clausum*, I.viii, 47.

[575] Gryphiander, *De insulis,* XXXI §75.

[576] A decade later Bochart, by contrast, insists that Greek stories are ridiculous fables, but Gen. 10 is reliable. Shalev, *Sacred Words,* 176-8. While this contrast brings out the secularising significance of Selden's move, the elaborate process he used to neutralise Genesis in *Mare clausum* I.viii highlights his commitment to history as a master discipline, insofar as it complements his refusal in *Mare clausum* II.ii to consider non-biblical historical sources that pre-date Julius Caeasar, because they are "too obscured with Fables." *Dominion*, II.ii.189.

[577] Peter Pett, *The Happy Future State of England…* (London, 1688), 130-1.

men in this particular. For, when they cloth their Gods with the persons of men, they commonly speak such things of them as belong unto men.[578]

Selden's other crucial move in this chapter is to begin to reinterpret his sources in order to transfer sovereignty from gods and rulers to the people. He criticises Lactantius for comparing Neptune with Pompey (though Lactantius' comparison was with Mark Anthony), not with the People of Rome (*Populi Romani*). He introduces and keeps the theme of popular sovereignty in the foreground, before he develops it later in *Mare clausum* at great length.

V.2.3 Reconstructing sources of law

V.2.3.1 History becomes law

Selden begins his account of public dominion over the sea in historical times with the Cretans. He carefully shows that the historical understanding and practice of dominion covers the right to make rules, collect tolls, and control the number of ships on the sea, analogously to the meaning of sovereignty in overseeing law, taxes and armies on land. Minos, king of Crete, set a precedent when he took first possession "of that part which was not yet possessed but remained vacant (from whence this kind of Dominion doth arise)."[579] Selden takes care not to contradict his earlier statements concerning Adam's and Noah's dominion, Noah's transfer of full title to his sons, all men's communal property in use and fruits, and their ability to claim private property in some unspecified way. However, he does not offer a coherent account of the transition from "fabulous" to historical time, nor an explanation of how some parts of the sea could have remained vacant (not owned) after the world was divided among Noah's three sons.

It is remarkable that Selden does not engage here the competing mythical genealogies beloved by his contemporary peers. The most straightforward, and at the time usual, option for Selden would have been to make a direct claim to British dominion over the sea by tracing Noah's sons' genealogy to a mythical English government.[580] Given Selden's secularising agenda, it was good strategy as well as good scholarship to avoid religious partisanship. It would have also undermined Selden's view of law as a changing and evolving corpus. It would

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[578] *Dominion*, I.viii.52. 'Alia sunt in Fabuloso tempore, quae de Diis dicta, quid de hominum heic jure sentirent Veteres, etiam indicare videantur. Nam ubi Deos hominum personis induunt, quae humana sunt de iis fermè loquuntur.' *Mare clausum*, I.viii.36. See R.H. Popkin, "The Crisis of Polytheism and the Answers of Vossius, Cudworth, and Newton," in J.E. Force and R.H. Popkin (eds), *Essays on the Context, Nature, and Influence of Isaac Newton's Theology* (Kluwer, 1990), 27-42.

[579] *Dominion,* I.ix.54.

[580] See e.g. Armitage, *Ideological*, 81-90, on Purchas, *Hakluytus Posthumus, or Purchas His Pilgrimes*, published in 1625.

have, however, made it much easier to support the claim that not only had Britain full title over the seas, but at the time of writing it was the only state in the world to have this sort of exclusive and historically justified dominion. The difficulties of making this claim are greater than the Spanish and Portuguese claims, even in their extreme form. In addition to millenarian, chosen nation and other exclusivist claims, the Iberians also had papal bulls in support.[581] The opportunity cost of Selden's eschewal of religious partisanship, and his refusal to offer a nationalist biblical exegesis in *Mare clausum*, was therefore considerable.[582]

After Minos and the Cretans, Selden names 17 nations that had private dominion over the sea, "accomplishing among them all above five hundred and sixtie years without Intermission": Cretans, Lydians, Pelasgi, Thracians, Rhodians, Phrygians, "Cyprians," Phoenicians, Egyptians, Milesians, Carians, Lesbians, Phoceans, Corinthians, Ionians, Naxians, Eretrians, and Aeginians.[583] Selden names his main sources as Eusebius and Africanus, and his references are mostly to Scaliger's *Thesaurus Temporum* (1606)/ Selden notes that the beginning of this chain, with Minos, coincided with the time of the Judges of Israel. In *Mare clausum*, Selden often relates a given sea-lord nation's period to Jewish history. Thracians belonged to the time of Jeroboam, Rhodians to the reign of Jehosaphat, the Cyprians to Joas, Phoenicians to Uzziah, Carians to Hezekiah, the Phoceans to the Babylonian Captivity. Yet Selden also remarks on the importance of Rhodes for international law, Phoenician technical improvements in seafaring, and tries to calculate the period of every nation's sovereignty over the sea.

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[581] For present purposes, the Iberian arguments for and against the legitimacy of occupation based on papal bulls supporting Iberian proselytising are sufficiently summarised in the secondary literature cited, for instance W.G. Grewe, *The Epochs of International Law* (revised ed., Gruyter, 2000), 233-7. A full comparison with Iberian non-secular imperialism is greatly desired, but beyond the scope of this work. Reference will be made to Vitoria, Freitas and others only as and when relevant to Selden. It is, however, useful to note that von der Heydte in "Discovery," 451 is right to point out that the legal issue of papal donations precedes Alexander VI's famous *Inter caetera* (1493). To be able to specifically ignore papal donations in the New World, Selden could turn at least as far back as Bartolus de Saxoferrato (1313-1357), whose "De insulis" was reprinted numerous times in *Consilia, quaestiones et tractatus* (e.g. Venice, 1593, vol. 10, 137-41). Selden's sometimes explicit, sometimes implicit insistence on effectiveness as a precondition of *de iure* occupation, which allows him to side-step much of the New World problematic, can come from the same Bartolus treatise.

