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Article (Published Version)

Somos, Mark (2012) Selden's Mare Clausum: the secularisation of international law and the rise of soft imperialism. *Journal of the History of International Law*, 14 (2). pp. 287-330. ISSN 1388-199X

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## Selden's *Mare Clausum*. The Secularisation of International Law and the Rise of Soft Imperialism

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Imperialism is no word for scholars.

W.K. Hancock, *Wealth of Colonies* (Cambridge, 1950) 1

Unlike the French and the Iberian, Dutch and English imperialists encountered non-European legal systems without having to take a position on just war, forced conversion, slavery, or non-Christians' right to property and sovereignty. Their system secured non-European cooperation and saved economic and ideological costs of commercial and colonial expansion. It enabled, structured, and sustained the British Empire before the 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 created soft imperialism. This article's aim is to propose *Mare clausum* as the beginning of imperialist international law.

### I. Introduction

#### I.1. Exordium and 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 biblical foundations of law.<sup>1</sup> 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.'<sup>2</sup>

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 just war, missionary obligation, forced conversion, slavery, or non-Christians' right to property and sovereignty. The new system proved effective in securing non-European cooperation and saving the economic and ideological costs of non-secular commercial and colonial expansion. It created, structured, and maintained the British Empire before the 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* (MC) 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 article presents MC as the birth of the legal foundations of modern imperialism. *Demonstranda* categories include Selden's reformulation of all property as *de facto* private; of state sovereignty as including effective and legal control over territorial seas; the possibility of expanding the seas

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<sup>1</sup> Mark Somos, *Secularisation and the Leiden Circle* (Leiden: Brill, 2011).

<sup>2</sup> For an influential statement of the softness of British imperialism see J.R. Seeley, *The Expansion of England* (London: Macmillan, 1883). "Soft" features of an empire include an organic state; a shared sense of identity; provincial rulers aspiring to emulate metropolitan elites; a continued role for local courts, traditions and government. See C.L. Tomlins, 'Legal Communications 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: Cambridge University Press, 2008), vol. 1, pp. 104–143.

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.<sup>3</sup> 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.<sup>4</sup> Classifications of newly encountered actors, including classifications of sovereignty, posed to the Iberians a particular subset of challenges of this type.<sup>5</sup> By contrast, secularised natural law applied to everyone equally, whether immediately or at a future stage of development. 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 ecclesiastical 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.<sup>6</sup> 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

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<sup>3</sup> Tarik Kochi, *The Other's War: Recognition and the Violence of Ethics* (London: Routledge, 2009).

<sup>4</sup> Compare Stephen Greenblatt, *Marvellous Possessions: The Wonder of the New World* (Oxford: Clarendon, 1991), p. 135. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Clarendon, 2001). Randall Lesaffer, ‘Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,’ *European Journal of International Law* 16 (2005), pp. 25–58, reminds Anghie that Vitoria’s natural law remained Christian.

<sup>5</sup> C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon, 1967), chapter 2.

<sup>6</sup> Hugo Grotius ‘Reply to Welwod,’ in *idem, The Free Sea* (Indianapolis, IN: Liberty Press, [ca. 1615] 2004), pp. 83–87.

and maintain than the colonialism of Christian divine law.<sup>7</sup> 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. 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*.

### 1.2. *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.<sup>8</sup>

Additionally to positing efficient long-term conspiracies and revealing a shallowness of morals 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 imperialism.

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<sup>7</sup> Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' *Harvard International Law Journal* 40:1 (1999), pp. 1–71, esp. pp. 46–51. Another perspective in Thomas McCarthy, *Race, Empire and the Idea of Human Development* (Cambridge: Cambridge University Press, 2009).

<sup>8</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill, 2005), pp. 197–224, esp. pp. 200–208.

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 cooperation 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.<sup>9</sup>

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.<sup>10</sup> All have adherents, opponents, and modifiers proposing sub-varieties. This article suggests the ‘Seldenian moment’ as a useful alternative.

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<sup>9</sup>) Jonathan Scott, ‘What the Dutch Taught Us: The Late Emergence of the Modern British State,’ *Times Literary Supplement* (16 March 2001), pp. 4–6. *idem*, *Commonwealth Principles: Republican Writing of the English Revolution* (Cambridge: Cambridge University Press, 2004), p. 41. J.G.A. Pocock, ‘The Atlantic Republican Tradition: The Republic of the Seven Provinces,’ *Republics of Letters* 2(1) (2010), pp. 1–10, at p. 3. See also Alexandrowicz, *op. cit.*, p. 42, and Anthony Pagden, ‘Law, Colonization, Legitimation, and the European Background,’ in Tomlins & Grossberg, *op. cit.*, pp. 1–31.

<sup>10</sup>) Machiavellian: J.G.A. Pocock, *The Machiavellian Moment: Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975). Critically examined for early English imperialism: D.B. Quinn, ‘Renaissance Influences in English Colonization,’ *Transactions of the Royal Historical Society* (1976), pp. 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: Clarendon, 2010). Vitorian: Antony Anghie, ‘Francisco De Vitoria and the Colonial Origins of International Law,’ *Social and Legal Studies* 5(3) (1996), pp. 321–336. Grotian: Hersch Lauterpacht, ‘The Grotian Tradition in International Law,’ *British Year Book of International Law* 23 (1946), pp. 1–53; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977); *idem*, ‘The Importance of Grotius,’ in *idem et al* (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon, 1990), pp. 95–131; Edward Keene, ‘The Reception of Hugo Grotius in International Relations Theory,’ *Grotiana* 20/21 (2000), pp. 135–158. Overviews of ‘the Grotian moment’ are in C. Cutler, ‘The Grotian Tradition,’ *Review of International Studies* 17 (1991), pp. 41–65.

## II. *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: Hakluyt, R. and R., *The Original Writings & Correspondence of the Two Richard Hakluyts*, ed. E.G.R. Taylor (London: Hakluyt Society, 1935) 332.

### II.1. *The Four Lives of Mare Clausum (1616?–1621, 1630–1635, 1652, 1663)*

MC has a remarkable publication history even by seventeenth-century standards. From 1616 to 1663, under James VI/I, Charles I, Cromwell, then Charles II, MC addressed enduring concerns including the Civil War, mercantilism, the government's right to tax for defense, and its right to identify emergency. It was first drafted in response to the publication of Grotius's *Mare liberum* (ML, 1609), originally chapter 12 of *De iure praedae commentarius* (IPC).<sup>11</sup> The whole IPC remained unpublished until 1864. Hakluyt translated ML into English some time before his death in 1616 (perhaps as early as 1609).<sup>12</sup> Armitage dates MC to 1618; Toomer cites Selden's *Vindiciae* to show that Selden decided to counter ML before 1618; Tuck posits 1616–7.<sup>13</sup> Buckingham, recently made Lord Admiral, had Selden submit the draft MC to James for approval in the summer of 1619. Although approved, the court asked Selden to remove the final chapter on British

<sup>11</sup> On Selden and mercantilism see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), p. 100.

