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Following Intellectual Genealogies: The Construction of Mare Liberum and Mare Clausum, 1603-1652

Christopher Michael Crum
Bates College, ccrum@bates.edu

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**Following Intellectual Genealogies: The Construction of
Mare Liberum and *Mare Clausum*, 1603-1652**

An Honors Thesis

Presented to

The Faculty of the Department of History

Bates College

In partial fulfillment of the requirements for the Degree of Bachelor of Arts

by

Christopher Michael Crum

Lewiston, Maine

March 24, 2017

For those who make my life easier: Mom, Dad, and Sarah

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As an overeager sophomore I remember emailing Professor Melvin something along the lines of, “I’ve been reading in the library and I want to write my thesis on maritime history.” Two years, many classes, several semesters spent at international institutions of higher education, and one, “my name is Lawrence Lessig and I’m going to make everything about IP law,” moment later, I’ve written a thesis about maritime history. I have Professor Melvin to thank for my success in doing so. She is the rare person who is both astonishingly intelligent and unendingly patient. I am especially thankful for the latter because I know that I would have expended the patience of any other advisor as I careened from subject to subject and from proposal to proposal like some sort of crazed academic tourist.

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Abstract

This thesis traces the early modern intellectual lineages of *Mare Liberum*, the idea that the ocean should be common to all, and *Mare Clausum*, the idea that the ocean can be owned. It examines the genesis of *Mare Liberum* in jurist Hugo Grotius's *Mare Liberum* as well as the genesis of *Mare Clausum* in eminent and well-developed responses to Grotius: William Welwod's *De Dominio Maris*, Serafim de Freitas's *Do Justo Império Asiático dos Portugueses*, and John Selden's *Mare Clausum: Of The Dominion, or, Ownership of the Sea*. In bringing each theorist into dialogue and debate with the others, this thesis bridges language barriers and demonstrates the importance of understanding each theorist in his context. Ultimately, it argues that the continued existence of *Mare Liberum* and *Mare Clausum* as distinct "genealogies" of ideas centered on the fact that Grotius justified *Mare Liberum* on a philosophical level while jurists like Welwod, de Freitas, and Selden justified *Mare Clausum* on a practical level. With justifications resting in two separate spheres – one regarding what the nature of the ocean *was* and one regarding what the state of the ocean *ought to have been* – *Mare Liberum* and *Mare Clausum* were unable to speak discursively to one another. In the early seventeenth century, *Mare Clausum* and *Mare Liberum* were ships passing in the night.

Table of Contents

The Parameters of a Dispute: <i>Mare Clausum</i> vs. <i>Mare Liberum</i>.....	1
The “Geography” Facing the Jurist of Empire in the Early Modern Intellectual World.....	5
Scholarly Work on the History of the Law of the Sea.....	11
The Logistics of Tracing the Construction of <i>Mare Clausum</i> and <i>Mare Liberum</i>	15
Staging a Clash of Genealogies: Grotius on the Freedom of the Seas	17
Contextualizing the Publication of <i>Mare Liberum</i>	18
Framing Grotius’s Argument: Aquinas’s View of Natural Law.....	21
Grotius’s Debt to Vitoria and Vázquez.....	25
Grotius’s Arguments for Free Seas.....	28
Welwod’s Critique and Grotius’s Response.....	34
Frei Serafim de Freitas on <i>Mare Clausum</i>.....	43
Contextualizing de Freitas	47
On de Freitas Himself.....	52
De Freitas’s Intellectual Heritage.....	54
De Freitas’s Treatise and its Engagement With Grotius	57
Closed Seas as a Desert Claim: de Freitas’s Contribution to <i>Mare Clausum</i>	67
The Common Law in Defense of <i>Mare Clausum</i>.....	70
John Selden As the Disinterested Antiquarian	71
Locating <i>Mare Clausum</i> in the English Scholarly Landscape	76
The Immediate Contexts of Selden’s <i>Mare Clausum</i>	79
Selden’s Arguments in Favor of English Sovereignty in Territorial Waters	82
Fitting Selden with de Freitas and Grotius	90
<i>Mare Liberum</i> vs. <i>Mare Clausum</i> in Retrospect.....	93
New Paths for Further Historical Research.....	97
Notes on <i>Do Justo Império Asiático Dos Portugueses</i>	102
Notes on Marchamont Needham’s Translation of Selden’s Work.....	108
A Broad Overview of the History of The Law of the Sea as a Subfield of the History of International Law	109
A History of International Law	109
The Development of the Law of the Sea Prior to the Early Modern Period	113
Bibliography.....	116

Introduction

The Parameters of a Dispute: *Mare Clausum* vs. *Mare Liberum*

“Wer seine Gedanken nicht auf Eis stellen kann, sollte nicht in die Hölle des Konflikts kommen.”¹

Friedrich Nietzsche, *Human, All Too Human*

On August 28, 1645, as he lay dying from complications of shipwreck and exposure in the university town of Rostock, Germany, Hugo Grotius is supposed to have exclaimed, “by understanding many things I have accomplished nothing.”² If Grotius was speaking exclusively of *Mare Liberum* (Latin for open seas) and *Mare Clausum* (Latin for closed seas), we should consider his dying words a little less ironic than they seem *prima facie*. On the surface however, the irony of his claim is twofold: throughout his life he did of course accomplish many things, and moreover, had he survived only several more months, he would have observed the christening of the sort of balanced international order that his work had advocated for in the Peace of Westphalia. The Westphalian Peace closed off nearly 100 years of internecine imperial conflicts, bellicose international competition, and rampant economic militarism.³ The final form of the treaty was also the result of almost 150 years of intellectual dispute regarding how empires ought interact with one another.

¹ Friedrich Nietzsche, “Section 315. Requisite for Disputation,” in *Human, All Too Human*, trans. R.J. Hollingdale (Cambridge: Cambridge University Press, 1996), 138. “He who cannot put his thoughts on ice should not enter into the heat of dispute.”

² Jon Miller, “Hugo Grotius,” *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), ed. Edward N. Zalta, <<https://plato.stanford.edu/archives/spr2014/entries/grotius/>>. Grotius’s last words, “door het begrijpen van veel dingen die ik niets heb bereikt,” are generally considered apocryphal, but they are certainly fitting for the debate between *Mare Clausum* and *Mare Liberum*.

³ Peter H. Wilson, “The Westphalian Settlement,” in *The Thirty Years War: Europe’s Tragedy* (Cambridge: Harvard University Press, 2009), 751-779.

In the early modern world, empires interacted with one another nearly as much in the ocean as they did on land.⁴ These frequently pugnacious maritime interactions prompted early modern jurists to confront a number of issues regarding the nature of the ocean itself and, in particular, whether or not the ocean could be owned. Some empires like the Portuguese Empire depended (for their coherent, integrated existence) on claims of ownership extended through the ocean. Others like the Dutch depended on the illegitimacy of such claims and the freedom of commerce that came with such illegitimacy. Conflict between competing empires with different justificatory needs produced two coeval, but discursively distinct lineages of ideas: *Mare Clausum* and *Mare Liberum*. Respectively representing closed seas owned by some and open seas free and common to all, *Mare Clausum* and *Mare Liberum* occupied opposite poles in the early modern intellectual landscape.

The emergence of the concept of open seas with Grotius's treatise *Mare Liberum*, from which the intellectual tradition takes its name, disrupted hundreds of years of intellectual inertia by suggesting that *Mare Clausum* had a potential challenger, which is why, when it was published in 1609, Grotius's treatise entitled *Mare Liberum*, was intellectual dynamite. The nature of the definition of *Mare Liberum* in combination with its direct impact on any imperial claims to sovereignty in the ocean suggested and demanded discursive response from *Mare Liberum*'s intellectual opposite, *Mare Clausum*. As such, Grotius's work, as an integral part of the genealogy (lineage) of *Mare Liberum*, was attacked most immediately by three jurists of *Mare Clausum*: William Welwod in *An Abridgement of all Sea-Lawes*

⁴ Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015), 9-14.

published in 1613, Frei Serafim de Freitas in *Do Justo Império Asiatico Dos Portugueses* published in 1625, and John Selden in *Mare Clausum: Of the Dominion, Or, Ownership of the Sea*, first published in 1636.⁵ The debate between Grotius, Welwod, de Freitas, and Selden, insofar as it was a debate since each work was meant to be directly responsive to, and, in some cases, mentioned the arguments of the others, constituted a distillation of the scholarly conflict between *Mare Clausum* and *Mare Liberum*.⁶ Given the persuasive demands of debate, each side was compelled to clarify their ideas, and as composite genealogies whose constituent parts were individual ideas, *Mare Clausum* and *Mare Liberum* were subsequently crystalized and clarified.

⁵ See, David Armitage, "Introduction," in *The Free Sea: Hugo Grotius*, ed. David Armitage (Liberty Fund: Indianapolis, 2004), xviii. Juan Solórzano Pereira also published a response to Grotius in *De Indiarum Jure* (1629). For no reason other than time constraints his work was excluded from analysis, though I suspect it would be profitable to explore how his arguments fit with the arguments of Grotius, de Freitas, Welwod, and Selden, as well as the two genealogies broadly in question. Additionally, Sir John Borroughs responded to Grotius in *The Sovereignty of the British Seas*, published in 1633. His work is in many ways similar to John Selden's work, but it is neither as well developed nor as responsive to Grotius as Selden and was therefore excluded from deep analysis. See, Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, With Special Reference to the Rights of Fishing and the Naval Salute* (Clark, New Jersey: The Lawbook Exchange, 2010; originally published, Edinburgh: William Blackwood and Sons, 1911), 286-338. Lastly, Dirk Graswinckel has been excluded from analysis as well for similar reasons (time and argument overlap with Grotius). See, Herbert H. Rowen, "Review: The Myth of Venice and Dutch Republican Thought in the Seventeenth Century," *Renaissance Quarterly* 34 (1981): 598.

⁶ We know that each jurist was aware of the others (with the exception of Selden, who was, as far as history can tell, unaware of de Freitas) from either their personal correspondence or the fact that they explicitly reference each other in their work. See, Mónica Brito Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," *Journal of the History of Ideas* 64 (2003): 362.

I am studying the dialectic between *Mare Clausum* and *Mare Liberum* in order to come to understand how they, as genealogies of ideas, fit together, where they disagree, and how they disagree, such that I may paint a detailed picture of the state of the law of the sea in the first half of the seventeenth century. Borrowing from the terminology of intellectual historian Randolph Starn, I use the term genealogy to describe these two intellectual traditions because each is composed of constitutive, interconnected strands of ideas that build on each other in much the same way that a genealogy is an interconnected strand of genes that builds on itself from generation to generation.⁷ In the vast pool of historical ideas, a genealogy represents one isolated strand, but can help to make sense of how ideas are related.⁸

I argue that *Mare Clausum* and *Mare Liberum* were incapable of speaking discursively to each other because jurists constructing *Mare Clausum* (Welwod, Selden, and to a lesser extent de Freitas) justified closed seas with common law while jurists constructing *Mare Liberum* (Grotius) justified open seas with the natural law. Ultimately, *Mare Liberum* was constructed on the basis of, “what ought,” while *Mare Clausum* was constructed on the basis of, “what is.” As their justifications existed on two different planes of debate, *Mare Liberum* and *Mare Clausum* remained distinct and incompatible genealogies of ideas through 1652.⁹

⁷ See, Randolph Starn, “Toward an Alternative Genealogy of Intellectual Property,” *Representations* 132 (2015): 130-142.

⁸ Throughout this thesis, I capitalize *Mare Liberum* and *Mare Clausum* to highlight their proper noun status as the specific names of genealogies. *Mare Liberum* or *Mare Clausum* may also refer to a book title, but whether they refer to a genealogy of ideas or a book title will be clear from context.

⁹ In a very real sense, it is quite difficult to have a legal debate when one side insists on the rhetorical and argumentative primacy of customs (common law) while the other insists on the primacy of what customs *should* be (natural law) since at the

The “Geography” Facing the Jurist of Empire in the Early Modern Intellectual World

In answering the questions of empire, in particular how to justify the extension of sovereignty, there were several intellectual lineages open to imperial jurists: the natural law, the common law, and the civil or Roman law.

Post 1492, the European intellectual world, as Anthony Pagden notes, was dramatically different from that which had existed before. Contact with the Americas and the people of the Americas dramatically loosened the bonds of established intellectual thought and radically undermined previously unquestioned theories of human history, anthropology, natural science, and theology.¹⁰ In particular, the scope and necessity of law and sovereignty took on an acute importance, as European monarchies became colonial powers on a massive scale. The mass unmooring of continental intellectual thought, combined with the absolute brutality of Spanish and Portuguese conquests in Latin America, North Africa, and the Caribbean, led to an intense and existential imperial struggle for any bearing upon which a cogent legal defense of the extension of sovereignty could be anchored. *Inter alia*, the Alexandrine Bulls (1493) had legalized various forms of adverse possession in lands beyond Christendom, which had supposedly belonged in the distant past to a post-fall world Christian kingdom (i.e. any part of the world not occupied by Christians in the 1490s). Such lands were rendered *terra nullius* to be owned by the Christian monarchs of Spain and Portugal insofar as they could

point at which customs change to accord with some conception of what they should be, they are not quite customs anymore. Moreover, “what ought,” has never been a particularly compelling question for *realpolitik* political actors and intellectuals (and, oftentimes, they seem to be running the show).

¹⁰ Pagden, *Burdens of Empire*, 10.

extend sovereignty over them. Yet, there were few canon lawyers or natural law intellectuals in the tradition of Thomas Aquinas who were prepared to accept the legal defense of papal donation, sometimes because of genuine intellectual disagreement and sometimes because their state patrons were loath to accept a world divided solely between Spain and Portugal.¹¹

In fact, scholars of the natural law and even theologically minded scholastics like Francisco de Vitoria and Fernando Vázquez y Menchaca (paragons of the Salamanca School discussed in chapters two and three) persuasively disputed the legality of the Alexandrine Bulls. Christian natural law held that the source of sovereignty was not the divinity of the ruler, but rather nature, which meant that a sovereign's religious beliefs could not disqualify (or qualify for that matter) that particular sovereign for sovereignty over particular lands.¹² As such, many scholars held that wars of expansion could only be wars aimed at taking back land that was originally stolen. Thus, for example, the Spanish Reconquista was justified on the grounds that it was truly a reconquest and not an imperial war of expansion. Quite obviously, such a justification could not apply to colonization in the Americas, Caribbean Islands, or East Indies since they had not previously been held by European powers. So jurists of empire looked for justification elsewhere.

Vitoria, despite his objections to the brutal manner of colonization, laid the groundwork for its justification. Pagden convincingly argues that Vitoria's purpose was, "to establish a legal basis for a situation which already existed."¹³ In pursuing a

¹¹ Pagden, 10. The latter motivation was especially pronounced for Dutch jurists.

¹² Pagden, 10.

¹³ Pagden, 12. Vitoria was more of an apologist for empire than he was a critic.

legal basis for empire, Vitoria transformed natural law theory from its private law provenance (law that deals with the relations between individuals or institutions) into a body of law that could apply publically (to the relationships between individuals and government) using medieval just war theory, a proto-law of nations. To Vitoria, a just conquest could only be undertaken for just reasons, not merely utility, and because Vitoria saw just war theory as a form of natural law, natural law, in his conception, came to be a constraint on the legitimacy of the actions of colonizing powers.¹⁴ By suggesting that a law of nations, one part of which was just war theory, based in natural law could morally constrain the actions of empires, Vitoria set the tone for debate about the legitimacy of empire in the early modern period.¹⁵

The exact character of this new law of nations was nevertheless only vaguely outlined by Vitoria.¹⁶ It was particularly unclear to contemporaries (and later philosophers of law like Kant and Hobbes) whether or not the law of nations was a series of proscriptive rights or an actual body of law that could be codified. Alberico Gentili (1552-1608), Italian jurist and Professor of Civil Law at Oxford (who plays a role in chapter four), helped to clarify this potentially insoluble problem at the heart of international jurisprudence. He argued that the law of nations was simply coeval with the Roman concept of *ius gentium* (the law relating to the interaction of Roman

¹⁴ See, Francisco de Vitoria, "The Law of War," in *War and Christian Ethics*, ed. Arthur Holmes (Grand Rapids: Baker Academic Press, 2005), 178-179.

¹⁵ Anthony Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700," in *The Origins of Empire: The Oxford History of the British Empire*, ed. Nicholas Canny (Oxford: Oxford University Press, 1998), 34-37.

¹⁶ Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700," 36.

citizens and non-Roman citizens). Though his argument raised issues regarding how the law of nations was to apply to all peoples, it nevertheless provided precedent and codification from the perspective of jurisprudence.¹⁷ Universality, however, was not an issue to be brushed aside. If the law of nations was to be normatively powerful at all, it had to be universal in some sense. Natural law provided an easy solution since it was supposedly derived from reason (see chapter two), but Gentili's elision of *ius gentium* and natural law suggested an alternative tract since it highlighted immemorial custom (in his case Roman customs) as appropriate heritage of the law of nations.

Post-Gentili, debates surrounding the law of nations tended to be variations on a particular tripartite dialectical format: common law vs. civil (Roman) law vs. natural law. Common law partisans tended to look to tradition and custom as a body of law germane to the law of nations. Civil law partisans tended to look to received legal codes and natural law precedent as derived from the *ius gentium*. Natural law partisans, on the other hand, tended to take a philosophical approach and argue that bare reason ought underpin the law of nations. Though the three camps were not necessarily mutually exclusive in either theory or practice, they tended to shape the direction of arguments jurists made.¹⁸ Accordingly, in the early seventeenth century, two critical questions faced an intellectual interested in the law of nations as it

¹⁷ See, Benedict Kingsbury et al., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2011), esp. pp. 163-187, 269-297.

¹⁸ For example, Grotius himself used Roman Law as corroborating evidence for the validity of the system of law based on reason outlined in *De Jure Belli Ac Pacis*, his most famous contribution to international legal jurisprudence. Daniel Lee, "Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius's 'De Jure Belli ac Pacis'," *Journal of the History of Ideas* 72 (2011): 371-392.

related to imperial claims to sovereignty: one, which side to take in the tripartite dialectic surrounding the justification of the law of nations, and two, how to use the received precepts of whichever tradition one selected in service of one's nation (or, more broadly, one's chosen imperial ends).