[582] For Ronsard, Hotman, Becanus and others who derived such theories of exceptionalism see Maurice Olender, "Europe, or How to Escape Babel," *History and Theory,* 33:4 (1994), 5-25. Contrasts. Also matches *Janus,* and *Titles!* This is the crucial point missing from the account of Selden's linguistic theory in the otherwise excellent Daniel Droixhe, *Souvenirs de Babel. La reconstruction de l'histoire des langues de la Renaissance aux Lumières* (2007), ch. 4.

This is not to say that Selden shrank from a fight. In the case of Minos, he picked several. A careless scribe, Selden posits, must be responsible for distorting the passage in Jerome's translation of Eusebius' *Chronicon*, Book II: "Minos Mare obtinuit & Cretensibus leges dedit, ut Paradius memorat, quod Plato falsum esse convincit." (*Mare clausum*, I.ix.55), Using Scaliger's *Thesaurus temporum,* but castigating him for missing these errors, Selden first conjectured that *para Dios* was jumbled into the name of a non-existent writer. The salient passage in Plato's *Laws* confirms that Minos's laws were not recorded by a "Paradius," but received from Jupiter. Second, Selden must accordingly change the translation from *convincit* to *affirmat*, from "which Plato proves to be false" to "which Plato affirms."

[583] *Dominion*, I.x.57.

We discussed earlier how the practice of ancient Rome, as a store of precedents, is a more valuable source of international law for Selden than the Roman legal writings are as a source of authority. Selden cites and reviews these texts critically. Though written by historians, they are subjected to historical criticism as much as any other source. When Dionysius Halicarnassus calls Rome "Ladie of the whole sea," Selden explains that he is using a hyperbole that is nevertheless "a clear Testimonie of a very large Sea-dominion."[584] Grotius, Selden continues, is therefore wrong in *De iure belli ac pacis*, II.iii.§15, to argue that these examples "do not prove a possession of the Sea or of a Right of Navigation," but instead are contracts whereby a party gave up not only its particular right to dominion in favour of the other party, but also its right to the same sea that originally derived from holding the sea in common with all mankind.

This may seem an odd passage to cite and refute. Selden's *Mare clausum* is an attack on Grotius's *Mare liberum*, and there are many other passages he could have cited to illustrate and support his disagreements. Moreover, Grotius's point could have been adapted to support Selden's argument. It would have enabled Selden to argue, for instance, that all other nations but the British have alienated their dominion. The customs, treaties, coins, inscriptions, and other evidence that Selden cites in *Mare clausum* could have easily been selected and arranged to support this line of counter-argument. Instead, Selden reduces the point he ascribes to Grotius *ad absurdum*: if dominion has been lost through such contracts, and another party's fishing for instance can be banned by the force of such contracts, not from dominion (as Grotius interprets Ulpian), then dominion is meaningless. Enjoyment and the right to hinder others must constitute dominion, otherwise the category is empty.

Selden backs up this claim with a line from Lycophron's *Cassandra*, predicting that the people of Rome will have dominion over both land and sea. The reference is doubly odd. First, because Selden gets little support by citing a prophecy in a poem for the methodological argument that Grotius handled his sources with insufficient historical criticism. Second, in another case of Selden mis-citing a classical source on a single ruler's empire as if it concerned an empire under popular sovereignty, in this play Cassandra is predicting the global empire of Alexander the Great, and not of the Roman people. Indeed, Selden's subsequent references, to Suetonius, Aristides, Themistius, Procopius, Nicephorus Callistus, Julius Firmicius, Oppianus, Virgil, Claudian, Constantinus Monomachus, Varadatus, Constantinus Porphyrogenitus, Nicephorus Gregoras, and so forth, are all passages that describe the worldwide empires of single individuals, and not populations.

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[584] *Dominion*, I.xiv.78.

Selden continues his systematic reinterpretation of classical *loci* on empire as if they supported popular sovereignty by criticising Herodotus's statement that except for Minos, Polycrates was the first to desire dominion over the sea.[585] Selden objects that Herodotus must have meant the first king to do so, since all the states he previously listed had already held that dominion under popular or aristocratic government.[586] Selden next launches into a discussion of Spartan and Athenian dominion over the sea, coveted by both, but open only to one. He moves from an account of concurrent historical rivalries to the scheme of a succession of single rulers over the sea. Thereby he gradually builds a customary law of nations that supports the British claim to sole dominion, without claiming to go back to the beginning of history to do so. At the end of *Mare clausum*, I.xi Selden reveals that Africanus and Eusebius, whom he named at the very beginning of *Mare clausum*, I.x as the source of his list of Lords of the Sea, probably took the list from Castor Rhodius. He cites *viri docti* in support of this view, but refers only to Scaliger, Vossius (*Historicis Graecis* again, given by Selden as I.25, though in fact I.24) and to *alii*. Selden conjectures that in his lost work Castor must have added Athens and Sparta to the list, which brings it to a total of 20 successive nations with full and single dominion.

In a crucial departure, Selden transforms the deeply rooted, time-honoured analogies between property held in common, yet privatised by temporary enjoyment, and occupation of seats in public baths and theatres. Crossing the sea and even fishing is conventionally likened to both. Selden undercuts the potential use of this hallowed trope to counter the claim of exclusive British dominion over the seas by showing that the types of dominion and the transition between them described in these analogies "are proper and peculiar to the people of *Rome,* not common to all men."[587] Selden draws on Sextus Pomponius (2nd cent. AD) and Ulpian (c. 170-223), imperial lawyers, to revisit the analogy between theatre (or bath) and the sea.[588] He develops the point with reference to Celsus (2nd cent. AD), who emphasised popular sovereignty. Yet when Selden insists that the analogy applies to the Roman people, not to all men, he writes in his own name, and before he brings in Celsus. When he does, he quickly proceeds from Celsus's confirmation of his own insistence on popular sovereignty to a reinterpretation of Celsus, who assigned only the shores to the Romans, and allowed the air to all men. According to Selden, the earlier statement modifies the latter, meaning that Celsus advocated popular sovereignty over shore, air, and seas alike.