<sup>12</sup> P.C. Mancall, *Hakluyt's Promise: An Elizabethan's Obsession for an English America* (New Haven: Yale University Press, 2007), p. 275.

<sup>13</sup> David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), p. 113. Tuck 1979, *op. cit.*, p. 116. Welwod in 1613, and even Freitas in 1625, did not name Grotius as the author of ML, perhaps because they genuinely did not know. Fulton regards the second edition of ML, from 1618, as the official disclosure of Grotius's authorship. W.T. Fulton, *The Sovereignty of the Sea* (Edinburgh: Blackwood and Sons, 1911), p. 342 fn 1.

claims in the North Sea, likely to offend James's brother-in-law, Christian IV of Denmark. Selden was unable to gain access to Buckingham with the revised version, and MC vanishes from sight for a decade.<sup>14</sup>

Bourghier updated Ussher several times about Selden's condition in Marshalsea Prison. In one of these letters, from June 1630, he informed Ussher that Selden was preparing MC for publication.<sup>15</sup> Nothing more is heard until spring 1635 when, according to his *Vindiciae*, Selden was approached by unnamed noblemen with Charles I's 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.<sup>16</sup>

MC was closely tied to Stuart maritime policies, including claims to the adjacent seas, as well as ship money. As many point out, MC 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 Bourghier's 1630 report is credible, and revision may have begun as early as 1630.

Toomer's two points on the dating of MC's revision, namely its connection to Stuart claims to adjacent seas, and Selden's appeasement of the Crown, neither support nor contradict each other. Selden's revisitation of MC in 1630 could be connected to Charles's third Parliament, 1628–9, rather than to Ship Money. A very brief overview of the much-discussed events is in order. The 1625 June-August so-called Useless Parliament granted Tonnage and Poundage to Charles I for a year, instead of life, as

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<sup>14</sup>) John Selden, *Vindiciae... Maris Clausi* (London: Bee, 1653). G.J. Toomer, *John Selden: A Life in Scholarship* (Oxford: Clarendon, 2009), p. 389.

<sup>15</sup>) James Ussher, *The Whole Works of Ussher*, ed. C.R. Elrington (Dublin: Hodges and Smith, [n.a.] 1847). Vol. xvi, p. 514.

<sup>16</sup>) Toomer, *op. cit.*, pp. 390–391. Fulton, *op. cit.*, pp. 367–368.



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 Hampden led to his own arrest. The third Parliament opened in 1628. Led by Selden, John Eliot, Edward Coke, Robert Phelps and Thomas Wentworth, it forced Charles to sign 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 held in the Tower for eight months, before being moved to Marshalsea Prison under less harsh conditions.

The tenor and implication of MC's covert and overt legal 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 MC regardless of his position on Grotius's free sea arguments, has not been raised before. Perhaps it was politic, for instance, to cite DIBP strategically, and not to draw too much support from it for his anti-ML arguments, however tempting it was to dwell on Grotius's changes of mind or emphasis from ML to DIBP.

The second life of MC, 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. The States General also commissioned Dirk Graswinckel (1600/1–66), who finished his draft by the end of 1636. Graswinckel was eminently suited to the task. A cousin and student of Grotius, Graswinckel was with him at Senlis when he was writing DIBP around 1623.<sup>17</sup> Graswinckel already had a reputation as a polemicist favouring free seas. *Libertas Veneta* (1634) defended Venetian claims to trade freely.<sup>18</sup> Soon after MC's appearance, and before the States General commissioned him to draft an official response, he privately sent detailed criticisms to Selden.<sup>19</sup> 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. Published responses 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. MC's first appearance in 1635 is as convenient a birthday for the public international law of modern imperialism as one can hope to find.

The third life of *Mare clausum* begins in the 1650s, under a different regime facing similar problems. The English Commonwealth is at war with the United Provinces, but its disputes are similar to those pursued under James's and Charles's monarchy. The first published translation was Marchamont Nedham's in 1652 under the title *Of the Dominion, Or, Ownership of the Sea* (DOS).<sup>20</sup> Nedham replaced Selden's dedication to Charles with a dedication to Parliament, and added supplementary materials. This translation is considered generally faithful and accurate. As we will see, it introduces a few important changes to Selden's text to fit the Cromwellian milieu.<sup>21</sup> After

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<sup>17</sup>) Henk Nellen, *Hugo de Groot. Een leven in strijd om de vrede 1583–1645* (Amsterdam: Balans, 2010), p. 307.

<sup>18</sup>) Tuck, 1979 *op. cit.*, pp. 89–97.

<sup>19</sup>) Tuck, 1979 *op. cit.*, pp. 89–90.

<sup>20</sup>) An earlier translation attempt by William Watts around 1636 was unsuccessful. Selden, *Correspondence*, pp. 104–105. Toomer, *op. cit.*, pp. 345–349.

<sup>21</sup>) For the diplomatic rumour that Cromwell used MC to prepare his claim to becoming 'emperor of the seas *occidentalis*' see Armitage, *op. cit.*, pp. 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 disputed in MC.

the Restoration, James Howell, Historiographer Royal, deleted Nedham's deprecatory comments on Charles, restored Selden's original dedication, and published the reworked translation in 1663.<sup>22</sup>

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

## II.2. *Deconstructing Sources of Law: Bible and Human Reason*

### II.2.1. *Origins of Global Private Property: Samaritan Pentateuch vs. Conventional Legal Loci*

In Selden's classification the universal laws of nations, or common laws of mankind, are either natural or divine.<sup>23</sup> They are unchangeable, as shown by ancient philosophers (including Aristotle and Cicero), theologians (Aquinas), and lawyers. By contrast positive or civil law, "ordained either by God or men", can change.<sup>24</sup> 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.<sup>25</sup>

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, for instance,

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<sup>22</sup>) D.J. Padwa, 'On the English Translation of John Selden's *Mare Clausum*,' *American Journal of International Law* 54:1 (1960), pp. 156–159.

<sup>23</sup>) DOS, I.iii.12.