Parallel to ongoing debates about the legitimacy of empire, jurists in Vitoria and Vázquez's time confronted questions of sovereignty. The question of sovereignty in the ocean was of particular import to jurists because the ocean was both the vehicle and the barrier to the extension of territorial control in the Americas, the East Indies, and the Caribbean. In the early modern world, as the Kingdoms of Portugal, Spain, England, France, Italian and Germanic city-states, and the Dutch Republic vied for control of lucrative colonies, who owned what part of the ocean was a question with pressing economic, military, political, and legal implications. This setting of economic, military, and legal competition made debates over sovereignty truly an existential competition.

As nations expanded rapidly in the late fifteenth and early sixteenth centuries, forming a series of colonial empires, sovereignty (i.e. imperium) had to be extended to a wide range of geographies, so the important question was who owns what. As legal historian Lauren Benton writes, a range of uneven legal geographies (the tailoring of a legal framework to fit a literal geographic space) characterized this type of imperial sovereignty.¹⁹ Two underlying assumptions made possible the application of sovereignty to acquired territory according to Benton: first, that

¹⁹ See, Lauren Benton, "Introduction," in *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2009), 1-40.

“subjecthood” was portable, and two, that sovereignty as the offshoot of performed legal rituals could be legally delegated to colonial authorities. The resulting “geography,” of these assumptions was a patchwork of overlapping legal spheres with varying characteristics. The ‘geography’ of imperial sovereignty entailed a network of corridors of sovereignty in the ocean, enclaves of sovereignty on land (colonial hubs) and areas of quasi-sovereignty bordering those enclaves of sovereignty.²⁰ Sea routes, Benton notes, took such a form that, “ships and their captains,” navigated in full appreciation that the ocean they sailed while they sailed it was sovereign territory of their parent nations.²¹ Intellectuals of empire were thus centrally tasked with suggesting that their polity had claim to the most lucrative waters or the most direct sea routes or the most strategic parcels of water. *Mare Liberum*, as the sixteenth century transitioned into the seventeenth century, changed the question from who owns what part of the ocean, to can someone or some nation own any part of it at all.

With the rise of strong monarchs in the seventeenth century, maritime law, the codified product of these intellectual debates, entered a period where it was more inextricably bound up in the authority of heads of state than it had been previously. Early in the seventeenth century, it was quite common for individual nation-states to issue a body of maritime laws under the authority of the monarch. Christian V of Denmark, Louis XIV of France, and Christian XI of Sweden, for

²⁰ Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*, 104-279.

²¹ Benton, 161.

instance, all issued their own maritime law codes.²² In tandem with issuing codes of maritime laws, nation-states with powerful maritime interests set up special courts for maritime pleading known as Admiralty Courts.²³ When these courts competed with each other for jurisdiction, they justified their claims through the authority of the sovereign who had issued the body of maritime law they claimed had jurisdiction. *Mare Liberum* threatened jurisdictional claims that stemmed from claims of sovereignty. So, in addition to altering questions of sovereignty, *Mare Liberum* also directly attacked the authority of heads of state. Given that, it is unsurprising that jurists versed in many different traditions in the post-Gentili tripartite dialectic were quick to attack its claims.

Scholarly Work on the History of the Law of the Sea

A number of scholars have addressed Grotius, Selden, and de Freitas in the context of doing historical work on the law of the sea. Historian of political thought Mónica Brito Vieira in her article, "*Mare Liberum vs. Mare Clausum*: Grotius, Freitas, and Selden's Debate on the Dominion over the Seas," outlines the argumentative links between the three jurists.²⁴ Brito Vieira argues that the traditional omission of de Freitas from historiography is entirely unjustified, commenting that, "Freitas's treatise is an earlier, fuller, more systematic and perhaps historically more significant discussion of Grotius's *Mare Liberum*," than Selden's *Mare Clausum*.

²² See, B. Obinna Okere, "The Technique of International Maritime Legislation," *The International and Comparative Law Quarterly* 30 (1981): 513-516.

²³ See, William Tetley, "Evolution of Maritime and Admiralty Law," in *International Maritime and Admiralty Law* (Montréal: Éditions Yvon Blais, 2002). See also, William Senior, *The History of Maritime Law* (London: Society for Nautical Research, 1974).

²⁴ Mónica Brito Vieira, "*Mare Liberum vs. Mare Clausum*: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," *Journal of the History of Ideas* 64 (2003): 361-377.

Though I remain agnostic as to the validity of the claim of regarding hierarchies of historical, I whole-heartedly agree that the omission of de Freitas's work constitutes an artificial silencing of the debate that was actually occurring.²⁵ In fact, his inclusion helps to elucidate the distinctions between *Mare Clausum* and *Mare Liberum* because his arguments for *Mare Clausum* make *Mare Clausum*, a "fuller," and, "more systematic," lineage of ideas than those of Selden alone.

Nevertheless, inclusion always suggests exclusion and so I am sensitive to the claims of R.P. Anand, who in, *Origin and Development of the Law of the Sea*, published in 1983, admonished the field for positing one single node of origin for the Law of the Sea. Anand argued that the law of the sea had multiple independent nodes of origin, some in Asia and some in Europe.²⁶ Targets of Anand's persuasive criticism include *The History of Maritime Law*, written by William Senior and published in 1952, *The Enclosure of Ocean Resources* by Ross D. Eckert, published in 1979, and *The Law of the Sea*, by R.R. Churchill and A.V. Lowe, published in 1983. Eckert, Churchill, Lowe, and Senior form a cohort of scholars who treat jurists of maritime law as secondary to the economics of the law of the sea.²⁷ Thus, they paint jurists

²⁵ For an example of such silencing see, James Muldoon, "Who Owns the Sea?," in *Fictions of the Sea: Critical Perspectives on the Ocean in British Literature and Culture* (Farnham, UK: Ashgate Publishing, 2002). Aside from the omission of de Freitas Muldoon's work seems valid.

²⁶ R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (The Hague: Martinus Nijhoff Publishing, 1983).

²⁷ To a lesser extent I think, D.P. O'Connell, *The International Law of the Sea* (New York: Clarendon Press, 1982), endorses a similar perspective. In a particularly indicative passage, O'Connell writes, "The history of the law of the sea has been dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas. When one or two great commercial powers have been dominant or have achieved parity of power, the emphasis in practice has lain upon the liberty of navigation and

like Grotius and Selden as actors of compelled by the economic needs of their patrons to certain conclusions, which has the attendant effect of painting the conclusions of de Freitas, Grotius, Welwod and Selden as foregone. Senior, Eckert, Churchill, Lowe, and scholars like them thus rob imperial jurists of intellectual agency (the idea that an agent can pick and chose among ideas to build new ones) and delegitimize the very concept of a genealogy of ideas because they remove any meaning from the intellectual act of building it.

Senior, Eckert, Churchill, and Lowe in delegitimizing genealogies of ideas raise the normative question: should genealogies of *Mare Clausum* and *Mare Liberum* be foregrounded at all. Recent scholarship suggests that the answer is yes. In, *Neptune's Domain: A Political Geography of the Sea*, published in 1990, Martin Glassner makes the point that consensus in any legal framework applied to the ocean (like UNCLOS I, II, and III) depends on the consent of conflicting ideas of what ownership of the ocean is.²⁸ It is a short step from Glassner's point to the notion that legal frameworks depend for their validity on the nature of the ideas that underpin them. It would therefore seem ahistorical to ignore the way such ideas build upon one another to create such frameworks. Similarly, intellectual historian David Armitage, in "The Elephant and the Whale: Empires and Oceans in World History," published in 2007, makes the case that, "arguments developed to justify rights of sovereignty and property over land could not readily be transferred to the different

the immunity of shipping from local control. When, one the other hand, great powers have been in decline or have been unable to impose their wills upon smaller States, the emphasis has lain upon the protection and reservation of maritime resources, and the assertion of local authority over the sea." O'Connell, 1.

²⁸ See, Martin Ira Glassner, *Neptune's Domain: A Political Geography of the Sea* (London: Unwin Hyman, 1990), esp. Part I: The Law of the Sea.

medium of the sea,” but nonetheless simultaneously that, “[such arguments as were developed] were of course the product of inter-imperial rivalry between the maritime empires [in particular] the Dutch and the Portuguese.”²⁹ The fact that Armitage clearly believes that the latter suggestion does not undermine the validity of the former, and, by extension, the need to understand such arguments as were developed to justify sovereignty in the ocean, is evidence for the necessity of evaluating the construction of *Mare Liberum* and *Mare Clausum*.³⁰

In light of the state of scholarly discussions regarding the history of the law of the sea, I want to make two points. First, I take Anand’s argument seriously, which means that I do not wish to suggest that because I am focusing on a European debate between Europeans means that other debates in other parts of the world were not occurring. In fact, they likely were. Second, in keeping with the implications of Armitage and Glassner’s arguments, I want to highlight the agency of the jurists in question: Grotius, de Freitas, Welwod, and Selden. Collectively, their acts of picking and choosing from among the pool of received ideas to build their arguments are the fundamental acts of genealogy construction. Moreover, their selection of different ideas insofar as it constituted a taking of a side in an is/ought debate resulted in the insolubility of debate between, and continued distinctiveness of, *Mare Liberum* and *Mare Clausum*.

²⁹ David Armitage, “The Elephant and the Whale: Empires of Land and Sea,” *Journal for Maritime Research* 9 (2007): 30.

³⁰ With regard to the state of the law of the sea in the contemporary world, political geographer James C.F. Wang endorses the idea that regulatory schemes build on each other. Wang, in arguing that political ideas build on one another, mirrors my argument about how ideas build on one another to form genealogies of *Mare Liberum* and *Mare Clausum*. See, James C.F. Wang, *Handbook on Ocean Politics and Law* (Westport, Connecticut: Greenwood Press, 1992), 41-107.

The Logistics of Tracing the Construction of *Mare Clausum* and *Mare Liberum*

I have divided my thesis into five chapters, including this introduction. Hugo Grotius and his work on *Mare Liberum* is the subject of chapter two. I argue that Grotius, in setting out *Mare Liberum*, borrowed from the natural law tradition and that the manner of his response to Welwod's critiques clearly indicates that he rested his argument for free seas on principled grounds regarding what the state of the ocean *ought* naturally be.

The next two chapters address *Mare Clausum's* responses to Grotius. Serafim de Freitas and his work on *Mare Clausum* is the subject of chapter three. De Freitas built his positive case for closed seas on papal power and the evangelizing tendencies of the Portuguese imperial project. Though he attempted to respond to Grotius's principled arguments, I argue that Grotius pre-empted what few arguments de Freitas mustered regarding the principled grounds of free seas.

John Selden, in his work in defense of *Mare Clausum*, continued the tradition of justifying closed seas based on facts surrounding what the state of the ocean was. However, rather than argue in the non-secular language of de Freitas, Selden used tradition and precedent (common law) to defend closed seas.³¹ Selden's contribution to the debate was to assert the primacy of a patrimonial body of law for England, which helped to build an argument for territorial waters, but led *Mare Clausum* even further away from principled engagement with *Mare Liberum*. For Selden, the natural law just did not matter because precedent mattered to English claims more than philosophical integrity.

³¹ To be clear, Selden was likely unfamiliar with de Freitas, but his work on *Mare Clausum* is similar. See, Brito Viera, 362.

I conclude with a final chapter that examines how the debate between *Mare Liberum* and *Mare Clausum* was occurring on two levels (what is and what ought) that meant neither genealogy was able to engage discursively with the other. Moreover, I suggest some implications of that conclusion for the modern status quo. Today the ocean is a bifurcated geographic space - partially open and partially closed. One reason why that is the case might be that *Mare Clausum* and *Mare Liberum* formed two sides of an insoluble dialectic. In the last section of this thesis, I also suggest that viewing *Mare Clausum* and *Mare Liberum* as genealogies opens up new paths for research in the area of intellectual property law.

Chapter Two

Staging a Clash of Genealogies: Grotius on the Freedom of the Seas

“The man who has no tincture of philosophy goes through life imprisoned in the prejudices derived from the habitual beliefs of his age or his nation.”³²

Bertrand Russell, *The Problems of Philosophy*

In April 1609, Philip III of Spain (who was also Philip II of Portugal) concluded the Twelve Year Truce with the United Provinces. For the first time, the Dutch East India Company (VOC) was granted the freedom to trade in Iberian overseas possessions but, per the stipulations of the treaty, the right to navigate in the adjacent seas remained dependent on the express permission of Philip III.³³ The treaty was particularly advantageous for Philip because it allowed him to formally end resource intensive hostilities and focus instead on consolidating his position on the Iberian throne. At the same time, he was able to extract the navigation clause from the similarly exhausted Dutch in order to keep them from interfering with Iberian mercantilist interests overseas.³⁴ However, the denial of an open right to navigation was particularly unpopular among the commercial interests in the United Provinces, because, without open rights to navigation, the Spanish

³² Bertrand Russell, *The Problems of Philosophy* (Blacksburg: Wilder Publications, 2009), chapter XV, paragraph 7, line 1, unpaginated, accessed January 1, 2017, <http://www.ditext.com/russell/rus15.html>.

³³ Mónica Brito Vieira, “Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas,” *Journal of the History of Ideas* 64 (2003): 361.

³⁴ Due to the death (never confirmed, but almost certain) of heirless Sebastian I of Portugal at the Battle of Alcácer Quibir in 1578, the Portuguese throne was plunged into a succession crisis, which culminated in the union of the Iberian crowns under Philip II of Spain, who backed up his claim to the Portuguese throne through his mother Isabella of Portugal with a powerful Spanish army. See, A.H. de Oliveira Marques, *History of Portugal* (New York: Columbia University Press, 1976), 306-322.

concession of the right to trade was functionally meaningless.³⁵ Into this politically charged atmosphere stepped Hugo Grotius, defender of *Mare Liberum*, the idea that the sea should be open to all to trade and use as they see fit.

Contextualizing the Publication of *Mare Liberum*

Like many distinguished early modern scholars, Hugo Grotius was a precocious child prodigy. In 1594, at the age of eleven, he enrolled at the University of Leiden and by fifteen he was accompanying Johan van Oldenbarnevelt, a leading diplomat, in his diplomatic missions to the French royal court. As a recognized genius, at an early age Grotius acquired a yawning familiarity with the heads of elite Dutch society. He parlayed his status into a successful law practice. Among his clients he counted Prince Maurice of Nassau, the Dutch East India Company, and Oldenbarnevelt.³⁶ His connections and intellectual reputation ensured that when the time came the Dutch East India Company chose him to defend their economic and political interests.

Ultimately, it was the dissatisfaction of the commercial class in the Dutch Republic with the navigation clause exacted by Philip III that spurred the

³⁵ Arthur Weststeijn, *Commercial Republicanism in the Dutch Golden Age: The Political Thought of Johan and Pieter De La Court* (Leiden: Brill Publishing, 2011), 37-50, 224-242. Weststeijn, in explaining the context of republican thought in the United Provinces also explains how the commercial class came to be a major political player. He highlights that, by referring to how the growing displeasure of the commercial class with treaties that infringed on their commercial interests actually led to political changes. One example of commercial displeasure he refers to is the displeasure resulting from the Treaty of Antwerp in 1609. See also, Martine van Ittersum, "Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615," (Ph.D. dissertation, Harvard University, 2002), 442-453.

³⁶ Jon Miller, "Hugo Grotius," *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), ed. Edward N. Zalta, <<https://plato.stanford.edu/archives/spr2014/entries/grotius/>>.

publication of *Mare Liberum*, the twelfth chapter of Grotius's full manuscript *De Indis* or *De Rebus Indicis*, in the spring of 1609.³⁷ But, Grotius had in fact begun to write *Mare Liberum* in 1604 at the behest of the Zeeland Chapter of the Dutch East India Company, which was seeking to defend its taking of the Portuguese carrack *Santa Catarina* in 1603 to the international community.³⁸ As such, it is clear that economic and political considerations played a catalyzing role in compelling Grotius to compose *Mare Liberum*.³⁹

Scholars agree that Grotius had economic motivations to compose *Mare Liberum*. R.P. Anand, for one, considers economic exclusion the primary motivating exigency. As he puts it, "the Portuguese monopoly of the lucrative spice trade of the East Indies aroused the lust of other countries and created jealousy and dissension in Europe, [which were] the necessary preconditions for Grotius's intellectual endeavor."⁴⁰ Similarly, Grotius's chief biographer, W.S.M. McKnight, explains the circumstances that compelled Grotius to compose his argument in largely economic

³⁷ David Armitage, ed., *The Free Sea* (Indianapolis: The Liberty Fund, 2004), x-xiii. It is important to note that *De Indis* was the title Grotius himself used for his manuscript. It was published in 1864 under the title *De Iure Praedae Commentarius*. See Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," 361. The various names for Grotius's full manuscript can be confusing, an unfortunate reality compounded by the fact that each version was published at a different time.

³⁸ Armitage, xii. See also, Peter Borschberg, "The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-1616)," *Journal of Southeast Asian Studies* 33 (2002): 31-62. For correspondence related to the publishing and composing of *Mare Liberum*, see *Briefwisseling van Hugo Grotius*, ed. P.C. Molhuysen, B.L. Meulenbroek, and H.J.M. Nellen, 17 vols. (The Hague: Martinus Nijhoff Publishers, 1928-2001, I, 128-134, 139-141, 144-145).

³⁹ See, Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 80.

⁴⁰ R.P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1983), 7.

terms. In McKnight's account, Grotius wrote *Mare Liberum* more or less because it was in the best economic interest of his benefactors since militant aggression in pursuit of economic ends could be quite profitable.⁴¹ McKnight argues that *Mare Liberum* was a pretext to cloak such militant actions in a shroud of legitimacy and defend the VOC against the moral compunctions of some of its own members. In his view, "it was, without doubt, the existence of strong sectarian feelings [within the VOC] against [the legitimacy of an act of piracy such as the taking of the *Santa Catarina*] that caused Grotius to write the *De Jure Praedae*."⁴²

Grotius offered a similar explanation. In *Annales et Historiae de Rebus Belgicus*, published in 1657, he explained the situation that had faced the VOC in 1604: "The capture of [the *Santa Catarina*] from public enemies brought the Dutch... much honourable profit. Yet there were some, in a nation no less straightforward than desirous of gain, who refused to countenance such an act on the ground that plunder won in war was little befitting to merchants." They therefore required convincing.⁴³

It would be folly to dispute the fact that economic (or political) considerations played a role in shaping Grotius's argument. The danger is that in foregrounding exigency an historical account so conceived might treat Grotius as merely a mouthpiece of the VOC's interests, and, in turn, suggest that understanding

⁴¹ The *Santa Catarina* for instance was worth approximately the same as the annual revenue of the English government. See, Tuck, 80.

⁴² W.S.M. McKnight, *The Life and Works of Hugo Grotius* (London: The Grotius Society Publications, 1925), 82-83.