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[585] Herodotus, III.122.
[586] *Dominion*, I.xi.65-6.
[587] *Dominion,* I.xiv.87.
[588] Ulpian reproduced much from Pomponius. The first modern edition of Ulpian was by Jean du Tillet in 1549. Selden had been fond of Tillet at least since *Titles of Honor* (1614).

Selden's emphasis on popular sovereignty becomes even more apparent when we compare this chapter with Grotius's *Mare liberum*, chapter I, to which this is a direct reply, tackling the same subjects of occupation and shore, sea, theatre and land through roughly the same *loci,* but with even greater emphases on popular sovereignty.[589] A quick reference to Scaevola (?-82 BC), Aristo (in the Digest), and "Greek lawyers" concludes Selden's argument, before a summary of legal sources and conclusion:

> Whereby it is made manifest, as well out of the determinations of Lawyers, as the Transcripts of Leagues and Treaties, and the writings of Historians, Orators, and Poëts, that a Dominion of the Sea was in use among the *Romans,* after the same manner as the Land.[590]

Earlier we saw Selden's insistence on popular sovereignty, including dominion over the sea. To further erode *Das Selden Rätsel,* Christianson's book can be brought in at this point to show that Selden's work on the history of English law, and his active defence and enlargement of Parliament's powers, were cut from the same cloth. Christianson shows how Parliament's control over the seas, and cognisance over taxes required to defend it, are themes that run through *Mare clausum*.[591] The ironic tone noted above in Selden's discussion of Charles I's Ship Money, and Selden's stress on the people as the seat of dominion, complete the jigsaw puzzle of the coherence and trajectory of Selden's writings.[592] Surprisingly, although *Mare clausum*'s first draft was written for James VI and I around 1616-9, and the second for Charles I in 1635, Selden's arguments that sovereignty over the sea is fundamentally popular sovereignty,[593] and his irony in places where one would expect him to support Ship Money, are both integral to the text, and unlikely to have been absent from the first draft. The irony is nicely exemplified by Selden's derivation of the concurrent rights to sea and to taxes, in exchange for protection, from the Glutton's speech in Antiphanes' comedy.

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[589] See e.g. *Mare liberum*, Liberty, 27-8.

[590] *Dominion*, I.xiv.89. Also see I.xv.90! 102, 106.

[591] Paul Christianson, *Discourse in History, Law and Governance in the Public Career of John Selden, 1610-1635* (Toronto, 1996), 270-81. Popular sovereignty and irony are among the elements of *Mare clausum* that make it difficult to accept i.a. Fulton's view of Selden as a coward who wrote *Mare clausum* to get out of jail. Fulton, *Sovereignty,* 367-8.

[592] One should perhaps add Selden's notion that tithes paid to clergy are also founded on the people's consent to pay the clergy, not on the monarch's will, let alone divine ordainment. *Tithes*, Preface, x, and throughout.

[593] Although there are oblique references that could be read with a contrary sense. E.g. *Dominion*, 73-4: sovereignty over others and over the sea go together. This does not mean this is how it should be, or that popular sovereignty is thereby excluded. This is a careful formulation typical of Selden.

A greatly telling silence in Selden is the biblical justifications of papal property. He categorically ignores them. Selden does cite Roman and canon law to discuss "*the Pope's Sea"* as any other Italian maritime state's.[594] He rejects Graffius's reinterpretation of *Mare Nostrum* as *mare universim Christianorum,* and sides with the Catholic lawyers Franciscus Toletus (1532-92), Francisco Suárez (1548-1617), Antonius de Sousa (1580-1632), Bartholomaeus Ugolinus (fl. 1600) (at least the first three of whom are Jesuits), to interpret the bull *Coenae Domini,* which excommunicates pirates infesting papal waters, as referring to the Pope's private patrimony. Selden ignores all theological contributions to this debate, treats the papacy as a secular state, and its private dominion as another precedent for his argument on customary international law. This is secularisation by inversion and omission, akin to Grotius's treatment of church-state relations in Abraham and Melchizedek.[595] What Selden does choose to emphasise is that the citizens of Rome had the right to fish in papal waters, despite the Pope's private dominion. As in Grotius's *De iure praedae*, legal claims based on *corpus Christianorum* and *respublica Christiana* are inadmissible. Selden rejects them in favour of private dominion, and does so on the basis of canon law, avoiding every part of the complex biblical exegetical tradition concerning the church's property. Furthermore, he limits the pope's private dominion by the people's right to enjoy the sea's fruits.

V.2.4 The new, imperialist public law of nations

> Selden in England writes in favour of dominion over the sea. Let the Dutch answer. I am now concerned with Swedish affairs.[596]

V.2.4.1 Free trade

The two main lines of argument in *Mare clausum* sketched out above, namely the Bible's neutralisation and closed seas, combine in Selden's position on free or unfree trade. Here he engages the Bible-based legal tradition directly. A conventional *locus* on free trade was Num. 21:21-35, the war of Israel against the Amorites.

> 21 And Israel sent messengers unto Sihon king of the Amorites, saying,

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[594] *Dominion*, I.xvi.104-7.
[595] Somos, *Secularisation,* chapter V.
[596] "Seldenus in Anglia pro maris dominio scribit. Respondeant Batavi. Ego nunc Suedica curo." Grotius, *Epistolae*, 457. Grotius, [n.a.] *Briefwisseling*, 2227.