<sup>24</sup>) DOS, I.iii.13.

<sup>25</sup>) DOS, I.iii.13–15.

to 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.<sup>26</sup> 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 an 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.<sup>27</sup> In MC, his response to Grotius, Selden picks the same passage to make a similar point, even though he has not seen the whole of IPC, only ML. Selden neutralises this key passage in the just war tradition slightly differently than Grotius, by redefining the types and hierarchy of laws it fits into.

Yet Selden's main concern in MC 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

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<sup>26</sup>) Francisco Vitoria, 'De Indis Posterior, sive de iure belli,' in *Relectiones theologicae XII* (Lyons: Jacob Boyer, 1557), Vol. i, pp. 409–410.

<sup>27</sup>) IPC, iv, Q II in *Commentary on the Law of Prize and Booty* (ed. M.J. van Ittersum, Indianapolis, IN: Liberty Press, [ca. 1603] 2006), p. 81. Further cases and details of Grotius's use of Deut. 20.10–17 in Mark Somos, 'Secularization in *De iure praedae*: From Bible Criticism to International Law,' *Grotiana* 26–28 (2008), pp. 147–191. Cf. the contrast between Augustine's, Aquinas's and Calvin's reading of another just war passage. Michael Walzer, 'Exodus 32 and the Theory of Holy War: The History of a Citation,' *The Harvard Theological Review* 61:1 (1968), pp. 1–14. 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.'

akin to the former. He begins by appealing to Lactantius's *Divine Institutes* V.v to explain the classical accounts of an original communality of property as poetic license. Lactantius thinks 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 *Metamorphoses* on the golden days. Through a neutralisation of the established biblical *loci*, Selden presents all property as private. Instead of Grotius's ML, Lauterpacht could have cited Selden's MC 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*.<sup>28</sup>

Selden cites Gen. 10:5 to 25 here, and allocates the three sons in geographical regions over which they “settled themselves as private Lords.” 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 rights to the whole 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. 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, *permitted* both the emergence of numerous private owners by 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 argues that universal law is not the source of private property.

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<sup>28</sup>) Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London: Longmans, Green and Co., 1927), pp. 72–87. Lesaffer, *op. cit.*, p. 28.

Instead, popular consent 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 law appropriates them to the Prince.<sup>29</sup> 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.<sup>30</sup> In later editions of DIBP, at II.ii “De his quae hominibus communiter competunt” Grotius referred to “Selden, the glory of England” and to this evidence that Selden found for explicit agreements to transform common into private property.<sup>31</sup> Grotius’s celebrated reformulation of both *ius naturae* and *ius gentium* with a pragmatic view to imperialism owes the discovery and occupation of this common ground to Selden.

Selden next directly faces 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 sort 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 (DIBP II.ii §2). 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.<sup>32</sup>

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 enioie them by Occupation; hee that shall so possess them by

<sup>29)</sup> DOS, I.iv.19–21.

<sup>30)</sup> DOS, I.iv.22.

<sup>31)</sup> DIBP, II.ii.v, p. 122 in the 1642 Amsterdam edition, author’s note. Tr. in ed. Richard Tuck (Indianapolis, IN: Liberty Press, 2005), p. 426.

<sup>32)</sup> DOS, I.v.24, I.vi.41, I.xxi.130.

Occupation, receive the Island and Building as it were by a Surrender of Right from former Owners.<sup>33</sup>

Unlike the universal and natural bodies of permissive positive law, the “due observation of Compacts and Covenants” remains an universal obligatory law that continues to underpin the permissive developments in property law, including division, inheritance, original occupation and, if so provided in a given state, even appropriation of still undiscovered lands to the Crown.<sup>34</sup> 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.

Selden’s next example for the permissive positive law of private property is Canaan, 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.*”<sup>35</sup> 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 the Canaanites as limited to modern-day Israel, just stretching into Jordan at the OT city of Lasha. By replacing the Jordan with the Euphrates as the other river, beside the Nile, that bordered Canaanite territory, Selden ascribes the whole Fertile Crescent to them. The deliberateness of this shift is confirmed when Selden continues by describing the land assigned to Japheth’s Sons as outside the Fertile Crescent, citing Num. 34:6–7 and 34:12 (to which Nedham adds 34:3–5). However, Num. 34:2 explicitly refers to Canaan, and the others are conventionally interpreted to do likewise. Selden points out that Josh. 15 (:1–5) gives the same description of a region, divided out by Joshua; though he fails to mention that there it applies to the land of Judah’s progeny. Selden’s final biblical support in MC I.v for using seas as territorial boundaries is Ps. 72:8. Although the best support for his

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<sup>33</sup>) DOS, I.xxi.130.

<sup>34</sup>) DOS, I.v.24–5.

<sup>35</sup>) DOS I.v.25.

argument, it is the only one that Selden simply includes in the marginalia, without discussion. Nedham's changes are not corrections, but attempts to steer MC back toward conventional sacred geography.

Selden's use of the Samaritan Pentateuch (SP) for Genesis and Deuteronomy here is striking. Although Jerome, Eusebius, Diodorus of Tarsus, Procopius, Cyril of Alexandria, Syncellus and others used and cited this Pentateuch, it later fell into oblivion. Scaliger was the first to reassert the SP's importance in *De emendatione temporum* (1583), but his own prized manuscript was the Samaritan Chronicle, not the Pentateuch. Peiresc tried to obtain a copy, but the ship carrying it was captured by pirates.<sup>36</sup> In modern times the first complete copy, dating from 1345/6 CE and now known as Codex B, was finally acquired in 1616 in Damascus by the redoubtable Pietro della Valle (1586–1652) and sent by 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 1628–1645 Polyglot (in vol. 6, 1645), from which Walton's famous Polyglot reproduced it in 1657.<sup>37</sup>

SP played several roles in political and legal controversies until the nineteenth century. It was known that the Samaritans arose from Jewish and Gentile intermingling, and that Jews and Samaritans entertained cordial hostility to one another.<sup>38</sup> Samaritans rejected all Jewish sacred texts except the Pentateuch, and raised a temple on Mount Gerizim to worship according to Mosaic law. Among early modern Bible scholars it was popular to argue that the mutual hostility between Samaritans and Jews stopped all interaction; therefore the insignificance of textual variants between the Torah

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<sup>36</sup> 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, Grenzgebiete* (Tübingen: Max Niemeyer Verlag, 2001), pp. 123–146.