⁴³ Hugo Grotius, *Annales et Historiae de Rebus Belgicus* (Amsterdam: Joannis Blaeu, 1657), accessed online, October 19, 2016, <https://archive.org/details/annalesethistor00grotgoog>, 530.

his intellectual process and agency is of secondary importance to understanding the economic and political needs *Mare Liberum* satisfied.

To avoid that pitfall, I argue that Grotius's *Mare Liberum* is at once better understood and more properly contextualized by demonstrating how Grotius's arguments and ideas fit in a genealogy of early modern ideas. Grotius's active decision to use natural law theory as a way to construct arguments for a sea free and common to all founded the genealogy of *Mare Liberum* and is therefore the most important decision in the context of this thesis. In other words, Grotius's intellectual agency – the way in which he selected certain ideas from his intellectual forbearers – will be central to analysis.

This chapter first explicates several important sources of inspiration and intellectual heritage Grotius made use of in *Mare Liberum* and then proceeds by breaking down Grotius's arguments for *Mare Liberum* in order to demonstrate how his conclusions and the immediate defense of them against his most timely challenger, the Scotsman William Welwod, may be understood as part of that heritage. It concludes by elaborating on what portions of *Mare Liberum* were left standing for attack by Serafim de Freitas and John Selden.

Framing Grotius's Argument: Aquinas's View of Natural Law

Grotius owed his conception of natural law and the argumentative weight it brought to bear to Thomas Aquinas (1225-1274). The first person to suggest, *lex iniusta non est lex*, that is to say, an unjust law is no law at all, was St. Augustine, but the phrase was most widely examined by the Dominican friar Aquinas. As a theologian, Aquinas conceived of morality as something derived from God's will.

Deriving morality from God's will, a distinct, immutable, timeless, and objective standard, was the only way, in his view, to confer objectivity on moral laws. To derive moral laws from our rationality, or considerations of utility, would be to obviate the need for moral laws to be objective by deriving them from points of view that are bounded by subjectivity.⁴⁴ What this points to is the fact that Aquinas conceived of rationality in a very different way than other philosophers do. For Kant, for example, rationality is a universal first principle capable, when used properly, of discovering some degree of truth in the world. For Aquinas, rationality is a subjective faculty seated in subjective minds, and therefore a barrier to absolute divine truth, which it can help discover, but can never fully and truly understand.⁴⁵

In examining the faculties of understanding, Aquinas came to a distinct metaphysical framework, which is the foundation of his theory of the natural law. It is this framework, which ultimately explains his theory regarding the moral force of laws. It consisted of four different types of functioning principles. Like the parts of a clock, these first principles allow reality to function as it does, and we, as subjective beings, to apprehend that function as we do. The first principle is the eternal law – a universal, timeless law first instantiated by God's will to create the world and sustained by the persistence of God's will. The eternal law at its most basic point is the idea that the world should continue to exist for if it continues to exist, it must be

⁴⁴ Jean Porter, "Contested Categories: Reason, Nature, and Natural Order in Medieval Accounts of the Natural Law," *The Journal of Religious Ethics* 24 (1996): 207-210.

⁴⁵ Porter, 210-217. In many respects, when we speak of rationality in casual discussion we unconsciously take on Kant's conception so it is important to consciously evaluate Grotius using Aquinas's description since that is the conception of rationality he was operating under. Kant and his conception would not exist for another 70 years or so after Grotius's death.

God's will that it do so. Laws like gravity, though unknown to Aquinas, are more or less what he had in mind in describing eternal laws. As much as one may attempt to defy gravity, it nonetheless governs one's behavior insofar as one is corporeally bound. In a similar way, as much as one may attempt to defy the existence of the world, insofar as one continues to be corporeally bound, one's defiance has no bearing on the validity of one's statement. The second principle is the natural law – a set of eternal, universal laws that govern the behavior of beings with reason and free will. The natural law refers to the series of laws that exist in the state of nature prior to the artificial imposition of human laws that detail our basic obligations to each other. It entails a certain theory of history wherein humankind was once liberated and free of self-imposed sanction but came to be sanctioned through the realization that self-sanction could be utile. Natural facts are part of the natural law. For example, death is the end of life, and, organic life requires sustenance, are axioms that make up part of the natural law. The third principle is human law – laws humanity makes. An injunction against charging too high an interest rate is a human law. Importantly, for Aquinas, for human laws to be in accordance with the natural law, they must meaningfully improve on the default condition of man. The final principle that animates reality is divine law – law discovered through divine revelations that detail how one comes to escape terrestrial bondage and attain heaven.⁴⁶ For instance, the Ten Commandments are divine law.

⁴⁶ Thomas Aquinas, *On Law, Morality and Politics*, ed. William P. Baumgarth, trans. Richard J. Regan (Indianapolis: Hackett Publishing, 2003), 91-97. See also, Norman Kretzmann et al. ed., *The Cambridge Companion to Aquinas* (Cambridge: Cambridge University Press, 1993), 160-217. The bulk of the information for the preceding paragraph comes from these two sources.

Each principle has its own epistemic standard. One comes to know human law through human interaction, natural law by reference to eternal law, eternal law through mediated apprehension (incomplete comprehension through reason), and divine law through revelation.⁴⁷ In turn, each principle is organized in a hierarchy based on its level of objectivity. Eternal law, which arises out of God's will is the most objective law. Divine law, which is revealed by God's will is the second most objective law. Natural law is the third most objective law since it is predicated on the existence of eternal law, which is based on God's will, and finally, human law, the least objective law, which is based on our decisions to enact laws. Each lower law derives its legitimacy from the law above it in the hierarchy of objectivity. Most importantly for the purpose of this thesis, human law then derives its legitimacy from natural law, which means that any human law that runs counter to the series of axioms governing humans in a state of nature is illegitimate because it fails to attain the necessary level of objectivity. Moreover, insofar as natural law is the basis of our obligations to each other (morality writ large) if a human law runs counter to natural law, then that human law is not only illegitimate but immoral.⁴⁸ Immoral and illegitimate laws, because they do not arise from the natural law, cannot even be called laws. Thus, we arrive at the famous claim – *lex iniusta non est lex* – an unjust law is no law at all.

⁴⁷ Axel D. Steuer, "The Epistemic Status of Theistic Belief," *Journal of the American Academy of Religion* 55 (1987): 235-256.

⁴⁸ Put differently, the moral force of legitimate laws derives from the fact that the law accords with the natural law. However, this raises serious questions about the morality of legitimate laws. It is not inconceivable to imagine that there is a third category of laws, that is to say legitimates laws that are immoral. Aquinas asserts that that kind of law is a categorical impossibility, but much of the academic critique of natural law theory, both contemporary and historical, rests on just such a qualm.

Though Aquinas died in 1274, the fact that he was reified by the Catholic Church, and venerated by generations of scholastic philosophers and theologians engaged in defending dogma in pluralistic contexts, meant that his ideas loomed large in early modern legal thought.⁴⁹ Though Grotius and Aquinas diverge in important respects, the fact that Grotius borrowed so much of his metaphysical picture from Aquinas (as hopefully will be clear) means the questions Grotius and his interlocutors faced were in many ways framed by Aquinas's ideas. Can human laws treating the sea as property be linked to natural law? What was the state of the natural law regarding ownership of the sea? Can ownership of the sea meaningfully improve on the conditions of the state of nature? Can abridgements of the natural law be justified by human edicts and proscriptions, etc.? Grotius's answers to these questions, and the implications that his answers raised for international politics, are the main points of disagreement between Grotius and his *Mare Clausum* detractors: William Welwood, John Selden, and the Portuguese jurist Frei Serafim de Freitas.

Grotius's Debt to Vitoria and Vázquez

Grotius, in addition to adopting Aquinas's conception of natural law, also borrowed arguments from several other humanist thinkers. In particular, *Mare Liberum* owes debt service to Francisco de Vitoria's lectures on the Indies and Ferdinando Vázquez de Menchaca's treatise *Controversiarum Illustrium Usuque Frequentium Libri Tres*.⁵⁰ His arguments are similar in structure to Vitoria and Vázquez and he frequently quoted both scholars.⁵¹

⁴⁹ Kretzmann et al., 4-10.

⁵⁰ Brito Vieira, 362. Though not quite as important to Grotius, Francisco Suárez bears mentioning as a source alongside Vitoria and Vázquez y Menchaca for his

Both Vitoria and Vázquez were liberal for their time. In fact, both were harshly critical of absolutist power and the poor treatment of native North Americans. Both similarly, were members of the so-called, “second scholastic,” an early modern instantiation of medieval scholasticism (of which Thomas Aquinas was the prominent figure) and avowed Catholics loyal to the Spanish crown. As such, their criticism was never wholesale, but rather rooted in their belief that Spanish imperial projects had to be beyond reproach since Catholic monarchs undertook them.⁵² To navigate their unusual position as both critics and apologists of the Spanish imperial project, Vázquez and Vitoria used the natural law to shape their arguments and in turn shaped Grotius’s arguments.

Vázquez begins his treatment of law with the following principle: “Natural Law is neither more nor less than human nature itself or a certain inborn instinct and the natural reason which encourages goodness and discourages its opposite.”⁵³ To Vázquez, “Natural Law,” is neither mutable nor subjective because it arises out of human reason, “imprinted by God,” who is omnipotent.⁵⁴ It is this theoretical basis that Grotius makes use of to argue that the sea cannot be occupied since it is by natural law common to all – that is to say, its natural state defies occupation. Since natural law is neither mutable nor subjective, despite being constructed by reason

sheer contribution to early modern philosophy. Grotius even wrote regarding Suárez, “he hardly had an equal.” Hugo Grotius, *Briefwisseling*, ed. H. J. M. Nellen et al., V (The Hague: Martinus Nijhoff, 2001), 194.

⁵¹ Brito Vieira, 362.

⁵² There are very few English language sources on Vázquez. One frequently cited Spanish language source (with an English abbreviation) is, J.M.S. Serano, *Ideas Políticas De Fernando Vázquez De Menchaca* (Logroño: University of La Rioja Press, 1976). On Vitoria see, James Brown Scott, *The Spanish Origin of International Law* (Oxford: Clarendon Press, 1934).

in Vázquez's view, Grotius was able to paint *Mare Liberum*, insofar as it rested on natural law, as objectively supported by reason.

Grotius further made use of Vázquez in arguing against the possession of the sea through the edicts of a prince. Vázquez for his part was radically anti-absolutist. According to his view, humanity possesses an independent value while political society does not since it only has value insofar as it enhances the value of individuals, thereby facilitating the realization of human life.⁵⁵ A prince is merely a servant of the people as the head of society, which functions primarily to serve and promote the interests of the individuals who collectively make up the, "people."⁵⁶ For Grotius, the important consequence of accepting this view is that a prince, as head of state, by princely edict cannot (or at least should not) have the ability to make proper that which is naturally common to all, and which admits no degradation through use.

As much as Vázquez was an individualist, Vitoria was an anti-colonialist. Famously, he argued that belief was an act of will and, as such, could not be compelled, which had the effect of demonstrating that force, as a method of conversion, was illegitimate. Moreover, he argued that the Pope lacked sufficient standing to grant dominion over primitive peoples, since primitive peoples had as much right to property as any persons given their physical occupation of land.⁵⁷ Grotius borrowed many of Vitoria's arguments for a limited conception of papal

⁵³ Vázquez quoted in Serrano, 301.

⁵⁴ Serrano, 301.

⁵⁵ Serrano, 302-303.

⁵⁶ Serrano, 302.

⁵⁷ Francisco de Vitoria, "The Law of War," in *War and Christian Ethics*, ed. Arthur F. Holmes (Grand Rapids: Baker Academic, 2005), 118-137.

power in order to defeat the Portuguese claim that dominion over the Indian Ocean had been granted them by a series of papal bulls. Grotius, for example, wrote in chapter 6 of *Mare Liberum*, “[the right of possession] could neither be given by the Pope nor received of the Portugals. Further, seeing it is before declared by the opinion of all men of sound judgment that the Pope is not a temporal lord of the whole world, it is sufficiently understood that he is not lord of the sea.”⁵⁸ In combination with Vázquez’s arguments against absolute power, Vitoria’s arguments for a limited conception of papal power formed a powerful rebuke of traditional sources of authority in the early modern world.

With regard to the law of the sea, neither Vázquez nor Vitoria followed their arguments to their logical conclusions. Grotius took it upon himself to do so, but, in working within the confines of arguments borrowed from others, Grotius ensured that his argument took on a unique character. In arguing that the sea cannot be occupied nor possessed, Grotius played with intellectual tinder, and his argument for the freedom of the seas was a lit match. The ideas he borrowed threatened the international status quo in a myriad of different ways. Refutation was readily forthcoming.

Grotius’s Arguments for Free Seas

The text of *Mare Liberum* has four main goals: to prove that access to the East Indies is open to all nations by command of the law of nations; that infidels cannot be stripped of their ownership merely because they are infidels; that neither the sea nor the right of navigation and fishing can be possessed solely by individual states,

⁵⁸ Hugo Grotius, *The Free Sea*, ed. David Armitage (Indianapolis: Liberty Fund, 2004), 38.

princes, or persons to the exclusion of others, and finally, that trading rights cannot be exclusively possessed.⁵⁹ Only having satisfied all four goals could *Mare Liberum* serve the political and economic purposes for which Grotius no doubt partially designed it. However, the idea that neither the sea nor the right of navigation and fishing could be possessed solely by individual states, princes, or persons constitutes the heart of *Mare Liberum* as a genealogy. It is *Mare Liberum's* most basic intellectual building block and so the following analysis focuses on it. In the context of analyzing Grotius the freedom of the seas is the goal the satisfaction of which forms the proximate basis – the foundation – of Grotius's other arguments against the Portuguese and their monopolistic tendencies in Asia; in other words, the satisfaction of the other three goals depended on Grotius successfully arguing for the freedom of the seas. If the sea could be possessed and the Indian Ocean was possessed by Portugal and the right to exclude others adhered in oceanic possession, then freedom of trade was irrelevant. Furthermore, Portuguese militaristic dominion of Asian land, illegitimate or not, would have been uncontestable.

The fundamental premise of Grotius's argument that the sea is free is that, "laws [are] set down," to constrain all such that, "all surely might use common things without the damage of all and, for the rest, every man contented with his portion should abstain from another's."⁶⁰ Property, in his view, is a tool developed to promote utility (a positive obligation understood as generalized benefit) by

⁵⁹ Viera-Brito, 364.

⁶⁰ Hugo Grotius, *The Free Sea*, ed. David Armitage (Indianapolis: Liberty Fund, 2004), 7.

enclosing those movable and immovable things that are liable to be degraded by collective use such that they are rendered dis-utile (e.g. food, clothing, arable land, tools, etc.). To establish this fact, Grotius formulated a unique theory regarding the history of property. To Grotius, all things were once common in an historical, but indeterminate, prior natural state. In this natural state, the God-given world belonged to all mankind.⁶¹ Out of this natural state, property naturally emerged through the realization that, “there are many things the use whereof consisteth in abuse, or for that being converted into the substance of the user they admit no use after,” such that, “a certain propriety appeared not severed from use.”⁶² In a sense, Grotius argued that possession is the natural condition of things that through their nature cannot belong to everyone simultaneously and be nonetheless useful.

Of things that may be possessed, Grotius delineated two kinds: things possessed publically (owned by a people, or peoples) and things possessed privately (owned by an individual). Possession of both things arises, according to Grotius, from the realization that some things can only continue to be utile through possession, but for possession to occur Grotius argued that occupation had to occur first.⁶³ What made space “possessable,” was prior occupation. It would be impossible on Grotius’s account to own something without ever having physically had or enclosed the thing and in the case of physical space that meant occupation.

⁶¹ Grotius, 21. He follows Horace in stating, “all things [were] common at that time.”

⁶² Grotius, 22.

⁶³ Grotius, 24. He wrote, “those things which cannot be occupied or were never occupied can be proper to none because all propriety hath his beginning from occupation.” Here Grotius is quoting François Le Douaren on Justinian’s *Digesta seu Pandectae*, an expansive compendium of Roman law frequently referenced by Grotius.

To summarize Grotius, those things, which may be used by all without reducing the utility derived from their use, ought remain in the first condition that nature left them – common to all. However, those things that are rivalrous goods (goods that do not admit simultaneous use) can become private property, but physical occupation has to occur before possession can occur.

Grotius, therefore, concluded that the sea is common to all for a double reason. First, the vast, fluid ocean cannot be possessed through occupation like land can by building fences or walking on it, so does not present the possibility of private ownership. Second, since all, without a degradation of utility, can use it, the ocean is properly by nature common to all. On those grounds Grotius concluded that the natural law in the Thomistic sense dictates that the sea is open and common to all. By grounding the freedom of the sea in natural law Grotius made it such that the existence of human law allowing for the ownership of the sea did not present a contradiction to his claims, since human law only derived its legitimacy from concordance with the natural and divine law.⁶⁴ Only having established what he believes to be incontrovertible proof of the commonality of the sea (that is, common to all) does Grotius set about defeating counter-arguments.⁶⁵

⁶⁴ Nevertheless, according to Grotius the sea is also open and common to all by human law based in immemorial custom. Thus, he hedges his bets when he writes, “by the consent of mankind [the sea] is perpetually exempted from propriety for use which, seeing it belongeth to all, it can no more be taken away by one from all than [someone] may take away that from me which is mine.” Grotius, 26.

⁶⁵ When one’s historical frame of reference focuses on the economic and political motivations *Mare Liberum* was meant to serve, it’s easy to misunderstand Grotius as suggesting only that because the sea is not rivalrous, it cannot become property. This understanding however is deeply erroneous because it accounts only for one reason why the sea is common to all and not for the true depth of Grotius’s

He first deals with the argument that a nation may own parts of the sea and consequently a nation, if able, ought be allowed to own *all* parts of the sea. He terms this argument the possession of the sea by parts. He argues that traditionally nations are allowed possession of parts of the ocean through the enclosure of a portion of the sea (as is the case when piers are built) that ostensibly grants the builder ownership. Yet, Grotius argues that such enclosure, though certainly granting the builder ownership over the mechanism of enclosure (the pier), does not necessarily grant the builder ownership of the sea enclosed. The sea enclosed, under Grotius's opinion, is only owned if the enclosure does not damage the ability of others to use the sea (as is the case with the building and maintenance of a port).⁶⁶ Possessing large portions of the ocean, even if possible, would certainly damage the ability of others to use the sea and is therefore illegitimate. In this manner he is able to square his argument for the general freedom of the seas with an admission that proprietary fishing grounds enclosed by human built structures are legitimate.