> 22 Let me pass through thy land: we will not turn into the fields, or into the vineyards; we will not drink [of] the waters of the well: [but] we will go along by the king's [high] way, until we be past thy borders.
> 23 And Sihon would not suffer Israel to pass through his border: but Sihon gathered all his people together, and went out against Israel into the wilderness: and he came to Jahaz, and fought against Israel.
> 24 And Israel smote him with the edge of the sword, and possessed his land from Arnon unto Jabbok, even unto the children of Ammon: for the border of the children of Ammon [was] strong.

The question is whether the war was just, given that Israel was denied right-of-way. Selden refers to Gratian's famous Causa 23, Quest. II and III, which commented on Augustine's justification of the war and served as a key commonplace for medieval and early modern treatments of just war. [597] Selden adds the reference to Grotius, *De iure belli ac pacis*, II.ii.§13. Grotius is discussing here the capacity of rivers to be subjects of private dominion. If considered territorially, they are subject to the sovereign. If seen as running water, their use must be free, like lighting one's candle from another's. Grotius draws from this the right of free passage over both land and water in case of necessity, such as expulsion, travelling to a land for rightful occupation, commerce, and just war. Grotius's account of Israel's war against the Amorites occurs in this context. His use of Num. 21 here is criticised by Barbeyrac, because Sihon not only forbade passage, but marched out against Israel; and because

> as GOD had given them the Land of *Canaan,* with express Orders, not only to destroy the seven accursed Nations, but also to combat all Opposition to the Execution of the Designs of Heaven, their Case was extraordinary, and such as cannot reasonably give Occasion to a general Rule for deciding the Question in hand.[598]

This was a shrewd analysis of one method by which Grotius subverted the Bible's use in international law.[599] Welwod pointed out another, namely the elimination of Scripture as an

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[597] References in F.H. Russell, *Just War in the Middle Ages* (Cambridge, 1975), 21-2, 64, 72-3, 91, 100, 221-2, 225.

[598] J. Barbeyrac, note 3 to *De iure belli ac pacis*, II.ii.§13, in ed. Barbeyrac, Grotius, *Le droit de la guerre, et de la paix,* 236. This Barbeyrac note first appeared in his 1724 French translation of *De iure belli ac pacis*. See also Tuck, Grotius, *The Rights of War and Peace*, 440fn3.

[599] One can read this as Grotius replacing the Iberian justifications of conquest, made with reference to the divine and papally approved right to access foreign lands to proselytise (summarised in Grewe, 233-7), with rival claims to

acceptable source of international law.[600] Unlike Barbeyrac, Selden accepts this Grotian claim as a methodologically valid legal proposition – despite the fact that this is one of the rare instances where Selden himself engages the tradition of biblical exegesis salient to this legal point. After adopting Grotius's inversion of universal and particular laws, Selden next refers to Gentili, Bodin, Vitoria, Solórzano, Molina and others, because this passage from Num., and the just war arguments built on it, played a prominent role in framing the early colonial legal debate over the right of merchants and evangelists, including their access to the Indies. In Selden's review of the literature not only the rejection of missionaries, but the denial of commerce was also used to justify Spanish conquest.

Selden raises two objections to the argument that this was a just war against the Amorites, who denied Israel right-of-way. First, private dominion over the land was not affected by the issue. Second, free passage is not a positive, and its denial is not a negative, externality.

> And for any man to allege here, what is commonly talked, of the lighting of one Candle by another, of the not deying a common use of Water, and other things of that nature, it is plainly to give over the disquisition of *Law* and *Right*, to insist upon that of *Charitie*.[601]

Selden here is responding to Grotius's use of the same references and images in *De iure belli ac pacis,* II.ii, referred to earlier in *Mare clausum*, I.xx. Here, Selden effectively lumps Grotius together with the Iberian lawyers.[602] Against Grotius he pits Gentili, who is right to say that Reason of State trumps charity, and Gratian and Augustine would be right only if there were no possibility that a passing army could do damage.[603] Selden shows that customary international law recognises this condition by citing one treaty, namely the 1609 Treaty of Antwerp between

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free trade, equally based on biblical exegesis, but in an ironic register. Iberian claims are thereby doubly subverted, with merchants replacing missionaries, and the biblical justifications for both shown to be inapplicable.

[600] Somos, *Secularisation*, 388-91.

[601] *Dominion*, I.xx.124.

[602] Though Selden does not give this reference, compare Grotius with Francisco de Vitoria, *De Indis et de Ivre Belli Relectiones* [1555] Ernest Nys (ed.), J.P. Bate (tr.) (New York: Carnegie, ([1555] 1917), 151-5. *Pace* Anghie, *op.cit*., the ineliminably religious character of Vitorian free trade doctrine is noted i.a. by Lesaffer, "Argument," Ian Hunter, "Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations," in *idem* & Dorsett, S. (eds) *Law and Politics in British Colonial Thought: Transpositions of Empire* (Palgrave, 2010), 11-30; and Martti Koskenniemi, "The Political Theology of Trade Law: the Scholastic Contribution," in Ulrich Fastenrath *et al* (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford, 2011), 90-112, at 110-112.

[603] Alberico Gentili, *De Iure Belli Commentationes Tres* (London: n.a., 1589), I §19.