<sup>37</sup> A. Schenker, 'The Polyglot Bibles of Antwerp, Paris and London: 1568–1658,' in M. Saebø (ed.), *Hebrew Bible/ Old Testament: The History of its Interpretation* (Göttingen: Vandenhoeck & Ruprecht, 2008), Vol. 2., pp. 774–784, esp. pp. 779–781. The project for this Polyglot was conceived by Cardinal du Perron and Jacques du Thou. Morin was invited in 1628. P. Gibert, 'The Catholic Counterpart and Response to the Protestant Orthodoxy,' in Saebø, *ibid.*, pp. 758–773, at p. 768. Toomer, *op. cit.*, p. 806, dates SP's *editio princeps* in LeJay's Polyglot, vol. vi, to 1632.

<sup>38</sup> The usual early modern reference for this trope of Jewish-Samaritan hostility is Flavius Josephus. As he does with the Druids in his 'Notes upon Fortescue', Selden positions Flavius as a lawyer. DOS, I.xxiii, 149.



and the SP was another proof of Moses's authorship and the text's faultless preservation throughout the millennia.<sup>39</sup> Others focused on the differences and turned them to sectarian use.<sup>40</sup> In light of these loaded debates surrounding the SP, Selden's reliance on the Samaritan version of Gen. 10:19 and Deut. 34:3 is indicative of both his philological and his non-sectarian self-positioning, especially in an applied legal work like MC.

His reliance on SP to redraw, on the one hand, sacred geography and, on the other hand, to reformulate the origins of private property, effectively sidestepped contemporary uses of the Bible in imperial debates. Had Selden proceeded to trace a genealogy of the Brits 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 they and they 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.<sup>41</sup> 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.<sup>42</sup>

In sum, in MC I.v-vi Selden goes to great lengths to 1) establish biblical evidence for the use of seas as boundaries within which dominion applies; 2) to make this biblical evidence as radically different as possible from the biblical exegeses used in the established pertinent legal tradition; and 3) to make the equation of the boundaries (which derived from his innovative biblical exegesis) with the territory, which is his clinching argument for possible dominion over the seas, depend not on biblical but on Roman legal commentaries. As SP has just become available for insertion in the legal tradition, his choice signalled that A) he regarded his treatment as original, and B) previous treatments (and therefore the conventional applications of the Bible to this issue) as inadequate.

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<sup>39)</sup> Toomer, *op. cit.*, p. 245.

<sup>40)</sup> E.g. Johann Heinrich Hottinger (1620–1667) derived Protestant justifications from the Samaritan Pentateuch in *Exercitationes Anti-Moriniana* (Zurich, 1644). Also see Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon, 2002), pp. 418–419.

<sup>41)</sup> 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.

<sup>42)</sup> Cf. Grotius's techniques for neutralising the Bible in IPC, described in Somos, *Secularisation*, chapter 5.

## II.2.2. *Natural-Permissive: The Unreasonable and Irreligious Common Law of Nations*

Book I, chapter vii, of MC 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*, MC 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, 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 across the ages.<sup>43</sup> Religious truths, however, cannot. 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.<sup>44</sup>

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 finding natural-permissive law. Reason must likewise be ignored, because religious lawgivers are right about reason being fallible. All that is left to deduce natural-permissive law from is history. From history one can glean the common law of nations by examining customs, which in turn might be best

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<sup>43</sup> See also Selden, 'Notes upon Fortescue,' to chapter XVII, 7–22 in Fortescue, *De Laudibus Legem Angliae, with Ralph de Hengham, Two Summes* (London, 1616).

<sup>44</sup> DOS, I.vii.43.

reflected in bodies of civil law. With reason, religion, and antiquity shown as unreliable sources, one wonders what natural law Selden allows for.<sup>45</sup>

Yet on closer inspection, the permissive natural laws regulating non-religious affairs are not much simpler. Selden reverts to the skepticism we find in the *History of Tithes* when in MC he cites Justinian and Gaius, who posit a “natural reason” that manifests in the law of nations, followed by all.<sup>46</sup> 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 gathered from inspecting and comparing the customs of nations.<sup>47</sup> Selden’s skepticism is unlike that of Montaigne, Charron or their many readers. From accounts of civilisations radically different from their own, including ancients and *in extremis* cannibals, they stoically surmised the contingency of their moral and religious norms.<sup>48</sup> Selden’s maxim in MC 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 MC that legal history shows that British common law applies globally follows from this skeptical blow to natural law. It was appreciated by Selden’s non-English followers as such when they adopted his reasoning to vindications of their own exclusive dominions over the sea.

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’

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<sup>45</sup> Tuck 1979, *op. cit.*, pp. 84–85 and 95, for the secularising implications of this move, both in terms of Erastianism and emptying divine law.

<sup>46</sup> John Selden, *The Historie of Tithes...* (London: William Stansby, 1618), Preface xiii, and *passim*.

<sup>47</sup> DOS, I.vii.43–5.

<sup>48</sup> M. Montaigne, ‘On cannibals,’ in *idem, Essays* (London: Penguin, ([1580] 1958), pp. 105–119. M. Hodgen, *Early Anthropology in the Sixteenth and Seventeenth Centuries* (Philadelphia, PA: University of Pennsylvania Press, 1964), pp. 358–382. Anthony Pagden, *The Fall of Natural Man* (Cambridge: Cambridge University Press, 1986), pp. 1–14, 27–38, 51–103, 114–135. Richard Tuck, *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993), chapters 2–4.

invocation of Roman law as *the* model for, virtually the entire content of, reformulated natural law.<sup>49</sup> Three well-known instances are the genealogical and analogical connection between private and public property and contract; occupation of *terra nullius*; and acquisitive prescription. Many, including Grotius, argued that international law arose from Roman private law.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

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<sup>49</sup> 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 H.W. Blom (ed.), *Property, Piracy and Punishment* (Leiden: Brill, 2009), pp. 61–78, esp. pp. 73–74.

<sup>50</sup> 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), p. 138 n7.

<sup>51</sup> 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* (New York, NY: Harper & Row, 1952). A.J. Slavin, *The New Monarchies and Representative Assemblies* (Boston, MA: D.C. Heath, 1964). R.H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge: Cambridge University Press, 1990). A balanced account is G. Butler, 'Roman Law and the New Monarchy in France,' *English Historical Review* 35:137 (1920), pp. 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.

<sup>52</sup> Lesaffer, *op. cit.*, p. 37.

These are the stakes and the context in which Selden here rejects Roman lawyers<sup>53</sup> 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.<sup>54</sup> In MC 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 of

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<sup>53</sup> In DOS, I.xxiv.151 he cites Cujas's rejection of Roman law when superseded later by custom.