Grotius further qualifies his argument (and fortifies it against counterattack) by distinguishing between jurisdiction and ownership. To Grotius, jurisdiction deals with the duty of those nations in closest proximity to a portion of the sea to punish pirates and come to the aide of stranded ships, which arises, "not by any proper right but of the common right which also other free nations have in the sea."⁶⁷ To Grotius, since jurisdiction does not stem from ownership but common obligation it

argument, which is that the sea is *naturally* common to all. I only mention this because it is a misconception that I fell prey to upon first reading Grotius.

⁶⁶ Grotius, 28.

⁶⁷ Grotius, 31.

is allowable. Moreover, since jurisdiction does nothing but improve and protect the commons, jurisdiction is allowable. Thus, jurisdiction does not transform into ownership since jurisdiction is only allowable under the natural law because it is a responsibility that nations share that keeps the sea open to all by facilitating navigation (access to the commons) through amelioration of navigation risks like piracy and shipwreck.

Grotius deals separately with arguments specifically advanced by the Portuguese as defense of their ownership of the Indian Ocean. In addition to papal donation, Portugal claimed ownership through treaties granting them such ownership. Grotius writes in response that such apprehension through “a certain imaginary line,” leads to absurd consequences, namely that, “the geometricians should long since have taken away the earth from us and the astronomers heaven.”⁶⁸ Occupation only occurs, by Grotius’s argument, through physical occupation (standing on a piece of land, holding a hat, etc.), not by imagining occupation, which is necessarily the process of apprehension when drawing boundaries in the ocean. Portugal also claimed possession through first right since they were the first to establish the route to the Indian Ocean around the Cape of Good Hope. Grotius rejects this on face writing, “seeing that there is no part of the sea into the which someone hath not entered first, it will follow that all navigation was possessed of some,” which, in his mind, is yet another absurd conclusion.

So Grotius concludes, if they rest on anything, Portugal’s claims to possession of the Indian Ocean must rest solely on just war waged by Portugal. Grotius rejects

⁶⁸ Grotius, 34.

Portugal's claim of just war on the grounds of conversion. Borrowing from Vitoria, he argues that since conversion can never be compelled no just war could be founded on it.⁶⁹

Welwod's Critique and Grotius's Response

William Welwod takes Grotius's argument regarding the nature of the sea as common to all to be an adroit intellectual pretext to allow the United Provinces to pilfer Scottish fishing grounds. To Welwod, the rights of navigation and trade, which Grotius defends under the banner of *Mare Liberum*, were not seriously contested by most nations. Consequently, in his view, most of *Mare Liberum* exists to mask an insidious attempt to render fishing in the sea open to all with a series of uncontroversial assertions regarding the freedom to navigate.

Welwod attacked Grotius on the freedom of the sea in his response to *Mare Liberum*, entitled, "Of the Community and Propriety of the Seas," published in 1613, four years after *Mare Liberum's* publishing. Though Welwod, in step with Grotius, believed that God's sanction is the only appropriate justification of human law, he disagreed with Grotius on what God actually sanctions. In Welwod's argument, God sanctioned the existence of fishing rights to succor humanity. In turn, the existence of fishing rights gives existence to the privilege of excluding others from fishing grounds, which suggests the possibility of *Mare Clausum*. To Welwod, from the beginning of time, under divine law, land and sea were inherently possessed by humanity.⁷⁰ God created the Earth, gave it to man to subdue, and in so doing,

⁶⁹ Grotius, 15-30.

⁷⁰ William Welwod, "Of the Community and Propriety of the Seas," in *The Free Sea*, ed. David Armitage (Indianapolis: Liberty Fund, 2004), 66-67. "Of the Community

permitted man possession of it, sea included.⁷¹ As man came to require things not immediately found in his surrounding environment so the privilege of freedom of movement was instantiated and the earth and land was, “partitioned.”⁷² Welwod remarks that it would be sufficient to end his argument there, having, as he believed, thoroughly trounced Grotius’s argument that in their natural state the sea and the land were “unpossessed.”

Grotius, for his part, did not think so, and in his defense of *Mare Liberum*, published in 1615, he responded to Welwod’s argument first by reminding readers that there are nations (namely, the Iberian Crowns) who clearly do not admit freedom of trade or navigation, and that it is not frivolous to upbraid them. Grotius then moves onto Welwod’s arguments regarding possession as sanctioned by God. Grotius writes “the ownership which God there confers is universal, not particular... God gave those things not to this person or that person, but to the human race.”⁷³ Therefore, God’s donation does not confer a right, which can be used to exclude one’s fellow man, but rather a right, which is given in common to all.⁷⁴ To hold things in common is to hold things in the manner in which God naturally provided them.

Nevertheless, Welwod had other lines of argumentation including an attack on what it means to hold something in common. Welwod distinguished between

and Propriety of the Seas,” is just one chapter in Welwod’s larger work, *An Abridgement of All Sea-Lawes*.

⁷¹ Welwod, 67.

⁷² Welwod, 67.

⁷³ Hugo Grotius, “Defense of Chapter V of the *Mare Liberum*,” in *The Free Sea*, ed. David Armitage (Indianapolis: Liberty Fund, 2004), 83.

⁷⁴ Grotius, 84. Grotius writes, “If it is, “licit for anyone to catch fish in the sea... it is clear that the sea belongs to no one.”

common to *a* people and common to people in general in order to cast doubt on the support that Roman Law gives Grotius since Grotius used the quotations of several Roman jurists to support his arguments. He asserts that many Roman jurists when discussing *publicum* (what Grotius translates as common), do not actually mean common to all, but rather common to Romans. A head of state, on those grounds, may apprehend a body of water as dictator of the common property of the state, that is, property belonging to every member of the state, while denying non-members apprehension of said body of water.⁷⁵

With regard to Welwod's argument on the distinction between common to *a* people and common to all people, Grotius accused Welwod of preferentially citing and interpreting sources.⁷⁶ Consequently, the two arguments clash on the correct translation of sources like Justinian's *Digest*.⁷⁷ Grotius, however, was unconcerned regarding the ultimate result of the translation clash because he felt his argument rested principally on other grounds. In an elegant skim of the argument he advanced in *Mare Liberum*, Grotius writes in his *Defense*, "the sea is common to all and just as it was produced first by nature has come in to the dominion of no one, and therefore is not in the patrimony of the people, is open by nature to all, is of the law of nations

⁷⁵ Welwod, 69.

⁷⁶ In truth, both authors did most certainly preferentially quote their sources and with a great deal of modification too. See, W.S.M. McKnight, *The Life and Works of Hugo Grotius* (London: The Grotius Society Publications, 1925). What's rather humorous as well is the fact that some of the Spanish jurists that Grotius most deeply depended on actually were against freedom of navigation. In fact, Vázquez thought navigation was suicidally dangerous. See, David Armitage, "Introduction," referenced above.

⁷⁷ See note 30.

and its use common to all men.”⁷⁸ The distinction he makes here is that the patrimony of people is not necessarily proscriptive for other peoples. As he put it, “there is considerable difference between the one for whom the law is laid down and the one whom the law benefits.”⁷⁹ The idea is that even if a head of state sanctions the positive right of some to fish in a certain location, he does not by that same token prohibit others from fishing be they subject or not since it is the natural law of nations, not human civil law, that prohibits the exclusion of some from fishing grounds since the sea is open to all. Human law may corroborate the natural law by giving a right to fish, but it can never contradict the natural law by taking that right away.

Welwod has a response though in that he argued forcefully that the sea could be occupied, which renders its natural condition irrelevant. In Welwod’s conception, since it is not necessary that physical occupation occur, but simply partial occupation with intent to occupy the rest, courses, soundings, and other methods of marking nautical navigation may serve as boundaries of occupation, *de facto* possession.⁸⁰ Moreover, to combat Grotius’s argument that the sea may never be possessed since it is constantly fluid and changing, Welwod leverages the metaphor of a ship’s crew: just as a ship’s crew is nonetheless the same ship’s crew even if its members change, an occupied segment of the ocean is nonetheless the same segment of the ocean even if new water flows in and old water flows out.⁸¹ Welwod concluded his attack on Grotius by hedging his bets and structuring his final

⁷⁸ Grotius, 94.

⁷⁹ Grotius, 100.

⁸⁰ Welwod, 70-71.

⁸¹ Welwod, 72.

argument as an “even if” statement. According to him, even if the sea is free, since, by Grotius’s own admission, that which may be exhausted by use may be naturally proprietary and fish stocks are reduced by use, fish stocks if nothing else ought be proprietary.⁸²

As far as Welwod’s analogy of the ship’s crew, which he uses to demonstrate that a thing though made up of entirely different parts, may nonetheless be the same thing, Grotius is skeptical of its applicability. He writes, “for nonoccupability does not properly rest upon this foundation nor does the comparison proceed correctly. For the parts of a ship (its crew) are not changed by a certain impetus simultaneously, but little by little and entirely insensibly, while the parts of the sea stand still at no moment.”⁸³ Additionally, in his *Defense*, Grotius similarly hedges by claiming that even if no positive reason for the freedom of the sea can be adduced, if the precepts for the argument behind the freedom of the sea adhere in the minds of persons, then it is legitimate to assume that the freedom of the sea might be compelled by God’s will.⁸⁴ This line of argumentation allows him to assert that, “whenever mention is made of the law of nations [in my argument], it is not to be understood that it is a law made by the common consent of the nations.”⁸⁵ What this means is that heads of state do not even have to consent to the natural law to be bound by it, which is a distinction borrowed from Aquinas. Furthermore, Grotius reminds his audience that the, “axioms, that the sea is owned by no one and its use is common to all men, are not of that civil law which by imitation has become common

⁸² Welwod, 73-74.

⁸³ Grotius, 115.

⁸⁴ Grotius, 105.

⁸⁵ Grotius, 106.

to many peoples, but of the law of nations properly so-called, which obliges nations to nations.”⁸⁶ Thus, Grotius reasserts that freedom of the seas is not contingent upon occupation; it is factually the natural condition of the sea independent of human law (even civil law borrowed from Roman codes). In taking the argument as contingent upon occupation, Grotius argued that Welwod made a fundamental mistake because even if the sea can be occupied it *should* not be occupied since it is not inherently reduced by use and was given by God as common to all.

Not satisfied at reiterating the principled basis of his argument, Grotius proceeds to address Welwod’s additional claims. He argues that an unlimited liquid is not to be possessed and that the sea far from being bounded by land actually bounds the land itself and so is in fact unlimited.⁸⁷ Even if it were limited, Grotius points out that no single person or kingdom occupies the limits (i.e. the shores of the entire ocean) all at once. He therefore concludes that, “the proximate reason why the sea can not be possessed is neither its fluid nature nor its ‘continually flowing to and fro’ (which Welwod brings up against himself in vain). But its incomprehensibility the same as in the case of the air.”⁸⁸ By incomprehensibility Grotius means the sheer unlimited nature of the sea.

Implicitly though Welwod has a response, namely, that the sea is made less incomprehensible and can in fact be limited through the use of navigational tools and landmarks such as islands which can serve as limiting points. To Grotius however, this type of argument leads to absurd conclusions since, “if the drawing of

⁸⁶ Grotius, 125.

⁸⁷ Grotius, 111.

⁸⁸ Grotius, 111.

a line were sufficient for occupation, the astronomers should be said to be the possessors of the heaven and the geometers of the earth.”⁸⁹ Whether or not one agrees with this logic, Grotius clearly felt he had dealt sufficiently with Welwod’s arguments regarding occupation so he moved onto fortifying his own arguments.

In his *Defense*, he added several novel arguments to those advanced in *Mare Liberum* in favor of open seas. First, he introduced the issue of free loading (what economists would call the free-rider problem) and why that problem naturally leads to property in land in order to avoid quarrel between a free loader and an industrious individual over the fruits of common property, but not the ocean since the ocean, to Grotius, was inexhaustible.⁹⁰ He further added two more arguments: another method of legitimate occupation, that of possession exceeding memory, which the sea categorically cannot be possessed through since it would be impossible to know all areas of the ocean through memory, and a compelling slippery slope argument: “if water is property [up to some arbitrary limit like 100 miles], why can not the water which is immediately contiguous to the property be equally property?”⁹¹ To Grotius, if we admit property somewhere, we admit it everywhere, which is impossible under *Mare Liberum*. Therefore all property in the open ocean is illegitimate. It is hard to find an argument in Welwod’s work to answer that open question. On account of Grotius’s comprehensive responses, it

⁸⁹ Grotius, 112. What Grotius means is that drawing an arbitrary boundary in the air might confer on some person a right of ownership over that air, which he considers absurd. Curiously, we do exactly that in the status quo.

⁹⁰ Grotius, 119.

⁹¹ Grotius, 127.

would seem at least that the ball was in the court of those who advocated for the free sea (a sea common to all) at the end of 1615.

At base, Grotius grounded his argument in a principled stance that the sea *should* not and not simply *could* not be owned. That Grotius is making a principled case and not just a practical one is clear in the way he responded to Welwod, emphasizing, as he did, the natural state of the ocean and not simply its literal possessability. To make this argument he depended on natural law theories descended from the work of Thomas Aquinas. The natural law in a Thomistic worldview epistemologically superseded human law, which meant that Grotius not only argued that human law regarding princes and states and papal donation could never make the sea proper to any nation, arguments he likely borrowed in part from Vitoria and Vázquez since he quoted both and his arguments are similar in structure, but that even if they could, it would not matter. The sea, *by nature*, was common to all since it is neither degraded by use, nor was given by God to any particular people, nor rendered limited by landforms. In so doing, Hugo Grotius, as the progenitor of many parts of a genealogy of ideas supporting *Mare Liberum*, placed that genealogy on the principled philosophical level. He thus constructed and gave a particular philosophically minded character to half of the dialectic between *Mare Clausum* and *Mare Liberum*.

In the following chapter, the reply of Portuguese jurist Seraphim de Freitas will be brought into dialogue with Grotius, in order to demonstrate that even though de Freitas's work is often left out of scholarly literature on the intellectual history of the law of the sea, his arguments for *Mare Clausum*, or closed seas, present a cogent

alternative to *Mare Liberum*. In constructing the beginnings of a logical genealogy of *Mare Clausum* out of the pool of early modern ideas, de Freitas attempted to engage Grotius on the principled level (the should/should not level). Nevertheless, his work sets a precedent later taken up by Selden for building arguments in support of *Mare Clausum* on the practical level rather than the philosophical level that Grotius put the genealogy of *Mare Liberum* on.

Chapter Three

Frei Serafim de Freitas on *Mare Clausum*

“O poder temporal ou politico foi concedidõ pór Deus, como autor da Natureza, ao rei ou príncipe da república, mediante a luz natural, por eleição ou transferência da comunidade.”⁹²

Serafim de Freitas, *Do Justo Império Asiático Dos Portugueses*

The need for a coherent theory that could be used to justify sovereignty in the ocean was especially acute in the Iberian kingdoms, and Portugal most of all. Lacking the demographic resources to mount full-scale colonial projects in the manner of England, or even Spain, Portugal structured its empire as a network of commercial *feitorias* and entrepôts linked together by the sea.⁹³ The very political structure of the Portuguese empire therefore depended on *Mare Clausum* so that the Portuguese could lay claim to the ocean between their territorial outposts. Since very few Portuguese colonies (with the exception of Brazil) were designed to be self-sustaining entities ownership of oceanic routes was particularly important. For economic survival metropolitan Portugal and its colonies required the comparative advantage as monopolistic supplier of spices and other goods exclusive ownership

⁹² Serafim de Freitas, *Do Justo Império Asiático Dos Portugueses* (Lisbon: Instituto de Alta Cultura, 1959), 162. “Political and temporal authority over a community was, in light of nature, granted by God, as author of nature, to the king or prince of the republic.”

⁹³ See, “Introduction,” in *Polycentric Monarchies: How Did Early Modern Spain and Portugal Achieve and Maintain a Global Hegemony*, ed. Cardim et al. (Eastbourne: Sussex Academic Press, 2012), 3-11. See also, Francisco Bethencourt, “Political Configurations and Local Powers,” in *Portuguese Oceanic Expansion, 1400-1800* (Cambridge: Cambridge University Press, 2007), 197-255.

of certain sea routes afforded them.⁹⁴ *Mare Liberum* was an existential threat to Portugal's economic future.

Facing an existential threat, the Portuguese had to defend their shipping routes and it is likely that they were going to militarily and politically do so whether or not they could muster a theoretical pretext for doing so, but a theoretical defense was nonetheless necessary. The Portuguese were competing with other empires no less powerful and in some cases more powerful than their own. That competition was in part a competition in justification, which is to say, a competition over claims of sovereignty. Whose imperial territorial designs were legal, or illegal for that matter, had pertinent and pervasive political consequences.⁹⁵ Perceived or undisputed legality was on some level a deterrent, even if a small one, to encroachment. More importantly, negotiating from a position justified by accepted theory was a more powerful negotiating tactic since it meant leverage in the negotiation. In short, perceived legality, which is to say successfully persuading other nations that your claims to territorial sovereignty were legitimate, functioned

⁹⁴ The problem confronting the Portuguese was not solely theoretical. In fact, what ultimately did in the Portuguese empire was, among other factors, the growing power of Dutch and English naval forces in the Indian Ocean, which robbed the Portuguese of their commercial success – the backbone of their imperial project – by forcing open oceanic trade routes that the Portuguese depended on monopolizing. Theories of *Mare Clausum* gave the Portuguese leverage in trade negotiations such that they could defend their monopoly to a greater degree than they otherwise would have been able to.

⁹⁵ Pagden, *The Burdens of Empire: 1539 to the Present*, 1-37. Pagden's entire book rests upon the premise that intellectual concerns have political ramifications.

both as mild deterrent to encroachment and as a powerful weapon in international negotiation.⁹⁶

What really set the Portuguese need to defend closed seas apart from the need of Spain or England, was the fact that Portuguese imperium was tied to ownership of the sea. Unlike any other European powers, Portugal claimed, through the *Ordenações Manuelinas* of 1521, dominion over commerce.⁹⁷ Historian João de Barros spoke of King Manuel as, “Lord of the conquest, navigation and commerce,” of Africa, Persia, and India.⁹⁸ To the Portuguese, the right to dominate Asian commerce and thereby exclude others from the portions of the sea wherein it occurred came from the right of imperial conquest. Any denial of that right was an attack on the legitimacy of the Portuguese crown’s authority to run its conquests as it wished.