Spain and the Netherlands, in preparation for which *Mare liberum* was published![604] The provisions about the contracting parties' right to ban access in order to avoid fear and jealousy, Selden points out smugly, support his point that dominion entails discretion over granting access to merchants, Christian proselytisers, and all strangers.[605] He brings in Aristotle's *Politics*, VII.6 and several passages from Bodin's *De republica* to corroborate that this right is a part of sovereignty, and to refute Vitoria's justification of Spanish conquest "for a denial of commerce."[606] Selden writes that Juan de Solórzano Pereira (1575-1654) follows Vitoria in this respect. Solórzano appears again when Selden lists other Spanish justifications for their conquests: "For, they pretend also a Right of Discoverie, primarie occupation, Conversion to the Faith, and other things of that nature, besides the Donation of the *Pope*. Of all which, *Solorzanus* treats at large."[607]

Solórzano's *De Indiarum iure, sive de iusta Indiarum Occidentalium inquisitione, acquisitione, & Retentione* appeared in two volumes, the first in 1629, the second in 1639.[608] Current assessments of Solórzano vary widely. Gordon considers him a realist, who placed the fact of occupation above papal and other justifications.[609] Alvares reads *De Indiarum* as prioritising papal authority above all other actual and possible justifications for Spanish and Portuguese conquest.[610] Muldoon regards Solórzano as a medieval just war lawyer hopelessly behind his more enlightened Salamanca and other neoscholastic Iberian peers, including Vitoria.[611] Pagden portrays Solórzano as more radical than Las Casas or Vitoria, attributing a potential to American Indians to progress to a state wholly equiparant with that of Catholic Spaniards.[612]

Selden's choice of Solórzano as Vitoria's mouthpiece and the representative of Spanish claims deserves further study, as does his pitting of the authority of the Salamanca Jesuit Luis de Molina (1535-1600) against Solórzano. Molina's position on the right to traverse a sovereign's land or sea without permission derives from his displacement of the divinely

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[604] Grewe, *Epochs,* 156-62.

[605] He calls the result of this treaty a League, *in foederibus*, which is odd. Harrington also considers the United Provinces a league in parts of *Oceana*, and a republic in others. Same in Madison and Hamilton in *Federalist Papers*. This may be one reason why provincial republicanism, as learned from second-tier Italian city-states and adapted to local and colonial government, remained ideologically distinct from the uncomfortably straightforward proposition to model Britain and/or its empire on the federalism of the United Provinces, which could have been easily seen as a continuation of the Italian model. Rommelse, "Mountains," 253.

[606] *Dominion*, I.xx.125.

[607] *Dominion,* I.xx.126.

[608] Selden's reference to lib. 2. cap. 20. §55 must be wrong, because §55 has a different subject matter. Lib. 2. is unproblematic, as it is part of vol. 1.

[609] http://blogs.law.yale.edu/blogs/rarebooks/archive/tags/Juan+de+Solorzano+Pereira/default.aspx

[610] Claudia Alvares, *Humanism After Colonialism* (Bern, 2006), 80-2.

[611] James Muldoon, "Solórzano's *De indiarum iure*: Applying a Medieval Theory of World Order in the Seventeenth Century," *Journal of World History* 2:1 (1991), 29-45.

[612] Pagden, *Fall,* 165.

instituted fellowship of men from the state into the church. As part of a post-Reformation tactical retrenchment of the church from politics, Molina argued that there was no political organisation in the original *status naturae* after the Fall, and polities were man-made for purely temporal ends.[613] There was no body of natural law that had content detailed enough to include provisions for crossing another sovereign's territory without permission, and could override civil laws at the same time. Molina anchored trading rights in a supra-political natural law of nations, the same state of nature in which Locke grounded original property rights.[614] Selden chose the Catholic thinkers for his contrast shrewdly.[615] In secularising fashion he thereby suspended two considerations: the true nature of papal authority, and the reasonableness of Christianity. Contrasting Molina and Solórzano allowed Selden to focus the readers' attention on the Spanish justifications of conquest, with reference to the natural right to trade, and oppose it to *mare clausum* without having to consider the religion or reasonableness of non-Europeans.

Another useful piece of the puzzle is Selden's difference from other critics of Grotius's *Mare liberum* on this point. In *De iusto imperio Lusitanorum Asiatico* (1625), Freitas countered *Mare liberum* with the straightforward argument that natural law underpins all civil laws; natural law is universal; and its ultimate purpose is the welfare of all mankind. While Freitas and Molina both mounted Catholic positions on trade, Freitas, like Selden, regarded the right to grant and revoke trading privileges as integral to sovereignty, which can be enjoyed by Christians or pagans alike. Here they both differed from Vitoria's view of the providential nature of global trade, among nations that must learn to co-exist or suffer the consequences of imperfect self-sufficiency. Despite making trade integral to sovereignty, Freitas justifies Portuguese occupation from the papal delegation of the universal duty to proselytise, joined to the particular duty to gather allies against Islam.[616] Another useful compare and contrast exercise is with Purchas who, unlike Selden, regarded the English as a new Israel, God's chosen nation, ordained to spread Christianity by imperial means. In *Hakluytus Posthumus, or Purchas*

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[613] J.H.M. Salmon, "Catholic Resistance Theory, Ultramontanism, and the Royalist Response, 1580-1620," eds. J.H. Burns and M. Goldie, *The Cambridge History of Political Thought, 1450-1700* (Cambridge, 1991), 219-253, at 237-8.

[614] Compare Gabriel Vázquez: prescription is purely civil, and not a natural law. Therefore it cannot be used to settle disputes between states that acknowledge no common arbitrator. Fulton, *Sovereignty,* 341.

[615] Shalev argues that Montano's reconstruction of sacred geography helped him justify Spanish imperialism, and also criticise its focus on material wealth. *Sacred Words*, 18, 54; but see 61 on reading Montano's equation of Ophir and Peru as an ambiguous justification, suggesting that the New World's natural resources are providentially meant for many nations.

[616] *De iusto,* cap. IX. Another difference between Selden and Freitas is that the latter regards the sea as *res communis*. Freitas is either inconsistent, or he demonstrates that the refutation of the universal and natural right to trade, and the specification of the right to ban or allow trade as a part of sovereignty, need not add up to a doctrine of *mare clausum*. The 'quasi-rights' and *quasi possessio* he assigns to the sovereign in *De iusto,* chapters VIII and XIV, which he tries to define as jurisdiction but not ownership, suggest that he is inconsistent. Alexandrowicz, *Introduction,* 68-9.

His Pilgrimes, published in 1625 like Grotius's *De iure belli ac pacis*, Purchas drew on Vitoria to refute Iberian claims to just conquest, particularly because they failed to spread the faith.[617] These contrasts economically adumbrate Selden's radical originality, and difference from the range of imperial justifications that had the use of religious components in common.