<sup>54</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 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 MC. Trade and colonisation in the East Indies, for instance, were not discussed in terms of *terra nullius*, as indigenous regimes were generally perceived as valid negotiating partners. Charters in M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green, and Co., 1926), pp. 94–98. 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 on Grotius. The genealogy of *terra nullius* is thus more important for English than for Dutch imperialism. *Terra nullius*, however, served to justify British occupations of America, Australia and Africa. James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993). Lesaffer, *op. cit.* 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) bridged the occupation of vacant land with the seizure of uncultivated but owned land. DIBP II.ii §17, II.iii §4, II.iii §19.2. To my knowledge this possibility of legal emergence (even constructivism), which dissolves the currently prized conundrum of the self-contradictions, hypocrisy and "justice" 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), pp. 448–471, at pp. 453–460. A.S. Keller *et al.*, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400–1800* (New York: Columbia University Press, 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: Cambridge University Press, 1995). Note that this context refutes Fulton and others who regard pertinent details concerning historical acts of taking possession in MC as mere digressions. Lesaffer, *op. cit.*, p. 49 posits a similar legal transformation, of acquisitive prescription into effective occupation.

Roman law as the law of nations and of nature. Selden's arguments against Gentili, an Oxford law professor and fellow defender of English imperial interests, follow Cujas's *mos gallicus* in showing abiding changes in custom from history.<sup>55</sup> As he does with Rome, Selden at the end of MC I.xxiv denies that the tradition of legal opinion and scholarship is a viable source of law, because of its incoherence and carelessness.

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,"<sup>56</sup> 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.<sup>57</sup> Roman Emperors

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<sup>55</sup> In MC I.xxv Selden, as he did earlier with Cujas, sides with Alciato 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), pp. 1651–1738, esp. 1657 n10. 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: Cambridge University Press, 1960), 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), pp. 22–39. Helmholtz, *op. cit.*, offers a fine refutation of the thesis that common law replaced Roman law in early modern England.

<sup>56</sup> DOS, I.xiii.76.

<sup>57</sup> I disagree with Paul Christianson, *Discourse in History, Law and Governance in the Public Career of John Selden, 1610–1635* (Toronto: University of Toronto Press, 1996), pp. 254–261, that Selden 'deflated Roman law to a status inferior to international treaties and equal to other national laws.' (p. 255). In Selden's system of international common law, Rome remained the most important precedent. Compare Kingsbury and Straumann, *op. cit.*, on the difference between the role Gentili and Selden assigned to Rome. Lesaffer's emphasis on medieval and early modern uses of Roman law as *ratio scripta* underlines Selden's deviation from the other end of the spectrum of Roman law's authority as source of law. Selden neither "deflated" Roman law, nor treated it as straightforwardly authoritative *ratio scripta*. For Harrington's adoption of this paradigm see Mark Somos, 'Irenic Secularisation and the Hebrew Republic in Harrington's *Oceana*,' in Gaby Mahlberg and Dirk Wiemann (eds.), *European Contexts for English Republicanism* (Ashgate, 2013, forthcoming).

were regarded as lords of both land and sea, hence a valuable precedent for closed seas.<sup>58</sup>

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.<sup>59</sup> 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 it tallies with his installation of Noahide precepts as a positive source of international law. Secondly, Selden’s presentation of Noahide precepts in *De iure naturali et gentium, iuxta disciplinam Ebraeorum, libri septem* (London, 1640, henceforth DIN) 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 MC. The third inference concerns secularisation. Fourthly, another key component for Selden in the precedent set by Rome for customary international law is popular sovereignty. Given MC’s original context as legal support for James VI/I, then for Charles I, this is unexpected, though given Selden’s parliamentary work, unsurprising. In various places of MC 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 yet powerfully 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

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<sup>58</sup>) DOS, I.xxii.143–5.

<sup>59</sup>) DOS, I.vii.42–3.

monarchs.<sup>60</sup> However, the limits Selden sets on reason also apply to public reason, which is limited by *opinio iuris* and parliamentary representation.

Assuming infallible universal reason, and appealing to it, is an obvious way of sidestepping religion. The two can be compatible, with reason as God's or gods' gift. If *a priori* superiority is given to reason in case they clash, reason is assumed to 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 thought 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 big; and some eighteenth-century formulations of "common sense" that posit a similarly omnipotent universal reason with a similarly limited sphere of applicability. All versions of this theory, however, assume that infallible universal reason is indeed universal, therefore can serve as the foundation for negotiation. The secularising effect of Grotius's *De veritate religionis Christianae* (1627), for instance, derives from this assumption, which can only be maintained and extended to savages by rejecting rationalist arguments that support Christianity proper.<sup>61</sup> Unlike today, however, seventeenth-century thinkers could argue that most men believed in one god or at least multiple gods, and those who did not were such aberrations that they, like the mentally disabled, could be ignored in reconstructing the nature and right sphere of reason.<sup>62</sup>

Selden is suspicious of all this. His skepticism toward reason is shared by many believers, but given what he writes about religious laws in MC, that comparison does not say much about him. Selden does not argue that an examination of the religious laws of states, other than Israel's, can indicate

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<sup>60</sup> Harrington similarly weaves imperialism and popular sovereignty together inextricably. Somos, 'Irenic.'

<sup>61</sup> Compare Selden calling Erastus a new Copernicus. Tuck 1979, *op. cit.*, p. 95.

<sup>62</sup> E.g. John Locke, *Letter Concerning Toleration* (London: Awnsham Churchill, 1690).



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.<sup>63</sup> Nor does he rely on reason, which must be deceived and contained by religion for the sake of public order.<sup>64</sup> Unlike the harmonisers, or even the skeptical fideists, Selden removes both reason and religion from the list of reliable sources of natural law. The most obvious corroboration of his secularising reformulation of natural law is what he does with natural religion.

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 construction 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.<sup>65</sup> 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 signing a commercial treaty, an English merchant or conqueror would need to know whether a native ruler 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 only 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. The fact that he did not suggests a calculated openness on the matter. It is also worth noting that Selden's weakening of reason can be easily accommodated by deleting the word

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<sup>63</sup> In Bedford's summary of this stance: 'No religion is entirely devoid of truth.' R.D. Bedford, *The Defence of Truth: Herbert of Cherbury and the Seventeenth Century* (Manchester: Manchester University Press, 1979), p. 181.

<sup>64</sup> DOS, I.vii.43.