A strong defense of Portuguese sovereignty and imperium came in 1625 when the Portuguese jurist, Frei Serafim de Freitas, published *Do Justo Império Asiático Dos Portugueses*, or *The Imperial Right Of the Portuguese*, at the University of Valladolid.⁹⁹ In 18 chapters de Freitas laid out why the Portuguese had an exclusive right to the Indian Ocean, which he interpreted as exclusive right to trade routes in

⁹⁶ In any event, Serafim de Freitas must have seen some necessity for writing otherwise he wouldn’t have written his response to Grotius’s *Mare Liberum*.

⁹⁷ Luiz Carlos de Azevedo, “O Reinado de D. Manuel E As Ordenações Manuelinas,” Ph.d. diss, Universidade de São Paulo, 1999.

⁹⁸ Barros quoted in, Pagden, *The Burdens of Empire*, 160. See for full quotation, Joam de Barros, *Asia de Joam de Barros dos feitos que os Portugueses fizeram no descobrimento e conquista dos mares et terras do Oriente* (Lisbon, 1781).

⁹⁹ *Do Justo Império Asiático Dos Portugueses* is the title of the Portuguese work. *De Iusto Imperio Lusitanorum Asiatico* is the title of the Latin work of which the Portuguese work is a translation. In scholarly literature, the work is generally referred to by its Latin name, but since I am working from the Portuguese version, I will use the Portuguese name.

the Indian Ocean, exclusive right to commerce in the Indian Ocean, and exclusive right to subjugate littoral zones of the Indian Ocean. De Freitas was also careful to devote several chapters to direct refutation of Grotius.¹⁰⁰ As such, de Freitas's treatise and Grotius's *Mare Liberum* represent the foundation of two sides of dialectic between *Mare Liberum* and *Mare Clausum*. In comparing them to each other there is a unique opportunity to historicize ideas in a way that helps explain the political power of their ideas.

Like Grotius, de Freitas selectively made selective use of his intellectual patrimony, picking and choosing from among ideas and arguments available to him in order to craft arguments. The act of employing intellectual agency was a political one. An idea is powerful politically or otherwise because of the weight of traditions of thought it draws on so it is impossible to understand the full political weight of either Grotius's or de Freitas's ideas without understanding them as intellectual gatekeepers. Crucially, it is then similarly impossible to understand the power of the international dialectic Grotius and de Freitas engaged in without understanding both jurists as links in genealogies of *Mare Liberum* and *Mare Clausum*.

Consequently, understanding Grotius and de Freitas in the context of a history of ideas has a dual purpose. First, it entails a more complete conceptualization of the

¹⁰⁰ In truth, de Freitas was not responding to Grotius's arguments *per se*, but rather, "someone's" arguments since he was not aware that it was Grotius who proffered them, as Grotius published *Mare Liberum* anonymously. That said, I do not believe that it made a difference. No matter who proffered them, whether he happened to be English, Dutch, Spanish, or Italian, the arguments were an attack on the intellectual coherence of the Portuguese imperial project.

theorists as intellectual actors.¹⁰¹ Second, it more accurately casts the degree to which the dialectic between *Mare Clausum* and *Mare Liberum* was politically powerful.

This chapter seeks to accomplish that dual purpose first by examining 1625 as a historical moment and Frei Serafim de Freitas as a scholar, then by elaborating on de Freitas's intellectual heritage and, finally, on how that heritage was selectively filtered by de Freitas in order to craft arguments aimed at dismantling the political power of Grotius's *Mare Liberum*.¹⁰²

Contextualizing de Freitas

1625 was a year for both hope and dread for the Portuguese state. On the one hand, the basic unit of the Portuguese economy, the gold cruzado, had been remarkably stable since approximately 1539, rendering inflation a non-issue, despite the declining silver output of Spanish America in the 1620s (a large source of Portuguese capital at the time).¹⁰³ What is more, the Portuguese state in the period was always able to acquire loans with relative ease on account of its profitable maritime trade, which accounted for around 62 percent of state income in 1619.¹⁰⁴

¹⁰¹ Less importantly, but not unimportantly, that understanding also helps clarify the content of the debate because one comes to more readily understand the process used to construct arguments.

¹⁰² For source criticism of *Do Justo Império Asiático Dos Portugueses* see Appendix I.

¹⁰³ "A.H. de Oliveira Marques, *History of Portugal* (New York: Columbia University Press, 1976), 277. Unfortunately for the Portuguese, declining silver output meant a more narrow structural dependence on fewer forms of wealth (spices exported to northern European ports and in the late 17th century and early 18th century, Brazilian gold) making the economic system more vulnerable to shocks. So the lack of inflation wasn't an unqualified good.

¹⁰⁴ Oliveira Marques, *History of Portugal*, 278-279.

However, these indicators of economic prosperity hid the underlying weaknesses of the Portuguese position. When viewed through the prism of hindsight, it is clear that the Portuguese economy was in a period of contraction. The gross revenue in cruzados of the Portuguese state declined from 3,488,000 in 1619, to 2,518,000 in 1628, while spending continued at early 1610s levels.¹⁰⁵ At the time, steady and even, in some periods, increasing revenue from maritime trade masked the effects of the decline in total revenue.¹⁰⁶ The contracting revenue stream writ-large along with increasing revenues from maritime trade combined to make the Portuguese state more and more dependent on a single revenue stream – maritime trade. In fact, the percentage of total revenue from maritime trade increased from 59 percent in 1607 to the aforementioned 62 percent in 1619. Nevertheless, as total state revenues continued to decline, increased maritime trade could not make up the gap and the Portuguese crown had to turn to something other than state trade monopolies to finance itself.¹⁰⁷

In searching for an alternative method of finance, it is somewhat ironic that Portuguese officials, who were well aware of their capricious fortunes, turned to the Dutch East India Company as a model. Its wild success made privately funded trade operations the trendy new item in early modern Europe. Privately funded trade was especially enticing to the cash strapped Portuguese crown because, from its perspective, it could kill two birds with one stone. It would shift the funding burden to private actors while continuing to fill state coffers with customhouse fees it could

¹⁰⁵ Oliveira Marques, *History of Portugal*, 278.

¹⁰⁶ Marques, 276.

¹⁰⁷ Marques, 277-278.

still collect since it legally retained a monopoly on maritime trade. Yet, the Portuguese could only follow the Dutch model to a limited degree because there were already well-developed state organizations in place. Most prominently, the *Estado da Índia*, run by an appointed governor as a network of littoral trading posts from Goa and Cochin to the Coromandel Coast and Malacca exercised a monopoly over Portuguese authority in the Indian Ocean.¹⁰⁸ A trade company run as a quasi-state would have been in direct competition with the *Estado da Índia*, which is why a private company never attracted much interest from the Portuguese merchant class.¹⁰⁹ A private company would never be able to get off the ground.

What the decline in state revenue did accomplish, despite its failure to instigate private funding of trade expeditions, was to ensure the concentration of wealth in a few hands.¹¹⁰ Where the Dutch East India Company and related trade organizations spread wealth among a merchant class, the Portuguese model of state capitalism that operated foreign trade through state trade monopolies concentrated money in the hands of those who could operate with the sanction of the state monopoly. Portugal consequently never developed a wealthy merchant class as large as that in the Dutch Republic. The result was to make Portuguese trade interests relatively slower to structurally adapt since they were bound up in state

¹⁰⁸ Sanjay Subrahmanyam, *The Portuguese Empire in Asia, 1500-1700: A Political and Economic History* (Malden, Massachusetts: Wiley-Blackwell, 2012), 169.

¹⁰⁹ Several nascent companies were formed, but in each case, the Crown bore the brunt of the overhead costs, which defeated the purpose of having a private company at all. See, Subrahmanyam, *The Portuguese Empire in Asia, 1500-1700: A Political and Economic History*, 169-170.

¹¹⁰ Oliveira Marques, *History of Portugal*, 293.

structures to changing capital flows than their Dutch or English counterparts – a fatal flaw.

The early 1620s witnessed the beginning of the end for the Portuguese empire (or at least an increase in the velocity of decline). Persian forces under Shah Abbas seized Hormuz, the main Portuguese port with access to trade in the Persian Gulf, in February 1622 with the help of English naval power.¹¹¹ The Dutch attacked Macao in June 1622 and were narrowly repulsed.¹¹² In 1624, eleven Dutch ships successfully attacked the Brazilian coastline, which the Dutch would hold until 1654.¹¹³ Even the small Kingdom of Kandy, in an alarming trend for the ability of the Portuguese to compel loyalty from local Asian rulers, began to resist Portuguese expansion in Sri Lanka in the early 1620s by seeking diplomatic relations with the Dutch.¹¹⁴ To compound issues, in 1625 the Spanish were expelled from Japan and a number of priests were executed.¹¹⁵ A large portion of Portuguese wealth came from its middleman position in the China-Japan trade since the Chinese prohibited their own merchants from trading with Japan and the Portuguese were well established at Macao enabling them to fill the void. So the increasing bellicosity and xenophobia of Tokugawa Japan under the reign of Tokugawa Iemitsu (1623-1651) as demonstrated by his expulsion of the Spanish put Portuguese interests in serious

¹¹¹ Subrahmanyam, *The Portuguese Empire in Asia, 1500-1700: A Political and Economic History*, 166. See also, Charles Boxer, *The Portuguese Seaborne Empire: 1415-1825* (New York: Alfred A Knopf Publishing, 1969), 111.

¹¹² Boxer, *The Portuguese Seaborne Empire: 1415-1825* (New York: Alfred A Knopf Publishing, 1969), 109.

¹¹³ Boxer, 109.

¹¹⁴ Subrahmanyam, 176-179.

¹¹⁵ Subrahmanyam, 179.

jeopardy. To Portuguese observers in 1625, it must have seemed as if their empire was under threat from all sides.¹¹⁶

At the same moment that Portuguese Asia was under existential threat, Spanish policy towards Portugal was changing. Since at least 1601 when the Duke of Lerma attempted to put Portuguese fiscal affairs under the authority of a *Junta da Fazenda* composed of Spaniards, the Spanish crown and its various agents had been attempting to assert increased control in the union of the Iberian crowns, which had existed since the Portuguese succession crisis in 1580.¹¹⁷ The Portuguese successfully protested for a number of years until 1617 when Philip III appointed the Count of Salinas viceroy of Portugal. The Count promptly declared that the Portuguese would have to cover the overhead for their Asian territories without the help of Spain.¹¹⁸ In order to do so, Portugal auctioned overseas offices, which had the effect of turning the *Estado da Índia* into a *de jure* rentier state, which had the corresponding effect of decreasing its administrative efficacy at a point in time when it most needed administrative efficacy.

¹¹⁶ Scholars have long recognized that the 1620s were tough years for the Portuguese. See, Frederick Charles Danvers, *The Portuguese In India: Being a History of the Rise and Decline of Their Eastern Empire* (London: W.H. Allen and Company, 1894). See also, Anthony Disney, *Twilight of the Pepper Empire: Portuguese Trade in Southwest India in the Early Seventeenth Century* (Cambridge: Harvard University Press, 1978) and Anthony Disney, *A History of Portugal and the Portuguese Empire From Beginnings to 1807* (Cambridge: Cambridge University Press, 2009), 198-209.

¹¹⁷ Subrahmanyam, 163. In 1580 Dom Sebastião, King of Portugal, led an ill-fated expedition to Morocco where he was presumably killed in action at the Battle of Alcácer Quibir. He was heirless and so upon his death the crown of Portugal reverted to Philip II of Spain who was his uncle.

¹¹⁸ Subrahmanyam, 163. The Count of Salinas is frequently referred to as the Marquês de Alenquer in historical texts, but this Portuguese title was just a pretext meant to hide his Spanish nationality.

The increasingly threatened nature of the Portuguese foothold in world affairs had serious effects on Portuguese intellectual life through the Portuguese Inquisition.¹¹⁹ Danger to the Portuguese state tended to result in a desire to bring thought more and more in line with religion. During the long decline of the Portuguese Empire from the late sixteenth century through the middle of the seventeenth century, universities and religion were knit together. The University of Coimbra, for instance, was placed under the jurisdiction of the *Mesa da Consciência e Ordens* in 1576 and the University of Évora, Portugal's other university, was purged of humanist influences in favor of a focus on canon from the 1580s through 1600.¹²⁰ So it was amidst both existential political crisis and increasingly overt religiosity of the intellectual life that de Freitas entered the University of Coimbra sometime in 1601 or 1602. Together those two trends had a profound effect on how he constructed his arguments for *Mare Clausum*.

On de Freitas Himself

Born in Lisbon, Serafim de Freitas obtained his doctorate in canon law from the University of Coimbra on November 3, 1607 after successfully completing several degrees at the university and two years as a lecturer at the University of Valladolid. Very shortly thereafter, he was granted a position at the University of Valladolid and there joined the Order of Our Lady of Mercy. Our Lady of Mercy, by the time de Freitas joined, was in part dedicated to evaluating the spiritual

¹¹⁹ On religious zeal in Portugal see, Francisco Bethencourt, *The Inquisition: A Global History, 1478-1834* (Cambridge: Cambridge University Press, 2009).

¹²⁰ Oliveira Marques, 298-300.

considerations of the discovery of new lands.¹²¹ For instance, the order was engaged in debates regarding best practices for evangelizing locals in newly “discovered” places. Through his engagement with the Order and his position at the university, de Freitas became quite a well-known intellectual. It therefore makes sense why in 1625 he was either selected or took the responsibility upon himself to write a response to Grotius.¹²²

His fame, however, was short lived, as he became deaf in 1626 and applied for retirement earlier than his position normally would have allowed. In his retirement he travelled frequently between Madrid, Lisbon, and Valladolid, maintaining contact with the intellectual world of the Iberian Peninsula. Upon his death in Valladolid in June 1633, possibly on account of exhaustion brought on by extensive travel, he is supposed to have expressed his desire to return to Portugal, the land of his birth.¹²³ It certainly seems that despite his installment at a Spanish university, de Freitas had Portugal and likely Portugal’s interests in mind throughout his life.

De Freitas’s extensive travel is indicative of how integrally linked the academic worlds of Portugal and Spain were during the period of the Iberian Union

¹²¹ Bruce Taylor, *Structures of Reform: The Mercedarian Order in the Spanish Golden Age* (Leiden: Brill Academic Publishers, 2000), 117-122, 333-334. I use the term discovery because to Europeans it was a discovery. They had little, if any, previous knowledge of the lands they sailed to. Nevertheless, discovery obviously is a complicated term that tends to elide the two-way nature of encounters, so I have placed it where applicable in quotation marks.

¹²² Marcelo Caetano, “Introdução,” in *Do Justo Império Asiático Dos Portugueses* (Lisbon: Instituto de Alta Cultura, 1959), 34-39.

¹²³ Caetano, “Introdução,” 38-39. I suspect this last addition is an apocryphal one added by Caetano to make it easier for Portugal to claim de Freitas as their own and deny his legacy to the Spanish.

(1580-1640). As historian A.J.R. Russell Wood notes, “mobility was a career characteristic of Portuguese [magistrates and academics].” For the most part,” he writes, “these were born in Portugal, graduated from the University of Coimbra with a degree in canon or civil law, completed a stint in Portugal, and then were posted overseas,” or completed their education abroad.¹²⁴ Abnormal though it may seem, de Freitas’s career was really just one example of a rich Spanish-Portuguese intellectual milieu during the period of their union. Spanish academics might teach at the University of Évora or Coimbra just as Portuguese academics might teach at the University of Salamanca or Valladolid. It is therefore unsurprising that de Freitas was familiar with a number of thinkers in both Spain and Portugal and thus heir to the intellectual traditions of both countries. Moreover, given his extensive contact with the elite intellectuals of both countries it seems fair to assume he was well informed regarding the crisis facing the Portuguese empire in 1625.

De Freitas’s Intellectual Heritage

Like Grotius, de Freitas was immersed in the tradition of natural law theory and intimately acquainted with the work of Thomas Aquinas. As such, he made frequent use of Thomistic terms in much the same way that Grotius did. However, as an Iberian and as someone determined to defend *Mare Clausum*, de Freitas had a fundamentally different perspective on Vitoria and Vázquez than Grotius. More importantly, he was heir to a specifically Portuguese intellectual tradition that began with Luis de Molina (1535-1600) and Pedro da Fonseca (1528-1599),

¹²⁴ A.J.R. Russell-Wood, *The Portuguese Empire. 1415-1808: A World on the Move* (Baltimore: Johns Hopkins University Press, 1998), 71.

Spaniards who taught at the University of Évora.¹²⁵ Molina's work and the distinction it introduced between the study of economics and that of theology are especially integral in understanding de Freitas's arguments.

Molina was primarily concerned with investigating the relationship between God's omniscience and free will. In Catholic belief, God is both omnipotent and omniscient, but does not predestine humans for heaven or hell. Reform minded Calvinists objected that if God is omnipotent and omniscient, he must know and approve of future events because he would have changed them until the point at which he approved of them. If that is the case, then the future is predetermined, free will is a fallacy, and humans are predestined for either heaven or hell.¹²⁶ To the Catholic Church, this was heresy, but to prove it, a defense of the compatibility of free will and God's omnipotence and omniscience was required. In order to provide the requisite defense, Molina argued that God's ability to know the future extended

¹²⁵ Together, Fonseca and Molina were part of a group known as the Conimbricenses, Jesuits dedicated to the study of Aristotelian method and philosophy at the University of Coimbra. The Conimbricenses were famous for their scholastic precision throughout European academic circles. There is no doubt that de Freitas was intimately familiar with their work. 34 editions of the *Institutionum Dialecticarum Libri Octo*, the central textbook of their ideas, were published under Fonseca's guidance between 1564 and 1625. Oliveira Marques, 301. On the Conimbricenses in historiography see, Pedro Calafate, "A Historiografia Filosófica Portuguesa Perante O Seiscentismo," *Revista Portuguesa de Filosofia* 52 (1996): 185-196. Francisco Sanches (1551-1623) also bears mentioning as a Portuguese philosopher who developed methods of skepticism that René Descartes would later take up in his philosophical project. However, Sanches and his radical skeptic views were more welcome abroad than in the Iberian Peninsula. Sanches, as a result, spent most of his life in France. It would therefore be difficult to link Sanches and de Freitas and probably unwarranted as well seeing as how de Freitas, as a religious scholar, would likely have rejected Sanches's skepticism as heretical. On Francisco Sanches's skepticism see, Rui Bertrand Romão, "Juízo e Incerteza em Francisco Sanches," *Revista Portuguesa de Filosofia* 66 (2010): 51-62.