V.2.4.2 Colonisation

Selden is quick to point out Spanish and Portuguese hypocrisy in justifying their conquest from denial of trade, and at the same time denying access to other European nations in both Indies.[618] The implications of his counter-argument are worth drawing out. Selden effectively postulates a global public order of sovereign nation-states with the capacity to own everything. When at the end of *Mare clausum*, I.xx Selden traces free passage arrangements to particular contracts instead of universal law, he positions himself on the distinctly modern side of the legal historical debate raging at the least until Carl Schmitt and Ulrich Scheuner. Schmitt famously argued that from an early modern European perspective, *Raumausgrenzungen* divided the world into geographically defined spheres of different types of international law. England and Spain, France and Spain, Spain and the Netherlands could cogently agree that might was right in the New World, while keeping the State of Nature under civilised control in Europe. Admiralty courts of the offending state could and did award compensation, for instance, if the plaintiff could demonstrate that its ship was taken in the sphere of civilised international law. Scheuner, Reibstein, Alexandrowitz, Grewe and others raised distinct objections against this account, which emphasised the 'lines of amity' that were specified in numerous treaties between European colonial powers.

While important, none of these objections are wholly convincing. As Grewe points out, Scheuner's counter-examples to Schmitt come from a later historical period, Reibstein's indignation is unsubstantiated, and Alexandrowicz's work on European-Asian seventeenth-century treaties and customary law undermines Schmitt's model indirectly at best. In my, rather than Grewe's, interpretation it does so because while the account of reiterated and evolving legal interaction between European and non-European powers is fascinating, it does not contradict the proposition that European treaty-making was often shaped by assumptions containing bias or assessments of non-Europeans as 'the other,' thereby strengthening rather than weakening Schmitt's model of distinct spheres. Grewe's objections, in turn, are contradictory. On the one hand, he criticises Schmitt for ascribing too much coherence to

[617] Armitage, *Ideological,* 81-90.
[618] *Dominion*, I.xx.126.

systems of 'lines of amity,' which did not add up "to a philosophy of a geographically determined *ius publicum europaeum.*" On the other hand, he argues that lines of amity did not affect rules of discovery or occupation. Instead,

> they gave each nation a formless and geographically restricted right of self-help beyond the line. This right of each State to enforce its supposed rights through the use of force was distinct from the formal *ius ad bellum* and the right to take reprisals. It had the effect of limiting the effectiveness of the peace treaties to Europe.
>
> The logic behind this limitation was to provide a shield for European peace against increasing conflicts overseas, and to protect the political balance of power from the impact of the unpredictably shifting pattern of forces there. The legal status of the overseas colonial sphere was not altered as a result.[619]

There are at least three problems with this objection. First, it contradicts Grewe's other objection concerning the coherence of the new European-made international law. Second, it effectively replicates Schmitt's argument for distinct spheres. Finally, it ignores global theories of law developed in response to occupation and colonisation, and in anticipation of its continuance. Grotius's *Mare liberum*, *De iure belli ac pacis* and Selden's *Mare clausum* and *De iure naturali* offer such theories.

Lines remain essential tools for controlling new lands.[620] Instead of lines of amity, Selden concentrates on the capacity of the whole world to be territorially divided by latitudes, longitudes, and the geometry of triangles they enable. In *Mare clausum*, I.xxii he praises the compass, and the reports of European settlers in America, for furnishing and expanding the store of geographical information on the basis of which private property can be demarked and occupied. It is after he points out the geometrical capacity of the world to be unambiguously divided that Selden reviews treaties and agreements that establish lines of amity. He cites a few cases to trace the legal custom from the treaty between Rome and Antiochus III of Syria to "the late Agreement betwixt the Kings of Great *Britain* and *Spain*" in 1630, before he turns to the bulls of Alexander VI.[621] Selden does not question here the validity of these bulls, only cites the part that introduced "an imaginarie Line drawn from the *Artick* to the *Antarctick Pole*,"

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[619] Grewe, *Epochs,* 161-2.

[620] Alexander VI's 1493 bull "Inter Caetera" and the 1494 Treaty of Tordesillas are conventional *loci* in the literature on lines as instruments of imperial control. Benton, *Search.*

[621] *Dominion*, I.xxii.138 ff.

dividing the whole globe.[622] Selden's use of geographical lines, in sum, dovetails with his tracing of dominion back to Noah. The whole world is private property from the beginning, and land, sea and air are equally capable of being privately owned. The finite nature of these resources (and of Creation) is why it is naïve and erroneous to posit unalienable rights to perpetually hold some things in common (e.g., the deep seas far from shore), and why international law must assume scarcity as the default condition.

As Tuck points out, Selden was not the first to raise the limited resource argument against Grotius's *Mare liberum*. Welwod's *De dominio maris* (1615) incorporates parts of his *Abridgement* (1613) and contains the passage:

> The earth, by the infinite multiplication of mankind, beeing largely replenished, and therefore of necessitie thus divided, and things upon the earth not sufficient for the necessaries and desires of man in every region, followed of force the use of trading upon the seas… For the which… the waters became divisible, and requiring a partition in like manner with the earth.

Though Welwod's arguments are "pretty shoddy," according to Tuck, this is not the reason why *Mare clausum* was fervently endorsed by both Charles I and Cromwell.[623] Differences between the two supporters of British imperialism include Selden's claim that it is only Britain that had full dominion over the seas; that this did not originate in an intermediate term, namely from the necessity to trade; and Welwod's reliance on the Bible.