<sup>65</sup> Tuck 1979, *op. cit.*, pp. 89–90.

‘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 or breaking promises. It is one thing to appeal to reason with a rhetorical strategy (whether about reason, God, or both) and argue that society collapses 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 according to rhetorical rules designed to persuade the reader.<sup>66</sup> If Selden assumed the priority of self-interest, as Tuck suggests,<sup>67</sup> 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 the possibility of eternal life.<sup>68</sup>

Selden’s displacement of the legal puzzles of early modern imperialism away from universal divine or natural law toward a 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.<sup>69</sup> This is a notable *coup* in the context of seventeenth-century imperial legal debates. Selden’s disagreement in MC with those who saw Judaism as superseded by Christianity, and with those who thought that formulations of universal truths pre-date the Rabbis,<sup>70</sup> set him up perfectly for his *leitmotiv* in DIN. Second, and also connecting the 1635 MC to the 1640 DIN, it also leads him to identify the Noahide Precepts as an historically recognisable instance

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<sup>66</sup> Ioannis Evrigenis, *Images of Anarchy: Rhetoric and Science in Hobbes’s States of Nature* (Cambridge: Cambridge University Press, forthcoming).

<sup>67</sup> Tuck 1979, *op. cit.*, pp. 96–97.

<sup>68</sup> This is the underlying message of Grotius’s *De veritate*, and the key to its efficacy as a sailors’, merchants’ and administrators’ manual for imperial encounters.

<sup>69</sup> Cf. Hugo Grotius, *Sensus librorum sex quos pro veritate religionis Christianae* (Leiden: Johannes Maire, 1627), V.vii. *Idem*, DIBP I.xvi, and J. Barbeyrac, note 11 to DIBP I.xvi.4, in ed. Barbeyrac, Grotius, *Le droit de la guerre, et de la paix* (Amsterdam, 1724), 60–61. 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.

<sup>70</sup> Bedford, *op. cit.*, p. 183.

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 instance for guidance. Thirdly, given Selden's notion of evolving laws, the Noahide Precepts may not be always binding, either.<sup>71</sup>

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<sup>72</sup>) to the reformulation of Roman law as binding due to past achievements. MC 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 becomes 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 XV ("That all Lawes are the law of nature, customes, or statutes"), XVI ("The Law of nature in all countries, is all one") and XVII ("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 legum Angliae* (1463?), 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.

This is why, after MC 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

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<sup>71</sup> This is the direction taken in H. Stubbe, *An Essay in Defence of the Good Old Cause* (London, 1659), pp. 15 and 106–132.

<sup>72</sup> See Fulton, *op. cit.*, p. 371 for Selden's realism. In MC II.ii Selden agrees with Grotius, DIBP II.iii.II, on the necessity of an external act in legitimate occupation, and the insufficiency of the mental act alone. This, however, is far from being the sum of Selden's realism.

a modern framework for assessing sovereignty and statehood, endogenising historical, even ethnic change. It contrasts with chosen nation theories as much as with “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.<sup>73</sup>

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 a 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 MC 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 and Byzantinian historical sources that discuss 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.<sup>74</sup>

Selden’s method of establishing both British geography and law relies on collating sources in several languages along a continuous historical timeline.

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<sup>73)</sup> DOS, II.i.182.

<sup>74)</sup> DOS, II.i.187.

Berman describes this as Selden's "historicity:" "He carried Coke's historicism one giant step beyond the conception of an immemorial past and an unchangeable fundamental law to the conception of an evolutionary past and an evolving fundamental law."<sup>75</sup> 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*.<sup>76</sup> In MC in particular, Selden consistently offers *historical* arguments for naval defense, fishing, and trade, as *ab initio* and uninterrupted British custom of sovereign *imperium* over the seas.

His 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. The historicisation of biblical precepts, for instance, that Grotius uses 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. Instead, Selden can deploy 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 build garrisons to protect them.

### II.3. *Reconstructing Sources of Law*

#### II.3.1. *The Bible Becomes Fable*

Selden's strategy in MC I.viii is 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

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<sup>75</sup>) Berman, *op. cit.*, p. 1695.

<sup>76</sup>) Somos, *op. cit.*, chapters I-II.

fables are subject to rigorous historical analysis leads him not to reject but to re-examine the historical foundations of the Bible. MC 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." 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 antient Historians, though wrap't up in the mysteries of Heathen Priests and Poëts.<sup>77</sup>

While this view is best known from Augustine, Selden cites Lactantius instead in both *De diis Syris* (1617) and MC. Lactantius is notoriously more forgiving than Augustine toward not only pagan philosophy but also pagan religions.<sup>78</sup> Renaissance and early modern Neoplatonists, including 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.<sup>79</sup> Seventeenth-century Englishmen were equally susceptible to charges of wandering beyond the acceptable, even into atheism.<sup>80</sup>

Though Selden 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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<sup>77</sup>) DOS, I.viii.47.

<sup>78</sup>) 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: Routledge, 1964), pp. 58–60.

<sup>79</sup>) See e.g. Yates, *op. cit.*, pp. 6–9, 18, 26–27, 36, 42–43, 83, 85–86, 143, 310, 364, 384–385, 399, 401.

<sup>80</sup>) Michael Hunter, 'The Problem of "Atheism" in Early Modern England,' *Transactions of the Royal Historical Society* 35 (1985), pp. 135–157.

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 derogares.<sup>81</sup>

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.<sup>82</sup> The context of the first sentence (the second in Selden's citation) is Lactantius showing that the poets must be transferring 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 before and after this Lactantius mis-citation in MC, is irresistible. Selden indicates from the start the historical kernel *and* fabulous character of the biblical story. 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 by a historical agreement. He cites Euhemerus in support, recorded and translated by Ennius, and also referenced by Lactantius. 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. The next key move, the application of mythographical instruments to the Bible, happens not under the aegis of Lactantius but a lawyer, Selden's contemporary.

<sup>81</sup> MC, I.viii, 33. "For (as *Lactantius* saith well) even *Those things which 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.*" DOS, 47.

<sup>82</sup> 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."