¹²⁶ Having and displaying faith is what marks those predestined for heaven (similar but not the same as *sola fide* Lutheran doctrine).

to the infinite number of contingent possible outcomes under a condition of human free will. Thus, he sees how humans might employ their free will no matter how humans actually employ it. Upon this foreknowledge, Molina argued, God could, if he wanted to, found predestinating decrees, but that need not necessarily be the case. An individual could certainly choose a divergent path insofar as it was within the bounds of possible contingent outcomes foreseen and approved of by God. Molina's argument allowed him to conclude that free will exists and humans are not predestined, even though God is omnipotent and omniscient.¹²⁷

The crucial takeaway for de Freitas was not, however, the result of Molina's turn at mental gymnastics, but what he managed to accomplish in the process. Molina's thoughts on free will and God allowed him to give special meaning to human relationships, which matter in a world with free will in a way that they do not in a world without it. Molina saw these relationships as mostly economic in nature. As historian and theologian Diego Alonso-Lasheras points out, Molina was intimately aware of Iberian business and financial practices and one of his primary goals was to establish normative practices for economic interaction that were based in Catholic doctrine.¹²⁸ To Molina, there was justice in seeking the common good and the common good might be sought through certain economic practices like money lending.

¹²⁷ Alexander Aichele, "The Real Possibility of Freedom: Luis de Molina's Theory," in *A Companion to Luis de Molina*, ed. Matthias Kaufmann et al. (Leiden: Brill Publishing, 2014), 3-55.

¹²⁸ Diego Alonso-Lasheras, *Luis de Molina's De Iustitia Et Iure: Justice as Virtue in an Economic Context* (Leiden: Brill Publishing, 2011). Lasheras lapses at points into Catholic apologetics, but his work nevertheless has historical merit.

This was a striking claim in the early modern world. In comparison to Franciscan order, for example, whose exegetical reading of scripture led them to conclude that abject poverty was a spiritual necessity, Molina's argument must have looked almost like a defense of greed.¹²⁹ Yet, Molina was careful to treat economics and theology as distinct subjects to be studied separately so as not to allow the moral analysis of theology to *prima facie* cloud his discussion of the ethics of economics. In the highly religious context of Iberian thought, his overt distinction between theology and economics was a new direction.¹³⁰ Ultimately, Molina's departure recognized the legitimacy of commerce when it pursued virtuous ends. That idea was taken up by de Freitas as a central theme in his attack on Grotius.

De Freitas's Treatise and its Engagement With Grotius

De Freitas's ultimate conclusion is that, "the Portuguese acquired ownership of the Indian sea through immemorial prescription or custom counting from the pontifical grant of Martin V... reinforced... by the actual occupation of the sea route to the Indies by Bartolomeu Dias and Vasco da Gama."¹³¹ It is possible to break down the path de Freitas took in reaching that conclusion into four steps: an attack on monolithic natural law as conceived of by Grotius, a defense of the legitimacy of possession via discovery, a defense of papal authority in temporal matters, and lastly, an exegetical rebuke of Grotius.

¹²⁹ Virpi Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven: Peeters, 2001), 153-155.

¹³⁰ Frank Bartholomew, *The Political Philosophy of Luis De Molina, S.J. 1525-1600* (Rome: Jesuit Historical Institute, 1974).

¹³¹ Mónica Brito Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," *Journal of the History of Ideas* 64 (2003): 377.

However, it is critically important to first make clear that only certain arguments were open to de Freitas as a religious academic attempting to give an intellectual defense of an empire imperiled by the military advances of rival nations, a serious lack of financial diversification, the growing resolve of local polities, and neglect from the Spanish crown. First, he could make no argument that contradicted papal power. Not only was he a believer in papal authority but Portuguese censors would have objected to leaving out a defense regardless of whether or not a defense was persuasive or germane.¹³² Second, it was crucial for de Freitas to defend a version of closed seas that also included the ability of nations to exclude other nations from trading routes. The remaining health of the flagging Portuguese financial system depended on it.

Under these constraints, de Freitas begins to dismantle Grotius's work by distinguishing between two types of natural law: permissive natural law, which is to say natural law (universal law arising from reason) that delineates what is allowed, and perceptive natural law, which is to say, natural law that delineates what is not allowed. De Freitas makes a further distinction between primary natural law (largely prescriptive) aimed at the good of human nature in a pre-fall state of innocence and secondary natural law (largely permissive) aimed at the good of human nature in a post-fall corrupted world.¹³³ The secondary natural law therefore regards mutable jurisprudence in which fact can create right. Immemorial custom

¹³² Mónica Brito Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," *Journal of the History of Ideas* 64 (2003): 368.

¹³³ On permissive natural law see, Brian Tierney, "Permissive Natural Law and Property: Gratian to Kant," *Journal of the History of Ideas* 62 (2001): 381-399.

sanctions ownership under such a mutable natural law. Ergo, exclusive rights to commerce, since commerce belongs to the post-fall corrupted world, may be acquired by immemorial custom. Exclusive rights can only be facilitated by dominion in the ocean, rendering dominion the proper result of custom. What mattered then was who first established dominion via custom. De Freitas writes in chapter 13, section 12, of *Do Justo Império*:

In fact, even if, by common civil law, trade is understood as to be common to all, this is to be understood [in the context of Roman jurisprudence], as common to one nation under a prince, and becomes the property [of the prince] who first intervened to open navigation to all through much bloodshed and danger to his own interest. Having done so [the Portuguese] claim resembles that of the first inhabitants.¹³⁴

Commerce, in that regard, may be justifiably regulated and controlled by the nation that was the first to, “discover,” a location. The necessary precondition of regulating and controlling commerce is jurisdiction over the ocean, but also ownership of particular sections of the ocean.

¹³⁴ Serafim de Freitas, *Do Justo Império Dos Portugueses*, tr. from Latin to Portuguese by Miguel Pinto de Meneses (Lisbon: Instituto da Alta Cultura at the University of Lisbon, 1959), published online by the Digital Library of India, <http://www.dli.ernet.in/handle/2015/535021>, 226. The PDF copy is the same text as the one published in Lisbon with the exception of the jacket. Discussion of the differences between the two texts as well as a source critique can be found in Appendix I. Portuguese: Com efeito, ainda que pelo direito das gentes o comércio com quaisquer povos seja comum a todos, isso assim se deve entender, antes de o comércio ser ocupado por outro príncipe e de se tornar propriedade sua, por quaisquer justas causas, como as que intervieram no referido comércio e exploração dos Portugueses, os quais, sendo os primeiros a abrir e tornar navegável o Oceano Etiópica até aos Índios, com muito derramento de sangue.

Yet, Grotius had preempted the idea that discovery could be made to justify ownership since India was not, according to Grotius, *terra nullius*. De Freitas accepts this writing in chapter 3, section 4 that:

The discovery of land does not attribute right, except when that land belonged to no one. The Indians, being Muslim, were idolaters, but had real dominion and possession of their things before the navigation of the Portuguese, and without cause they could not be despoiled of their land, because, according to [St. Thomas Aquinas] commonly accepted faith does not preclude natural law or human law being the sources of dominion over land.¹³⁵

Grotius had also further objected to the Portuguese assertion that they were the first to, “discover,” India, seeing as how classical authors were well aware of its existence, so it would seem to be argumentatively disadvantage to admit Grotius point about *terra nullius*. However, in his concession de Freitas reminds readers that residents of India were “idolaters,” and that played an important role in de Freitas’s argument. In an adroit argumentative move, de Freitas countered Grotius’s points by arguing that, “discovery,” can also mean opening up access to areas of land, which is something the Portuguese, by discovering the sea route to Asia, had done. To de Freitas, discovery did not literally mean coming to find an entirely new place (*terra nullius*), but rather bringing a new place into a narrative of Christianity and

¹³⁵ De Freitas, tr. Miguel Pinto de Meneses, 123. Portuguese: Porque o descobrimento não atribui direito, salvo sobre aquilo que antes a ninguém pertencia. Ora, os Índios, fossem maometanos, fossem idólatras, tinham verdadeiro domínio e posse de suas coisas antes da navegação dos Portugueses, e sem causa não podiam ser delas despojados pois, segundo S. Tomás, comumente aceito, a fé não tolhe o direito natural ou humano, que são as fontes do domínio.

presenting the possibility for the advancement of the true religion.¹³⁶ By opening the sea route to Asia, the Portuguese brought “idolaters,” “into history.”¹³⁷

According to de Freitas, the Portuguese were simply purveyors of the gospel to “heathens.” In much the same way that the disciples carried the gospel from Jerusalem to Rome, the Portuguese carried it from Lisbon to Goa, Daman, and Diu as the first Europeans to sail around the Cape of Good Hope. He writes in chapter 4, section 4:

Though the Incognito (Grotius) suspects falsehoods in our witnesses, let [me] show, with present and former authorities, that the Portuguese were the first that sailed from the west over the vast ocean from the Arctic to Antarctica into the Indian Ocean. And since it would be very laborious to present here all the quotations of all authors, [I] transcribed only those which I was at liberty to read as a monk engulfed in the assiduous study of the sacred canons.¹³⁸

He goes on to quote Aristotle, Virgil, Seneca, Vasco de Gama, and at least 10 other sources in support of his claim that the Portuguese were the first. Importantly however he did not argue that being the first in and of itself matters, but rather that being the first to bring the gospel and erect marks of Christianity in a place mattered. He believed that the Portuguese were the first to do just that in India. In

¹³⁶ See, Anthony Pagden, *The Burdens of Empire*, 168.

¹³⁷ See, de Freitas, tr. Miguel Pinto de Meneses, ch. XII, especially nn. 1-5. Here de Freitas quotes Domingo de Soto, a 16th century theologian, in support of his position several times.

¹³⁸ De Freitas, 130. Portuguese: Pondo de lado os testemunhos dos Portugueses como suspeitos ao Incógnito, mostremos, de presente, com autoridades de antigos e modernos, que os Portugueses foram os primeiros que do Ocidente pelo vasto Oceano navegaram do Árctico para o Antárctico. E, como seria assaz laborioso apresentar aqui citações de todos os autores, transcrevamos apenas aqueles que de reliance me foi dado ler, nos momentos em que dava tréguas à minha actividad de monge engolfado na assíduação dos sagrados Cânones.

section 10 of the same chapter he details how on many expeditions the Portuguese erected “cruzes de pedra,” or stone crosses, and several churches.¹³⁹

To de Freitas, the sea route to Asia brought commerce to India, but ultimately and more importantly for the Portuguese claim also made it easier to spread the gospel. De Freitas’s depiction of commerce as an appropriate method of advancing virtue (the gospel) not only makes explicit his debt to Molina, it also allowed him to argue against Grotius on Grotius’s own terms by submitting an alternate theory of property based on spiritual considerations not utility which Grotius had based his historical account of property on (see chapter one).

De Freitas conceded however that the prescriptive power of immemorial possession as an outgrowth of the will and power to possess, which according to him, the Portuguese had in spades, still required some additional sanction.¹⁴⁰ It would seem a serious concession to Grotius, but de Freitas thought he had a trump argument: the power of the papacy to intervene in temporal affairs to promote spiritual ends. If the pope had the power to give the Portuguese dominion, then by the Alexandrine bulls, the Portuguese clearly had it in the Indian Ocean. In fact, de Freitas devotes the entirety of chapters six and seven to a defense of the pope’s authority. To him, the pope may exercise power in temporal affairs insofar as they concern spiritual goals like broadening Christendom. This gives him the right to

¹³⁹ De Freitas, tr. Miguel Pinto de Meneses, 134.

¹⁴⁰ De Freitas notes that the *padrões* (stone pillars) that mariners carried with them and placed along the routes of their journeys of discovery were specifically laid out to mark the Portuguese intention to possess and that the Portuguese Crown had declared its intention to dominate commerce and navigation by using the self-styled title, “By the Grace of God, King of Portugal and the Algarves of Either Side of the Sea in Africa, Lord of Guinea and of Conquest, Navigation, and Commerce of Ethiopia, Arabia, Persia, and India, etc.”

entrust those goals to those who are in the best position to achieve them. He writes in chapter 6:

It must be said that one possesses and exercises that jurisdiction that is necessary to the purpose for which one acts and temporal things are ordered [to serve that purpose] and thus according to [various scholars] the Pontiff [sic] has no temporal power but has power over temporal things.¹⁴¹

It is through his position as arbiter of God's will on Earth (his purpose) that the pope acquired the ability to compel others to follow his edicts (order temporal things).

However, the question of scope, which is to say, the question of for whom is a papal order binding, still needed to be addressed. According to de Freitas, since the bull was issued to Philip I of Spain, who at the time was Earl of Flanders and the United Provinces were but part of Flanders, at the time it was issued, the United Provinces were also bound by the bull. To de Freitas, subsequent rebellion did not obviate the responsibility of the United Provinces to hold true to that covenant since the temporal power of the papacy was not diminished by rebellion.¹⁴²

¹⁴¹ Serafim de Freitas, tr. Miguel Pinto de Meneses, 165. Portuguese: De forma que, no rigor da lógica, se deve dizer que se possui e exerce aquela jurisdição para cujo fim se age e as próprias coisas temporais se ordenam. E, deste modo, Segundo Belarmino, *Aduersus Barclaium*, o Pontífice não tem poder temporal, mas tem poder sobre as coisas temporais. Here I am somewhat uncertain as to the translation of *ordenam*, which usually means ordered, but in this case could mean ordered in the sense that it was demanded or ordered in the sense that it was organized. So the sentence could either read, by one's actions things are ordered, as in one has the ability to compel others to do something or, by one's actions things are organized, in which case it is not the power to compel but the power to physically manipulate that is important. I think it is in the first sense, and have translated the phrase to reflect that because only through that sense would de Freitas's assertion of papal power have proscriptive weight without military conquest, which de Freitas admits had not been completely successful.

¹⁴² See, Brito Vieira, 369.

Of course, one might have rightly objected that rebellion put the Protestant United Provinces outside the pale of the Catholic Church, but de Freitas preempts this objection by developing Vitoria's argument that infidels may be forced to listen to preaching against their will, even though they have dominion over their own lands and may not be unjustly dispossessed of them.¹⁴³ To de Freitas, but not to Vitoria, since unbelievers (including Protestants) may be forced to listen to preaching, they are indirectly subject to the pope. Thus, if unbelievers (including Protestants) should resist the Portuguese as messengers of the pope, just war may be wreaked upon them. If the message came through the mechanism of commerce, resistance to commercial advancement was still a cause for just war. De Freitas writes in an integrally important portion of chapter 12, "in the process of [ordering] missions [to unbelievers] the Pope does not exercise temporal power for spiritual purposes, but exercises purely spiritual power, even though he may, to win converts through the propagation of the faith, prohibit the practice of commerce, thus exercising temporal power for spiritual purposes."¹⁴⁴ No one, Freitas reasons, would reasonably deny the pope the ability to exercise power for spiritual reasons, not even Protestants. Freitas continues in the same section:

When the ways and means of reaching the Indians is through the sea, in the midst of so many powerful nations, untamed and very remote from one another, [the propagation of the gospel] occurs under the pretext of commerce. Thus do the Portuguese,

¹⁴³ See, Steven P. Lee, *Ethics and War: An Introduction* (Cambridge: Cambridge University Press, 2012), 35-38.

¹⁴⁴ Serafim de Freitas, tr. Miguel Pinto de Meneses, 213. Portuguese: Donde, segundo o que acabámos de dizer, nesta material das missões não exerce o Papa o poder temporal para fins espirituais, mas exerce o poder meramente espiritual, muito embora ele possa, quando convier à propagação da fé, proibir a prática do comercio, exercendo assim o poder temporal para fins espirituais.

who exchange with the natives of varied places and regions the commodities necessary for life, not lose the opportunity of employing priests, notable for their integrity of customs and their gifts of eloquence, in spreading the word of God, bringing, with the authorization of the Roman Pontiff, the word of God, to the flocks of unfortunate mortals [who have never heard it].¹⁴⁵

Commerce, to de Freitas, was merely a necessary foot in the door for spreading the gospel. It was therefore necessary for the Portuguese to have an exclusive right to it if they were to carry out their charge as Christians compelled, by papal authority, to evangelize. As such, de Freitas believed that he had sufficiently defeated Grotius's arguments by showing why the Portuguese on account of papal donation, have, as they are required to, dominion over the Indian Ocean.

As to whether or not the sea itself could be possessed by nature, de Freitas believed that Grotius had given him all the argumentative ammunition he needed in *Mare Liberum*. For Grotius had conceded that a part of the sea could become property of the person occupying it so long as that portion of the sea is both susceptible to occupancy (can be enclosed) and occupancy does not impede common use. In this way, Grotius was able to make allowances for harbors, piers,

¹⁴⁵ Serafim de Freitas, tr. Miguel Pinto de Meneses, 217. Portuguese: Iniciando a discussão pelo direito de domínio ou navegação para as Índias, quando principalmente se trata do direito de enviar legados através do mar, e, só depois, do direito e meios de chegar aos Índios e com eles negociar, uma vez que tal missão não se pode fazer nem progredir, no seio de tantas nações poderosíssimas, indómitas e mui remotas umas das outras, senão sob pretext do comercio. Assim procedem os Portugueses, que permutando com os naturais dos mais variados lugares e regions as mercadorias necessárias à vida, não perdem o ensejo de empregar sacerdotes, notáveis pela integridade de costumes e dom de eloquência cristã, que disseminem ao longe e ao largo, com autorização do Pontífice Romano, a palavra de Deus, trazendo com ela aos mimosos pascigos e estábulos do Senhor os rebanhos de infelizes mortais perdidos nos sarçais das selvas. In the interest of making the quotation fit the argument more logically, the above translation is a marginal gloss.

and other publically held instruments of oceanic enclosure, but de Freitas argued that this argument could be expanded to the ocean writ large. According to de Freitas, it is only through the misrepresentation (or careful “curation”) of sources that Grotius is able to disguise that fact.

De Freitas’s responses to what he saw as academic disingenuousness constitute an exegetical attack. De Freitas points to a long tradition in Roman law of differentiating between the occupation of elements and the occupation of their physical location, which Grotius had supposedly disregarded. De Freitas admits, that in the case of both the air and the ocean, it is true that the physical material could never be occupied, but argues that that is largely irrelevant since the space can be occupied. So one might build a building on land one possesses without technically needing to occupy the specific air the building takes up but rather the space that the air is in. Though it may seem like a clever piece of legal fiction, it is actually an ingenious argument. The literal physical particles of air remained unoccupied and unfixed, but the space can be physically occupied (though de Freitas would not have used those particular words). Drawing a parallel argument in the ocean, in de Freitas’s opinion, by means of marking off geographic space through the use of navigational instruments, parts of the Ocean could be occupied, even if the literal water was unoccupied and unfixed. De Freitas also accuses Grotius of misquoting several authors from antiquity in addition to ignoring intellectual ideas that poked holes in his argument. For example, Grotius quotes Ulpian as evidence that the sea

could never be subject to servitudes, but, according to de Freitas, Ulpian actually meant never subject to servitudes on account of private law.¹⁴⁶

So in the end, to de Freitas it must have seemed as if he had soundly excoriated Grotius's *Mare Liberum*. He had demonstrated that the pope had a right to give exclusive commercial rights to the Portuguese in pursuit of spiritual goals, demonstrated that such a donation was binding for the Dutch as well, demonstrated that that donation did not depend on physical apprehension, and demonstrated that Grotius's portrayal of the sea as fundamentally resistant to occupation was invalid. To boot, he had caught him misrepresenting his sources.