V.2.4.3 Imperial law under limited resources

At the beginning of this section we saw Selden in *Mare clausum*, I.xx reject the traditional argument that merchants' passage across seas is just and cannot be hindered partly due to the common property of all mankind in the seas, and because such passage cannot injure the owner of the seas, even if there was one, in any way. In a modern and decidedly early-imperialist twist, in I.xxii Selden introduces the argument that the seas themselves are a finite resource. They are <u>not</u> like the burning candle from which another man can light his own without diminishing its flame. "Yea, the plentie of such seas is lessened every hour, no otherwise then that of Mines of Metal, Quarries of stone, or of Gardens, when their Treasures

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[622] Contrast Grotius's criticism of the same Iberian use of lines to justify possession: *The Free Sea*, 34.

[623] *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 2001), 115. Cf. Fulton, *Sovereignty,* 353. One could argue that Welwod's 1615 *De dominio maris* comes out better from a comparison with *Mare clausum*. Ford, "Welwod's Treatises."

and Fruits are taken away."[624] Caesar came to Britain looking for pearls; pearls and fish are further cases of exhaustible maritime resources. "Where then is that inexhaustible abundance of Commodities in the sea, which cannot bee impaired?"

> The Sea (I suppose) is not more inexhaustible then the whole world. That is very much inferior to this, as a part is to the whole, in greatness and plenty. And therefore a Dominion of the Sea is not to bee opposed upon this accompt…[625]

This is the final piece needed before Selden's doctrine of closed seas can come to serve early imperialism. In *Mare clausum*, I.xxiii he begins to bring the pieces together by showing that ancient accounts of free and unhindered fishing prove not a positive or a customary universal law, but belong to an early stage of human history when charity *ex officio humanitatis* encouraged sharing, and primitive technology discouraged those practices of private dominion over the sea that *Mare clausum* now codified as international law.[626]

V.3 Conclusion and outlook

> history devises reasons why the lessons of past empire do not apply to ours
> J.A. Hobson, *Imperialism: A Study* (London, 1902), 221.

Selden has long been recognised as a key figure in legal history. However, some legal scholars, including Westlake, attribute Selden's achievements to Grotius. Others give unclear or clear, but radically divergent, explanations of Selden's importance. This chapter presented Selden's importance in a new light, as the father of modern imperialism. Five elements of *Mare clausum* were discussed: Selden's redefinition of property as historically (but not theoretically) always private; his neutralisation of the Bible in legal argument; his Scaligerian reconfiguration of history into the highest source of law, furnishing colonial administrators, lawyers and statesmen with an historical sensitivity and soft imperialism toolkit with which to engage indigenous traditions; his pivotal replacement of the assumption of the co-existence of limited resources (land) with inexhaustible and uncontrollable resources (seas, air, fish and other

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[624] *Dominion,* I.xxii.141.
[625] *Dominion,* I.xxii.143.
[626] This is the State of Nature point where Locke instead re-emphasises divine Workmanship, human Stewardship, civil society, and the labour component of property that they infer. John Locke, *Two Treatises of Government* (London: Awnsham Churchill, 1690).

natural goods) with the assumption of universally limited and controllable natural resources, together with the transformation of European sovereignty and colonial prescription claims that follows; and his argument that the customary law of nations supports Britain as the one and only legitimate claimant of dominion over all seas.[627]

However, this colonial advantage was less the achievement of omniscient and omnipresent proto-capitalist oppressive states than a probably unintended consequence of the secularisation first performed to secure domestic stability in states troubled by religious conflict, which included the renegotiation of the powers of clergy and the contestation of sources of law and of the general theory of property.[628] Broadly speaking, English and Dutch competitive imperialist advantage was a corollary of the secularisation originally started in order to secure domestic stability in a time of religious conflict. One crucial move was to undermine the biblical foundations of law, from Christian just war theories to the use of the Bible in domestic legitimacy claims. The secularising project to reprioritise natural over divine law, or minimise divine law for the sake of peace and expansion, stands in stark contrast to varieties of international law that posit a radically different 'other.' At the least, Grotius's and Selden's law-creation strategy of neutralising biblical *loci* deeply embedded in international law, and demonstrating that the Bible's historicity is either dubious or, when clear, of limited cognisance, are among the many techniques they used to clear the ground for a new type of international law that was universal in scope.

The contribution of Grotius's *Mare liberum* to free trade arguments make his legacy enduringly relevant to colonialism and international law. One can also argue that Selden's case for closed seas, and unique British dominion, is a meaningful starting-point to the legal history of British imperialism that ends, or even continues, with American hegemony. One could also feasibly maintain that Grotius's appeal across religious divides is more formative of eighteenth-century international law than Selden's development of the Noahide Precepts. Conversely, one could argue that international law was retheologised in the nineteenth century, and the ecumenist Christian evangelism that Europeans could accept from one another was closer to

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[627] Fulton, *Sovereignty,* 373: "The maritime sovereignty claimed by Selden for the kings of England was of the most absolute kind."

[628] It may or may not be useful to note here that *imperium* is more serviceable than "imperialism" in that the former considers domestic and foreign affairs as inseparably joined, while the latter does not. While ancient, medieval, Renaissance and early modern thinkers distinguished the homeland from its overseas commercial and colonial interests, they tended to handle them as integrally connected. Livy's account of Roman politics and wars or Machiavelli's republics for increase saw demographics, form of government, education and the economy as intrinsically connected as the American Founding Fathers did. The ability to consider Western states as imperialist aggressors that act in smoothly-run conspiracies to dispossess the poor and the non-Western for uncomplicated profit probably dates from the nineteenth century. In contrast with two-dimensional usages, the challenge for seventeenth-century theorists was to reinterpret "imperium" in a three-dimensional chess game that combined domestic and foreign policy variables and could even replace pieces altogether (including bishops and kings).