Joannes Gryphiander (1580–1652) is seen as a pioneer both in adapting Roman law to modern conditions, and pointing out its limitations.<sup>83</sup> In *Tractatus de insulis* (1623) Gryphiander argues that prescription requires discovery (*invenire*) and actual occupation (*corporalis apprehensio*), reducing the complexity of the matter that Selden first touched on 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.<sup>84</sup> Discussing the fabulous age, Selden invokes Gryphiander's use of Homer's lines on Neptune.<sup>85</sup> Selden here reveals that following Lactantius's debunking of fables it is not he, as implied earlier,<sup>86</sup> but Gryphiander who equates the three Greek gods, Jupiter, Neptune and Pluto, with Noah's three sons.<sup>87</sup> Selden can now explicitly call Genesis 10 a fable (*in fabula illa*).<sup>88</sup> 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 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.<sup>89</sup>

Selden's parliamentarianism remains evident in this crucial debunking move, in which sovereignty is transferred from gods and rulers to the

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<sup>83</sup> Pioneer in adapting: J. Goebel, *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927), pp. 115 ff. Schmitt, *op. cit.*, p. 138, n. 7. A.S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press, 2011), pp. 222–225.

<sup>84</sup> DOS, I.iv.21–2.

<sup>85</sup> Gryphiander, *De insulis tractatus, ex iurisconsultis, politicis, historicis et philologis collectus* (Frankfurt, 1623), XXXI §74, p. 490.

<sup>86</sup> MC I.viii, 47.

<sup>87</sup> Gryphiander, *op. cit.*, XXXI §75.

<sup>88</sup> This elaborate process of neutralising Genesis in MC I.viii complements Selden's refusal in MC II.ii to consider non-biblical historical sources, which pre-date Julius Caesar, because they are 'too obscured with Fables.' DOS, II.ii.189.

<sup>89</sup> DOS, I.viii.52. MC 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), pp. 27–42.



people. Selden criticises Lactantius for comparing Neptune with Pompey (though Lactantius's comparison was with Mark Anthony), not with 'the People of Rome.'

### II.3.2. *History Becomes Law*

Selden begins his account of public dominion over the sea in historical times with the Cretans. He carefully shows that historical dominion covers the right to make rules, collect tolls, and control the number of ships on the sea. 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)."<sup>90</sup> 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 remained vacant after the world was divided among Noah's three sons.

It is notable that he does not engage in 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.<sup>91</sup> 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 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 dominion. The difficulties of making this claim were greater than the Spanish and Portuguese claims, even in their extreme form. In addition to millenarian, chosen nation and other exclusivist claims, the Iberians had papal bulls in support.<sup>92</sup>

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<sup>90</sup>) DOS, I.ix.54.

<sup>91</sup>) See e.g. Armitage, *Ideological*, 81–90, on Purchas, *Hakluytus Posthumus, or Purchas His Pilgrimes*, published in 1625.

<sup>92</sup>) Summarised in W.G. Grewe, *The Epochs of International Law* (revised ed., Berlin: Gruyter, 2000), pp. 233–237. Von der Heydte, *op. cit.*, p. 451 is right to point out that the legal issue of papal donations precedes Alexander VI's famous bull *Inter caetera* (1493). To be able to

The opportunity cost of Selden's eschewal of religious partisanship and his refusal to offer a nationalist biblical exegesis in MC was considerable.<sup>93</sup>

#### II.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.<sup>94</sup>

Grotius, letter to Du May, 10 Aug. 1635

##### II.4.1. *Free Trade*

The two main lines of argument in MC sketched out above, namely the Bible's neutralisation and closed seas, unite in Selden's position on free and unfree trade. 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. 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 became a key commonplace for medieval and early modern treatments of just war.<sup>95</sup> Selden adds the reference to Grotius, DIBP 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

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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, pp. 137–141). Selden's sometimes explicit, sometimes implicit insistence on effectiveness as a precondition of *de iure* occupation, which allowed him to sidestep much of the New World problematic, could have come from the same Bartolus treatise.

<sup>93</sup> 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), pp. 5–25.

<sup>94</sup> Grotius, [n.a.] *Briefwisseling*, 2227.

<sup>95</sup> References in F.H. Russell, *Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), pp. 21–22, 64, 72–73, 91, 100, 221–222, 225.

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.<sup>96</sup>

This was a shrewd analysis of one method with which Grotius subverted the Bible's use in international law. Welwod pointed out another, namely the elimination of Scripture as an acceptable source of international law.<sup>97</sup> Unlike Barbeyrac, Selden accepts this Grotian claim as a methodologically valid legal proposition. 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 denying 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*.<sup>98</sup>

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<sup>96</sup>) J. Barbeyrac, note 3 to DIBP II.ii §13, in ed. Barbeyrac, Grotius, *op. cit.*, 236. Also Tuck, Grotius, *The Rights of War and Peace*, p. 440 n3.

<sup>97</sup>) Somos, *op. cit.*, pp. 388–391.

<sup>98</sup>) DOS, I.xx.124.

Selden here is responding to Grotius's use of the same references and images in DIBP II.ii, referred to earlier in MC I.xx. Here, Selden effectively lumps Grotius together with the Iberian lawyers.<sup>99</sup> 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.<sup>100</sup> Selden shows that customary international law recognises this condition by citing one treaty, namely the 1609 Treaty of Antwerp between Spain and the Netherlands, in preparation for which ML was published!<sup>101</sup> 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. 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.'<sup>102</sup> 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."<sup>103</sup>

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.<sup>104</sup> Current assessments of Solórzano vary widely.

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<sup>99</sup>) Though Selden does not give this reference, compare Grotius with Francisco de Vitoria, *De Indis et de Iure Belli Relectiones*, Ernest Nys (ed.), J.P. Bate (tr.) (New York: Carnegie, ([1555] 1917), pp. 151–155. Pace Anghie, *op. cit.*, the ineliminably religious character of Vitorian free trade doctrine is noted i.a. by Lesaffer, *op. cit.*, 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* (New York: Palgrave, 2010), pp. 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: Clarendon, 2011), pp. 90–112, at pp. 110–112.

<sup>100</sup>) Alberico Gentili, *De Iure Belli Commentationes Tres* (London: n.a., 1589), I §19.

<sup>101</sup>) Grewe, *op. cit.*, pp. 156–162.

<sup>102</sup>) DOS, I.xx.125.

<sup>103</sup>) DOS, I.xx.126.

<sup>104</sup>) 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.

Alvares reads *De Indiarum* as prioritising papal authority above all other actual and possible justifications for Spanish and Portuguese conquest.<sup>105</sup> Muldoon regards Solórzano as a medieval just war lawyer hopelessly behind his more enlightened Salamanca and other neoscholastic Iberian peers, including Vitoria.<sup>106</sup> 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.<sup>107</sup>

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 instituted fellowship of men from the state into the church. In 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 that polities were man-made for purely temporal ends.<sup>108</sup> There was no body of natural law that both had content detailed enough to include provisions for crossing another sovereign's territory without permission, and override civil laws at the same time. Molina anchored trading rights in a supra-political natural law of nations, the same state of nature where Locke grounded original property rights.<sup>109</sup> Selden chose the Catholic thinkers for his contrast shrewdly. 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 reader's 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.