Closed Seas as a Desert Claim: de Freitas's Contribution to *Mare Clausum*

In sum, de Freitas attacked Grotius's claims about the natural state of the sea as common and unpossessable by mounting an exegetical attack and disputing his historical account of property. Grotius had argued that only rivalrous goods could be taken out of the commons that had been the previous condition of all resources, but de Freitas countered by suggesting that papal donation backed by just papal power and first discovery could do the same. On his account, insofar as closed seas were more conducive to Portuguese commerce, and by extension more conducive to Portuguese evangelism, *Mare Clausum* was owed the Portuguese by right of desert. Only seas which could be owned (seas from which other imperially minded nations like the Dutch could be excluded) would support Portuguese efforts at mercantilist

¹⁴⁶ Brito Vieira, 373-374. In fact, Ulpian's full quotation (not the truncated version cited by Grotius) sides with de Freitas. For Ulpian's full quotation see, *The Digest of Justinian*, ed. Theodor Mommsen and Paul Krueger, v. 1 (Philadelphia, University of Pennsylvania Press, 1985), 266.

evangelism and repay initial efforts in “discovering,” the Indian Ocean. Thus, to de Freitas, there was no other option but *Mare Clausum*.

However ironclad de Freitas thought he had made the Portuguese case for sovereignty in the Indian Ocean, he did not adequately dispute Grotius’s conception of the sea as *naturally* common. At best, his argument suggested that in some cases where first discovery, papal donation, and messianic motivations line up, the sea could be removed from its natural state and placed in the hands of certain states or certain individuals. He did not fundamentally attack the idea that the sea was *by nature* common, which is what Grotius rested his argument for *Mare Liberum* on (see chapter two). His only attack on that conception was the argument from parts that Grotius had pre-empted in his discussion of objections and response to Welwod. Though de Freitas’s acts of construction were responsive to the political power of Grotius’s ideas, they did not attack the most important of Grotius’s claims. De Freitas was thus unable to efficaciously attack *Mare Liberum* on the principled (should/should not) level.

In the next chapter, a similar method of contextual evaluation aimed at discerning how *Mare Clausum* interacted with *Mare Liberum* will be applied to the most well developed English response to Grotius, *Mare Clausum: Of the Dominion, Or, Ownership of the Sea*, published in 1652, and written by John Selden. Selden builds a persuasive common law argument in defense of English territorial claims but like de Freitas, did not completely dismantle Grotius’s conception of *Mare Liberum*. What is more, he arguably was not as close to dismantling it as de Freitas.

Nonetheless, (probably due to his linguistic accessibility) in the literature of the law of the sea he is often considered Grotius's strongest contemporary opponent.¹⁴⁷

¹⁴⁷ See, for example, Eric G.M. Fletcher, "John Selden and His Contribution to International Law," *Transactions of the Grotius Society* 19 (1933): 1-12.

Chapter Four

The Common Law in Defense of *Mare Clausum*

“Wise men say nothing in dangerous times”
John Selden, *Table Talk*¹⁴⁸

John Selden was the chief agent of *Mare Clausum* in the English language canon. The purpose of this chapter is to examine the man, his place in English scholarship, his arguments for *Mare Clausum*, and ultimately his place in a genealogy of it. I argue that he contributed more than a mere recitation of legal and statutory principles as some scholars suggest, but that he nonetheless disregarded Grotius’s more philosophical points in favor of arguments aimed at characterizing the ocean as it was at the time.¹⁴⁹ Moreover, to a greater degree than de Freitas, Selden, because he chose to base his justification of *Mare Clausum* in English Common Law, represented the side in the *Mare Liberum, Mare Clausum* dialectic that chose to focus on what state the ocean is in rather than the state it *naturally* ought be in.¹⁵⁰ Together with de Freitas, Selden pitched *Mare Clausum* in terms that did not

¹⁴⁸ John Selden, *Table Talk* (London: J.R. Smith, 1856), unpaginated, accessed January 29, 2017, <https://archive.org/details/tabletalkofjohns00seldiala>.

¹⁴⁹ For the traditional view see for example, J.G.A. Pocock, *The Ancient Constitution and Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957).

¹⁵⁰ It is important to keep straight the notions of Common Law and Civil Law as understood in this particular period in history. Civil law refers to the system of law predominant at that point (and still to a certain extent) on the continent of Europe that was heavily influenced by the codes of ancient Rome. Common law, on the other hand, refers to a particularly English form of law that was (and is in both the contemporary U.S. and England) derived from received custom and judicial precedent rather than statutes or law codes of the Roman variety. Common law then, as meant at the time, is much closer to its present day meaning than civil law, which presently refers to some body of law that holds jurisdiction over private individuals.

respond to Grotius's fundamental point, which was that the sea is *naturally* free and common.

John Selden As the Disinterested Antiquarian

Historian David Ogg, in an admitted fit of favoritism, wrote that John Selden “was the most disinterested figure in an age of fierce personalities, aloof from personal motives and party prepossessions, seeking not fame but truth in an erudition more vast than was ever garnered by any other human mind.”¹⁵¹ It certainly seems as though John Selden has been remembered by history, as Ogg's quotation exemplifies, as a man of great learning and widespread research interests. In an age wherein the academy had a tumultuous role to play in politics, that would make Selden an outlier. It is perhaps because academia had a tumultuous role to play, or rather, was surrounded by tumultuous politics, that Selden took pains to avoid the appearance of partisanship wherever possible and instead sought the certitude of precedent and history.

Born on December 16, 1584 into a relatively low prestige family, he was educated at the free grammar school at Chichester, in West Sussex, graduating to Hart Hall, Oxford in 1600.¹⁵² Twelve years later in 1612, Selden was called to the bar from the Inner Temple in London. Though he rarely practiced law, when he did, it seems that he had a very lucrative practice, which, in turn, allowed him to devote most of his time to academic research. He published his first major work in 1618, a

¹⁵¹ David Ogg quoted in, Jason Rosenblatt, *Renaissance England's Chief Rabbi: John Selden* (Oxford: Oxford University Press, 2006), 225.

¹⁵² J.G.A. Pocock, *The Ancient Constitution and Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957), 137-138.

History of Tithes, which pulled him into the world of politics, somewhat inadvertently.¹⁵³ The *History of Tithes*, even if not designed to be polemical, was quite controversial since it denied that the King and the Church existed by divine right by placing the history of their development in a strictly corporeal sphere. He was called to recant by the Privy Council and ultimately reached an agreement brokered by the Bishop of Winchester, with whom he was friendly, wherein he apologized for the publication of the book but not for the opinions it contained.¹⁵⁴ Outraged by the event, Selden stood for election to Parliament and was returned in 1623, 1625, and 1628. In 1640, he was returned to the Long Parliament convened by Charles I after the travesty of the Short Parliament convened at the end of Charles's eleven-year period of personal rule.

Thus, Selden shed his apolitical guise and ultimately took the side of Parliamentary Common Law against the King and kingly authority. What allowed him leeway to exercise his political opinions was his powerful group of friends, as his experience with the Privy Council illustrates. He was a member of the Mermaid Club, founded by Sir Walter Raleigh, and a close compatriot of the poet, Ben Johnson.¹⁵⁵ Later in his life, having been imprisoned for his role in the protest lodged by members of Parliament against kingly overreach in March 1629, his release was negotiated by the Earl and Countess of Kent as well as Archbishop William Laud.

¹⁵³ David Sandler Berkowitz, *John Selden's Formative Years: Politics and Society in Early Seventeenth-century England* (Plainsboro, New Jersey: Associated University Presses, 1988), 13-20.

¹⁵⁴ Eric G.M. Fletcher, "John Selden and His Contribution to International Law," *Transactions of the Grotius Society* 19 (1933): 3.

¹⁵⁵ Fletcher, 2.

Ultimately, Selden was convinced that legal precedent favored liberty and freedoms in Parliament over monarchical oversight. Historian G.J. Toomer characterizes Selden as pursuing his scholarly work in isolation from political influences and, for all intents and purposes, as the end in and of itself.¹⁵⁶ If Toomer is correct, Selden certainly came to very political ends through supposedly apolitical means, but Toomer may be correct. Perhaps it is true that Selden was willing to publish work if he thought it accurate as opposed to if he thought it politically useful. *Mare Clausum: Of the Dominion, Or, Ownership of the Sea*, the topic of this chapter, fits with Toomer's characterization since it functioned primarily as a defense of the Crown's (not Parliament's) right to exclude shipping from English territorial waters. When it was first published in Latin in 1635, it actually won Selden a great deal of favor with Charles I. Still, Selden consistently supported the parliamentary cause and regularly attended Parliament until Pride's Purge in 1648.¹⁵⁷ Post Pride's Purge, Selden withdrew from public life to the estate of then widowed Countess of Kent where he devoted most of his time to textual analysis, scholarly criticism, and philology.¹⁵⁸ He died in comfort at White Friars, Carmelite House, London, in 1654, the year after Oliver Cromwell took power.¹⁵⁹

¹⁵⁶ G.J. Toomer, "Selden in the History of Scholarship," in *John Selden: A Life in Scholarship* (Oxford: Oxford University Press, 2009), 800-828. See also, Tim Harris, "In Search of a British History of Political Thought," in *British Political Thought in History, Literature and Theory, 1500-1800*, ed. David Armitage (Cambridge: Cambridge University Press, 2006), 90-93.

¹⁵⁷ Anthony Grafton, "Review: John Selden: The Life of Scholarship," *Huntington Library Quarterly* 74 (2011): 508.

¹⁵⁸ G.J. Toomer, "The Social and Political Background to Selden's Later Work: Patrons, Friends and Acquaintances," in *John Selden: A Life in Scholarship* (Oxford: Oxford University Press, 2009), 311-334.

¹⁵⁹ Fletcher, "John Selden and His Contribution to International Law," 5.

It would be easy to dismiss Selden as an unquestioned adherent of the Common Law. In fact, many scholars including J.G.A. Pocock and William Searle Holdsworth have done so. Both have argued that English jurists in the seventeenth century knew little about humanist civil law jurisprudence, in short, that English Common Law developed with a good deal of dogmatism and insularity.¹⁶⁰ Recent scholarship has demonstrated that this was not the case and that has important repercussions for understanding Selden's work. As historian Martha Ziskind puts it, "while conclusions drawn from [Selden's] studies may have been consistent with traditional common law beliefs," Selden arrived at them not because he dogmatically believed in them, but rather, "because the antiquity of the Common Law and of parliament seemed reasonable inferences in light of his own exhaustive scholarship."¹⁶¹ That exhaustive scholarship included a thorough mastery of humanist methods of textual analysis, which included comparative analysis and an abiding preference for primary sources.

His respect for his sources is conveyed by his unyielding commitment to cite his sources. In fact, he casts aspersions at other scholars in the Author's Preface to *Mare Clausum* for their inability to do so, noting that, "the rest [of what I have to say] likewise [is] not unprofitable for them, who, while they salute Books by the way, are wont through a customarie vice of temeritie to stumble in the verie Threshold.

¹⁶⁰ See, J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957) and William Searle Holdsworth, *A History of English Law* (Boston: Little, Brown, and Company, 1903) IV, 220-221.

¹⁶¹ Martha Ziskind, "John Selden: Criticism and Affirmation of the Common Law Tradition," *The American Journal of Legal History* 19 (1975): 23.

Those things concern chiefly... the place of such Testimonies, as are alleged.”¹⁶²

What’s more, he was an adept translator of Hebrew, Arabic, Aramaic and Greek and Latin, which allowed him to compare and directly evaluate the source material with which he formed his opinions and to obtain a deep knowledge of various kinds of legal precedent.¹⁶³ Unlike many of his compatriots, Selden was willing to re-evaluate the classics and even the historical relationship between Judaism, Christianity, and Islam, owing, no doubt in part, to his appreciation of works in their source language.¹⁶⁴

Several broad conclusions hold with regard to Selden’s humanist tendencies. First, he was committed to using precedent as his preference for primary sources and what they had to say in various languages demonstrates. The second broad conclusion is of content rather than methodology. Selden, like many other English supporters of the Common Law, believed that Roman law was identified with continental absolutism and that Common Law in England was identified with English freedoms.¹⁶⁵ In *Mare Clausum*, he fundamentally aims to decouple the natural law from Roman law and looks to history as precedent for deriving principles of custom and legality upon which occupation must be justified. He ultimately found that in the case of English claims the proper principles of custom

¹⁶² John Selden, “The Author’s Preface,” in *Mare Clausum: Of the Dominion, Or, Ownership of the Sea*, trans. Marchamont Needham (Clark, New Jersey: The Lawbook Exchange, 2004), unpaginated.

¹⁶³ Ziskind, “John Selden: Criticism and Affirmation of the Common Law Tradition,” 36.

¹⁶⁴ Grafton, “Review: John Selden: The Life of Scholarship,” 512.

¹⁶⁵ Ziskind, “John Selden: Criticism and Affirmation of the Common Law Tradition,” 39.

and legality could be found in English Common Law. To understand how he arrived at such conclusions it is helpful to understand the strands of thought he drew from.

Locating *Mare Clausum* in the English Scholarly Landscape

To the scholar of the late 1500s, it was debatable whether or not something that happened in the past belonged to history, which is what made Joseph Scaliger's, *De Emendatione Temporum*, published in 1583, the controversial work that it was.¹⁶⁶ In *De Emendatione* Scaliger vigorously defended the inclusion of Persians, Jews, Babylonians, and Egyptians in history by demonstrating how analysis of their historical remnants yielded important advances in chronology, or the study of what things happened when.

Scaliger's radical step massively affected early modern scholarship by forcing it to account for ideas that were not Greek or Roman in provenance. His work, at base, was an expansion of what was, at the time, considered considerable. It is in part due to Scaliger's expansion of history that wide-ranging antiquarianism, the reading and analysis of rare historical works by authors of non-Roman or Greek provenance, became a fashionable scholarly method.¹⁶⁷ Since Selden's conclusions were often based on the study of non-Roman, non-Greek sources, he was deeply

¹⁶⁶ Anthony Grafton, "From *De Die Natali* to *De Emendatione Temporum*: The Origins and Setting of Scaliger's Chronology," *Journal of the Warburg and Courtauld Institutes* 48 (1985): 100-110.

¹⁶⁷ Yet, Scaliger's outsized influence cannot be solely explained by his scholastic achievements – he also had an outsized social persona. From his position at the head of the University of Leiden, he was able to spread his influence to many scholarly circles. See, Anthony Grafton, *Joseph Scaliger, A Study in the History of Classical Scholarship*, II (Oxford: Clarendon Press, 1994), 361-459.

indebted to Scaliger's work insofar as it expanded the sources that it was considered appropriate to cite and evaluate beyond Roman or Greek sources.¹⁶⁸

In 1587, in the context of Scaliger's expanding history, Alberico Gentili, an Italian jurist, became the Regius Professor of Civil Law at Oxford University. Gentili is often considered to be the father of public international law – that is to say, the body of law that pertains to states as opposed to the disputes of private individuals.¹⁶⁹ Like Luis de Molina separated economics and theology, Gentili separated international law from the aegis of the Catholic Church. In doing so, he built on the legacy of Francisco de Vitoria. As historian Anthony Pagden notes, Vitoria's arguments were limited in scope given that he derived them from the provincial experience of the Spanish in the Americas.¹⁷⁰ Gentili gave international law a truly international scope by deriving his arguments from the natural law, which applied everywhere.

Gentili's work is also unique because many other jurists developed general principles from fictionalized cases or abstract commentaries on particular Roman laws while Gentili applied his principles to actual cases.¹⁷¹ For example, in *De Iure Belli Libri Tres* (which Grotius later borrowed from) Gentili makes a case for

¹⁶⁸ Jason Rosenblatt, *Renaissance England's Chief Rabbi: John Selden* (Oxford: Oxford University Press, 2006), 79.

¹⁶⁹ See, Richard Tuck, *The Laws of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

¹⁷⁰ Anthony Pagden, *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015), preface, 1-45.

¹⁷¹ For examples of such jurists see, Ernest Metzger, "Roman Judges, Case Law, and Principles of Procedure," *Law and History Review* 22 (2009): 243-275. Metzger's argument for the idea that Roman law considered precedent in the sense that judges often conferred on the interpretation of civil law is a controversial one. For the purposes of this chapter, his essay only serves to provide examples of fictionalized cases.

proportionality in reprisals by referencing actual cases of disproportionate reprisal.¹⁷² The upshot of Gentili's work with regard to Selden was that Gentili established a precedent at Oxford where Selden received his education for making international law concrete with his reference to cases rather than mere abstract theory (something Gentili might have accused Grotius of).

In combination with Scaliger's expansion of history, Gentili's methodological improvements suggest that the requisite question facing the English scholar of international law in the early seventeenth century was: what body of law matters to England? More specifically, since Scaliger had opened up the possibility that many bodies of law mattered not just Roman Civil Code and since Gentili thought international law ought proceed by cases not just theory, the juridical question became: what body of law offered cases that mattered to English law? For Selden the answer was English Common Law. Though Gentili and Scaliger framed the question, Selden drew his answer in part from the ideas of Sir Edward Coke.

Coke was a champion of the Common Law. As a judge, he spoke out in favor of the Common Law as interpreted by Parliament against the King. Eventually removed from the bench by James I for insubordination, Coke became an MP, reinstated the practice of impeachment of officials in the House of Lords, and played a major role (as did Selden) in the Protestation of 1621, for which he was arrested and spent several years in the Tower of London. Selden himself recognized that Coke's work presented a major bulwark against arbitrary action undertaken by the

¹⁷² See, Alberico Gentili, "Ius in Bello," in *De Iure Belli Libri Tres*, trans John C. Rolfe (Oxford: Clarendon Press, 1933), unpaginated, accessed online at <https://archive.org/details/dejurebellilibri00gent>.