Selden than to Grotius. It is also valid to point out that the stadial theory in Grotius's writings, including his *Defensio capitis quinti Maris Liberi oppurgnati a Gulielmo Welwodo*, and the openness of his system to the insertion of other stadial theories, made the new, secularised natural law eminently adaptable to different cultural and legal environments in the course of Western colonialism, without enshrining much systemic protection for the conquered and colonised against being portrayed as occupying a much lower level of development, and in need of thoroughgoing political, cultural and legal tutelage (recall Kipling's 1899 poem, "The White Man's Burden"). In this sense, there seems to be little difference between Vitoria's humane approach to the radically 'other' natives, and secularised justifications based on the white man's burden trope instead of evangelisation.

These debates point beyond this chapter. For present purposes, Selden's impact on imperialism outweighs Grotius's to the extent that first, Selden's *Mare clausum* shaped legal justifications of state policy more than Grotius's *Mare liberum*; and second, the British Empire, financed, expanded and defended while Selden was its chief legal authority, outweighed and outlasted the Dutch Empire.[629] While this argument at first may seem a *reductio ad quasi-absurdum*, it is hard to think of more salient criteria for assessing the *de facto* impact of a legal treatise on early modern, modern, and contemporary imperialism.

It is important to recognise the limits of Grotius's and Selden's international law, and the differences between them. It nevertheless remains true that secularising manoeuvres allowed them both to posit a natural law with the potential to be applied all over the world, regardless of Christian specificities. Moreover, their stadial theories were not indeterminate or open-ended. 'White man's burden' raises different issues and tasks than evangelisation. In principle, however backward a people are, in a secularised system of international law they eventually attain equality with their wards, however dubious or accidental markers of civilisation are stipulated. If one must walk and talk like an Englishman to be accepted as civilised, one eventually can. Joining a 'chosen nation,' or the Elect, can be harder. Grotius in *Mare liberum* argued that all seas are free. Selden, including the end of *Mare clausum*, I.xx discussed above, argued that they are all closed. Both legal arguments claim global validity, and both break with the strong embedded tradition of using biblical passages to do so. Grotius rules in favour of the Israelites against God in the matter of having to give a formal declaration of

[629] Note that this comparison between *Mare liberum* and *Mare clausum* neither characterises the two authors' entire life work, nor denies the importance of other legal approaches to the same problems, including the "ocean regionalism" of co-existing claims to protect sea routes and maritime networks (Benton, *Search*, ch. 3).

war when a *de facto* state of war already exists;[630] and in Selden the Amorites were in their right to deny Israel passage.

The new system proved extremely effective in securing non-European co-operation and saving the economic and ideological costs of non-secular commercial and colonial expansion. It created, structured, and maintained the British Empire before its possible nineteenth-century retheologisation.[631] Identifying its distinctive features only provides analytical categories for revisiting not only the strange success of the British Empire, but also the relative decline of Iberian Catholic imperialism and the rise of Enlightenment American, French, and Prussian exceptionalism.

While secularised hallmarks of civilisation represent a significant break with the Christian international law tradition, non-Christian stadial theories of progress were easily adaptable to secularised imperialism. Throughout the seventeenth and eighteenth centuries, Europeans could and did claim prescription and/or first valid discovery or occupation against indigenous groups that were deemed to have a lower form of production (e.g. nomadic), culture (e.g. no writing), or political system (e.g. anarchy, or monarchy). Similarly, there are numerous cases when the early modern secularisation of international law made it possible to accord full recognition to non-Europeans' right to property, territorially defined nation-states, and sovereignty. It remains to be seen whether the nineteenth-century doctrinal turn in international law – discussed by Alexandrowicz, Grewe, Koskenniemi, and others, and paralleled by the resurgent missionary zeal of imperial powers previously careful to maintain a secular law idiom[632] – continued at least in part the stages-based justification of imperialism, or whether Victorian imperial evangelism constitutes a *volte-face* from almost three centuries of self-consciously secularising imperialist legal discourse, resurrecting in effect sixteenth- and seventeenth-century Catholic justifications of imperialism. Without drawing a comprehensive arc, one can start a pointillist picture of this change by contrasting, for instance, Vattel's (1758) criterion for being a member of the natural society of nations (namely, a state's own claim to govern itself by its own authority and laws) [633] with post-Kant and post-Bentham elaborations that the correct hallmark of civilisation is not self-determination but recognition by a club of

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[630] This is Grotius's reading of Deut. 20 in *De iure praedae,* H.G. Hamaker (ed.) (The Hague, [1604?] 1868), 102.

[631] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, new ed., 2004). Alexandrowicz sets the same end date to the process of international law-making through treaties between Western and non-Western parties. Alexandrowicz, *Introduction,* 2, 83. What I see as the possible nineteenth-century retheologisation of imperalism seems coterminous with Alexandrowicz's new West-centrism of international law, and Koskenniemi's professionalisation of international law.

[632] Alexandrowicz, *Introduction,* 83 and *passim.*

[633] Emer de Vattel, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (London: n.a., 1758), I.i §4.

nations, self-appointed as already civilised.[634] Even if there were no nineteenth-century reversal to the imperialist doctrines of Renaissance and early modern expansionary Catholicism, at least a common, minimalist Christianity became a defining hallmark of civilisation in positive international law. [635] Another open question is the relationship of this rechristianisation of public international law to post-Hegelian doctrines of recognition, as another hallmark of civilised statehood.

In sum, considering *Mare clausum* as a 'Seldenian moment' has multiple advantages. It exposes the legal cornerstones of early British imperialism's success, and provides analytical categories for revisiting both the decline of Iberian Catholic imperialism and the strange rise of Enlightenment American, French, and Prussian exceptionalism. It also throws into sharper relief three unclearly but intriguingly connected nineteenth-century imperial developments, namely the stadial theories of progress designed to classify state and non-state legal entities; the European formulation of an ostensibly universal doctrine of recognition; and the rechristianisation of international law that underpinned imperial justifications of occupation, prescription, and war.

[634] Koskenniemi, *Gentle.*

[635] C.H. Alexandrowicz, "Doctrinal Aspects of the Universality of the Law of Nations," *British Year Book of International Law*, 37 (1961), 506-15.