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<sup>105</sup>) Claudia Alvares, *Humanism After Colonialism* (Bern, 2006), pp. 80–82.

<sup>106</sup>) 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), pp. 29–45.

<sup>107</sup>) Pagden, 1986, *op. cit.*, p. 165.

<sup>108</sup>) J.H.M. Salmon, 'Catholic Resistance Theory, Ultramontanism, and the Royalist Response, 1580–1620,' in J.H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought, 1450–1700* (Cambridge: Cambridge University Press, 1991) pp. 219–253, at pp. 237–238.

<sup>109</sup>) 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, *op. cit.*, p. 341.

Another useful piece of the puzzle is Selden's difference from other critics of Grotius's ML on this point. In *De iusto imperio Lusitanorum Asiatico* (1625) Freitas countered ML 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.<sup>110</sup> 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 His Pilgrimes*, published in 1625 like Grotius's DIBP, Purchas drew on Vitoria to refute Iberian claims to just conquest, particularly because they *failed* to spread the faith.<sup>111</sup> These contrasts economically adumbrate Selden's radical originality, and difference from the range of imperial justifications that had a use of religious components in common.

#### II.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.<sup>112</sup> The implications of his counter-argument are worth drawing out. Selden effectively posits a global public order of sovereign nation-states with the capacity to own everything. When at the end of MC 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 least since Carl Schmitt and Ulrich Scheuner. Schmitt famously argued that from an early modern European perspective, *Raumausgrenzungen* divided the world into

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<sup>110</sup>) Freitas, *De iusto*, cap. IX.

<sup>111</sup>) Armitage, *op. cit.*, pp. 81–90.

<sup>112</sup>) DOS, I.xx.126.

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 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.<sup>113</sup>

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<sup>113</sup>) Grewe, *op. cit.*, pp. 161–162.

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 ML, DIBP and Selden's MC and DIN are such.

Lines remain essential tools for controlling new lands.<sup>114</sup> 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 MC 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.<sup>115</sup> 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*," dividing the whole globe. 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), and why international law must assume scarcity as the default condition.

#### II.4.3. *Imperial Law under Limited Resources*

Earlier we saw Selden in MC 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 partly because such passage cannot injure the owner of the seas (even if there is one) in any way.

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<sup>114</sup>) Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010).

<sup>115</sup>) DOS, I.xxii.138 ff.



In a modern and decidedly early-imperialist twist, in I.xxii Selden introduces the argument that seas are a finite resource. They are *not* 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 and Fruits are taken away.’<sup>116</sup> 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 . . .<sup>117</sup>

This is the final piece needed before Selden’s doctrine of closed seas came to serve early imperialism. In MC 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 only primitive technology discouraged those practices of private dominion over the sea that MC now codified as international law.<sup>118</sup>

### III. Conclusion and Future Directions

history devises reasons why the lessons of past empire do not apply to ours.

J.A. Hobson, *Imperialism: A Study* (London: Nisbet, 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, reasons

<sup>116</sup>) DOS, I.xxii.141.

<sup>117</sup>) DOS, I.xxii.143.

<sup>118</sup>) 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, 1689).

for Selden's importance. This paper outlined 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 (not theoretically) always private; his neutralisation of the Bible in legal argument; his Scaliger-based reconfiguration of history into the highest source of law, furnishing colonial administrators, lawyers and statesmen with a 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 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.<sup>119</sup>

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 Noachide 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 Selden than to Grotius. It is also valid to point out that the stadial theory in Grotius's writings, including his *Defensio capituli quinti Maris Liberi oppugnati 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.

These debates point beyond this article. 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

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<sup>119</sup>) Fulton, *op. cit.*, p. 373: 'The maritime sovereignty claimed by Selden for the kings of England was of the most absolute kind.'

defended while Selden was its chief legal authority, outweighed and outlasted the Dutch Empire. 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 both to posit a natural law with universal applicability, regardless of Christian specificities. Moreover, their stadial theories were not open-ended. 'White man's burden' raises different issues and tasks than evangelisation. In principle, however backward a people is, in a secularised system of international law it eventually attains equality with their wards, however dubious or accidental markers of civilisation are posited. If one must walk and talk like an Englishmen to be accepted as civilised, one eventually can. Joining a 'chosen nation,' or the Elect, is harder. Grotius in ML 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 finds for the Israelites against God in the matter of having to give a formal declaration of war when a *de facto* state of war already exists;<sup>120</sup> and in Selden the Amorites were in their right to deny Israel passage.

The new system proved extremely effective in securing non-European cooperation and saving the economic and ideological costs of non-secular commercial and colonial expansion. It created, structured, and maintained the British Empire before its nineteenth-century retheologisation.<sup>121</sup> Identifying its distinctive features only provides analytical categories for revisiting not only the strange success of the British Empire, but also the relative decline

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<sup>120</sup>) Interpretation of Deut. 20 in Grotius, *De iure praedae*, H.G. Hamaker (ed.) (The Hague, [1604?] 1868), p. 102.

<sup>121</sup>) Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, new ed., 2004). Alexandrowicz sets the same end date to the process of international law making through international treaties between Western and non-Western parties. Alexandrowicz, *op. cit.*, p. 2; also p. 83. What I see as the nineteenth-century retheologisation of imperialism seems coterminous with Alexandrowicz's new West-centrism of international law, and Koskenniemi's professionalisation of international law.

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 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 – continued at least in part the stages-based justification of imperialism (recall Kipling's 1899 "The White Man's Burden"), 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 begin 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)<sup>122</sup> with post-Kant and post-Bentham elaborations that the correct hallmark of civilisation is not self-determination but recognition by a club of nations, self-appointed as already civilised.<sup>123</sup> If not Iberian Catholicism, then at least a common, minimalist Christianity then became a defining hallmark of civilisation in positive international law.<sup>124</sup> Another open question is the relationship of this rechristianisation

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<sup>122</sup>) 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.

<sup>123</sup>) Koskenniemi, 2004, *op. cit.*

<sup>124</sup>) C.H. Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations,' *British Year Book of International Law* 37 (1961), pp. 506–515.

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 Western formulation of an ostensibly universal doctrine of recognition; and the rechristianisation of international law that underpinned imperial justifications of occupation, prescription, and war.