Monarchy insofar as it treated assertions of rights like the Magna Carta as assertions of rights anciently held by the English people.¹⁷³ The fact that Coke based his defense of Parliamentary power on ancient rights held by the English people may have been inspiration for Selden for Selden based his defense of *Mare Clausum* on similarly held ancient rights – the precepts of the English Common Law. Like his peer Coke had done in Parliament, in support of *Mare Clausum* Selden asserted the pertinence of English Common Law in support of English liberties and privileges. He merely extended English privileges to include territorial waters.

The Immediate Contexts of Selden's *Mare Clausum*

There are three immediate sets of contexts for Selden's *Mare Clausum* since it was composed in 1618, originally published in 1635, and finally, translated by Marchamont Needham and published in English in 1652. Each context is worth elaborating on, as are Needham's qualifications as a translator.¹⁷⁴

Some years (either three or four, historians disagree) after the publication of *Mare Liberum* in 1609, agents of the English military captured several Dutch whaling ships operating under the assumption of free seas near Greenland. The Dutch government protested, and a conference that was to serve as the forum for negotiations was convened in 1618. Grotius was the principle representative of the Dutch Republic.¹⁷⁵ Having just been censured for the incendiary implications of his *History of Tithes* and yet, at the same time, possessing the reputation of an eminent

¹⁷³ Harold J. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale" *The Yale Law Journal* 103 (1994): 1678-1695.

¹⁷⁴ Occasionally Needham's name is spelled Marchmont Nedham but, as far as I can tell from looking at various scholarly works, Marchmont Nedhman and Marchamont Needham are the same person and Marchamont Needham is the accepted spelling.

¹⁷⁵ Eric G.M. Fletcher, "John Selden and His Contribution to International Law," 8.

scholar, it seems probable that Selden was selected (or blackmailed to avoid further censure) by crown authorities to provide the English delegation to the convention with a defense of English claims to territorial waters.¹⁷⁶ Consequently, Selden, in 1618, composed *Mare Clausum, Of the Dominion, Or, Ownership of the Sea* and submitted it to royal authorities. However, James I objected to several passages in the text that he thought were offensive to the maritime claims of the King of Denmark, Christian IV, to whom he was heavily in debt, and so Selden's text was passed over until 1635.¹⁷⁷ James I and his successor Charles I were both interested in the development of territorial waters throughout their reigns (1603-1625; 1625-1649) but in 1635 the Dutch publishing house of Elzevir republished *Mare Liberum* in a set of works dedicated to defending Dutch claims to fisheries in the North and Norwegian Seas, so a defense was especially necessary.¹⁷⁸ On the advice of one of his closest advisors, William Laud, Charles I had Selden's book published in Latin as a defense of English claims.¹⁷⁹

The first English language version appeared in 1652, the year before Oliver Cromwell officially dissolved the Rump Parliament and claimed power as Lord

¹⁷⁶ If Selden was blackmailed into producing *Mare Clausum*, a particular crown authority, James I's advisor George Villiers, 1st Duke of Buckingham, an ardent Protestant who personally disliked Selden, was in all likelihood the culprit. See, William L. Fisk, "John Selden: Erastian Critic of the English Church," *Journal of Church and State* 9 (1967): 349-363.

¹⁷⁷ Fletcher, 8.

¹⁷⁸ Fletcher, "John Selden and His Contribution to International Law," 8. On the imperial ambitions of James I and Charles I see, Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (London: Palgrave Macmillan, 2011).

¹⁷⁹ Fletcher, 9. See for further reference on publishing circumstances, Mark Somos, "Selden's *Mare Clausum*: The Secularization of International Law and the Rise of Soft Imperialism," *Journal of the History of International Law* 14 (2012): 287-330.

Protector.¹⁸⁰ Two related events catalyzed its translation and publication: first, the passage of the Navigation Acts by the Rump Parliament under Cromwell in 1651, second, the subsequent outbreak of hostilities between England and the Dutch States-General in May 1652. The Navigation Acts were intended to help English shipping compete against superior Dutch competition by mandating that English ships carry any foreign cargo arriving in England and her colonies.¹⁸¹ The acts had the effect of keeping the Dutch out of English trade. Along with hostilities mounted by the English against Dutch merchant convoys trading with Barbados and the capture of Dutch merchants in the North Sea, the Navigation Acts touched off war. Several last-ditch English efforts at diplomacy were rejected.¹⁸²

As a prominent polemical pamphleteer in the vein of Thomas Paine or John Milton, Marchamont Needham was selected to bring Selden's work to wider audiences in the Commonwealth to provide some legitimacy for the English

¹⁸⁰ Though a marginal digression, I have a filial obligation to my Irish Catholic mother to note that Cromwell's methods are frequently (and perhaps ought to be) considered dictatorial and genocidal. See, Michael O Siochru, *God's Executioner: Oliver Cromwell and the Conquest of Ireland* (London: Faber and Faber, 2008). For an account that is less openly slanted see, *Images of Oliver Cromwell: Essays by and for Roger Howell, Jr.*, ed. R.C. Richardson (Manchester: Manchester University Press, 2015). Note that as this footnote does not pertain to source material these works do not appear in the bibliography.

¹⁸¹ The alternative to passing the acts (since the English considered some way to even trade competitiveness necessary) was an offer of union between the Dutch Republic and the British Commonwealth under the auspices of the Commonwealth. When the Dutch Republic rejected the offer insofar as it was quite content on its own having built, at that point, a profitable empire in Asia at the expense of the Portuguese, the acts were passed.

¹⁸² For a detailed treatment of hostilities between the Dutch Republic and England in the 1650s see, Paul M. Kennedy, *The Rise and Fall of British Naval Mastery* (New York: Humanity Books, 1976), 37-69.

cause.¹⁸³ Needham's translation was timely because it provided crown officials with an English language treatise that could be read aloud and disseminated to generate public support for the war.¹⁸⁴ *Mare Clausum* was also a justification for starting the war at all. Even while last minute negotiations were underway, English Admiral Robert Blake attacked a Dutch merchant convoy being escorted by Dutch forces under Maarten Tromp for refusing to doff their flag, which was one privilege the English associated with their territorial waters. The engagement between Blake and Tromp is considered the first of the First Anglo-Dutch War. As such, Selden's defense in book 2 of the longevity of the custom of other nations's ships doffing their flags in English waters functioned as a convenient pretext for England.¹⁸⁵

Selden's Arguments in Favor of English Sovereignty in Territorial Waters

John Selden's *Mare Clausum: Of the Dominion, Or, Ownership of the Sea*, consists of two books. In the first, he argues that the sea, by the law of nations, is not common to all men and that what qualifies a portion of the ocean for ownership is perpetual occupation (a long tradition of occupation). In the second book, he demonstrates using various historical sources that England had just such a long tradition of occupation of its surrounding waters. Insofar as the first book makes

¹⁸³ On Selden's reputation see, David J. Padwa, "On the English Translation of John Selden's *Mare Clausum*," *The American Journal of International Law* 54 (1960): 157.

¹⁸⁴ In the 1630s, about 70 to 80 percent of the English public was illiterate and had to have propaganda read to them. See, David Cressy, "Literacy in Seventeenth-Century England: More Evidence," *The Journal of Interdisciplinary History* 8 (1977): 143-144.

¹⁸⁵ For source analysis of Needham's translation see Appendix II.

possible the second and is the part of Selden's argument that most engages with other theorists like Grotius, it will be the primary focus of the following pages.¹⁸⁶

The traditional image of Selden is that he, as an antiquarian primarily, did not base his work on philosophical principles and that, therefore, his work does little more than refute Grotius's work on statutory grounds.¹⁸⁷ However warranted Selden's characterization is his work did make philosophical strides in refuting Grotius. At base, Selden's argument is about theoretical jurisprudence, more specifically, about what bodies of law apply were and that necessitated a more complex philosophical position that he is traditionally given credit for.

In the "Epistle Dedicatorie" Needham in an insightful passage writes, "without the maintenance of a Sovereigntie [in the sea], the Island it self had been [in Selden's time] but a great Prison, and themselves and the Natives but so many Captives and Vassals to their Neighbors round about; not so much secluded, as excluded from all the world beside."¹⁸⁸ What is insightful about Needham's obviously hyperbolic quotation is that it recognizes that for England, an open sea

¹⁸⁶ There is little evidence either that Selden knew of de Freitas's work and arguments, but it is hard to say for certain that he did not. He most certainly, however, was familiar with Grotius's arguments and took his book as a response to them. He was also most certainly aware of Vazquez's work. In fact, he quotes Vazquez several times in the first two chapters of *Mare Clausum* alone. On Selden's knowledge of the field (or lack thereof) see, Monica Brito Vieira, "Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas," *Journal of the History of Ideas* 64 (2003): 361-377.

¹⁸⁷ Fletcher for instance characterizes him in such a way as do J.G.A. Pocock and, to a lesser extent, Brito Vieira. Moreover, when reading de Freitas's work and Selden's work side by side it can seem as though de Freitas is the more deep-thinking and theoretical of the two.

¹⁸⁸ Marchamont Needham, "The Epistle Dedicatorie," in *Mare Clausum: Of the dominion, Or, Ownership of the Sea* (Clark, New Jersey: The Lawbook Exchange, 2004), b2. Each page number (or letter) corresponds to a digitally reproduced page. So in some cases the, "page," actually takes up multiple pages in the physical book.

meant navigational servitudes (easements on geographically defined ocean spaces) in English coastal waters and the superiority of the shipping of other nations in those waters. Only from such a perspective could an open sea shut a nation in. Needham continues, “the Sea is indeed your Territorie no less than the Land; It hath been held so by all Nations, as unquestionably subject... so that the Netherlanders having enter’d your Seas, in defiance of your Power, are as absolute Invaders, as if they had enter’d the Island it self.”¹⁸⁹ Here Needham recognizes the conceit of Selden’s work – the sea is like the land.

To Selden, the ocean may be possessed in the same way and the same body of law applies to it as terrestrial earth. Selden makes it clear he believes this to be the case despite the differences between enclosing land and enclosing the ocean. He writes in “The Author’s Preface” that, “neither is it necessarie, that what may bee rightly said in this sense to bee shut, should bee shut or enclosed by som continued Fence, or by a continued Tract of som eminent Limit like a Mound: But any kinde of imaginarie Line... hath taken place in the designation of private Dominions, or in the shutting or inclosing of a thing possessed in a civil acception.”¹⁹⁰ By this Selden means that an imaginary line marked by some accepted measure of distance or geographic locating scheme is often an accepted way for private persons to possess land in the civil law sense. To deny that is to deny that many persons who own land own the land. If one accepts that an imaginary line may be used, then one is also compelled to assent to the use of imaginary lines in enclosing the ocean. Thus, if the

¹⁸⁹ Needham, d.

¹⁹⁰ John Selden, “The Author’s Preface,” in *Mare Clausum: Of the dominion, Or, Ownership of the Sea* (Clark, New Jersey: The Lawbook Exchange, 2004), g2.

sea is like the land, as Selden suggests it is, there seems to be no geographic barrier to owning it.

Selden begins to demonstrate that there is no meaningful difference between the sea and the land by outlining the arguments that oppose dominion in the sea. He writes, “the Arguments usually brought against the Dominion of the Sea, are of three sorts. Som are drawn from freedom of Commerce, Passage, and Travel; Others from the nature of the Sea; and a third sort from the Writings and Testimonies of learned men.”¹⁹¹ Both de Freitas and Grotius reference all three arguments: that the sea is open in order to facilitate travel that is necessary under God’s law, that the sea is unpossessable, and that classical authorities were supposedly in favor of the freedom of the seas.

Selden attacks the notion the first two arguments in tandem. First, he redefines what he means by common. Citing Roman Christian jurist Lactantius, he argues that the ancient commons (the pseudo state of nature described by Grotius) was mostly figurative.¹⁹² To Selden, it was not the case that everything was once held in common, but rather that greed did not reserve the use of particular things to particular people. Everything was neither held in common nor held exclusively by some to the detriment of others. The concept of exclusivity, Selden argued, arose only after greed appeared, God flooded the Earth, and the world divided.¹⁹³ Of the post-division world Selden wrote:

¹⁹¹ John Selden, *Mare Clausum: Of the dominion, Or, Ownership of the Sea* (Clark, New Jersey: The Lawbook Exchange, 2004), 3.

¹⁹² Selden, 17.

¹⁹³ Selden, 18.

but in this division of Bounds and Territories, there intervened, as it were, a consent of the whole bodie or universalitie of mankind for quitting of the common interest or ancient right in those things that were made over thus by distribution to particular Proprietors... [Truly] it hath been a custom of old, and which hold's to this daie in the more eminent Nations, that Vacancies are his who apprehend's them first by occupation; as wee use to saie of those wee call, no man's Goods.¹⁹⁴

Selden's argument was that in the post-greed, post-flood world, humanity came to recognize that private property was in some cases beneficial. So, by general consent, it came to be recognized that a compact between two entities with the power to prescript (i.e. power of enforcement), could remove something from the commons. Moreover, if a particular was never part of the commons, which is to say, was never used or possessed by anyone, then possession simply entailed apprehension.¹⁹⁵ Thus, if either by common consent something was removed from the commons or it never belonged to the commons in the first place, then the thing in question could be made private. Selden believed he could prove that the ocean had been removed from the commons by general consent of nations and book 2 is, in part, a list of citations demonstrating the myriad nations historical and contemporary that considered themselves to have sovereignty in various parts of the ocean.

Additionally, Selden thought he had a trump argument. In chapter 7 of book I, Selden argues that the natural permissive law ought be derived out of the customs and constitutions of the, "more civilized and more noble Nations, both antient and

¹⁹⁴ Selden, 21.

¹⁹⁵ Selden, 23-26.

modern.”¹⁹⁶ In essence, Selden suggested that Common Law (precedent in England) is the pertinent body of jurisprudence in determining how the natural law applies to England’s case. Such an argument turns Grotius’s arguments on their head since it implies that the natural law, as derived from reason, does not have to be constantly updated using reason’s faculties, but instead is to be compiled from the accumulated, “reasoned,” precedents of previous, “civilized,” nations. Selden admits that, “a right use of humane Reason, which usually serv’s as an Index of the natural Law, cannot well bee gather’d from the Customs of several Nations,” but he contends that to avoid these errors of particular custom one must aggregate the practices of all nations and from that one might avoid errors of human reason.¹⁹⁷ Selden also admits that there is a disagreement among the customs of nations. Here he has recourse to his qualification of “civilized” nations. He argues that the customs of the more civilized nations give two testimonies: “some are those which shew, that a Sovereigntie and private Dominion of the Sea hath been by Historians other Writers, acknowledged... [others] that demonstrate out of Lawyers, and other particulars of that nature, that such a Dominion of the Sea, is in like manner agreeable.”¹⁹⁸ To Selden, since general consent from various nations and lawyers renders it *possible* for a claim to be legitimate, what makes a *particular* claim legitimate is general consent by parties with interests at stake over time.

To prove this point, Selden spends several pages on the case of Botrojan Farm, referenced by Roman jurists Paulus and Ulpian, a farm that abutted some

¹⁹⁶ Selden, 42.

¹⁹⁷ Selden, 43.

¹⁹⁸ Selden, 46.

coveted shores, that was sold along with the rights to the shore. He writes, "In this case, the owner of the Botrojan Farm renounceth his right of fishing [by contract to sell]. And Ulpian might as well have said, that restraint of subjection was imposed upon that adjacent Sea (as indeed it was) but that [the owner] was so unwilling to forgo his opinion of the Seas unalterable communitie."¹⁹⁹ The case of Botrojan Farm was usually meant to show the inadequacy of possession via sale when the original owner never had the rights, but Selden turned the case on its head by suggesting that insofar as both parties to the contract were aware of the situation and consent to the sale the rights can be taken out of common land if there is no adverse possession (no one else claims the rights).²⁰⁰ Provided there is no such adverse possession, the sea rights (shore rights) transfer as well. By extension, in exactly the same manner, the ocean can be made private and use rights can be transferred to private individuals or states if there is no long-standing countervailing claim. Using English Common Law as a source, Selden concluded that there was no countervailing claim and that England had claimed territorial waters without dispute going as far back as its first kings.²⁰¹ Thus, Selden rests his case on the Common Law and the long-standing, unchallenged nature of English claims of sovereignty in territorial waters that it supposedly demonstrated.

Later, in chapter 12, Selden stopped to mark an objection to his claims that he believed he had not yet dealt with: that the ocean is unbounded and therefore

¹⁹⁹ Selden, 95.

²⁰⁰ Selden also details the claims of the Portuguese, though he makes no reference to de Freitas, instead merely suggesting that the Portuguese crown assents to the dominion of the seas, as does the Spanish crown (he quotes theologian Rodrigo Suarez in defense of the Spanish claim). See, Selden, 108-109.

²⁰¹ Selden, 90-130.

cannot be possessed, even through immemorial custom, insofar as it is the bound for the land and not vice versa. In an expression of rhetorical disbelief Selden writes, "I do not well see, why the thing conteining should not in truth bee bounded by the thing conteined, as well as this by that. May not a lesser bodie that is spherical, or of any other form, being conteined by a greater which is every way contiguous to it, bee said to bound and limit the Concave of the greater Bodie?"²⁰² To Selden, the answer is clear – of course the lesser thing (i.e. land) can serve as a boundary to the greater (i.e. the oceans). Nevertheless, he adds another argument to his response, maintaining that, "the Seas [in any event], are sufficiently distinguished by their Names and Bounds [as well as] the useful invention of the sea-man's compass, and the degrees either of Longitude or Latitude."²⁰³ Like de Freitas before him, Selden argued that various navigation tools are sufficient for marking out, and therefore bounding, the ocean, which renders any arguments about its unbounded nature irrelevant.

In his final chapter, Selden addresses several of Grotius's extraneous arguments. In one of his more compelling segments Selden takes Grotius's argument that the sea is inexhaustible at its best and shows it to be an insufficient argument for free seas:

Suppose it bee inexhaustible, so that hee which shall appropriate it to himself, can receiv no damage by other men's using it, what more prejudice is this to the right of Ownership or Dominion, then it is to the Owner of a Fire or Candle, that another man's should be lighted by his? Is hee therefore less Master of his own Fire or Candle? But truly wee often see, that the Sea it self, by reason of other men's Fishing, Navigation, and Commerce, becom's the wors for him that own's it,

²⁰² Selden, 136.

²⁰³ Selden, 138.

and others that enjoie it in his right; So that less profit ariseth, then might otherwise bee received thereby.²⁰⁴

He follows the above passage with a *reductio ad absurdum* argument meant to demonstrate that Grotius's arguments lead to unacceptable consequences and thus must be rejected:

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 account, unless also wee in like manner affirm, that not only that saying of the emperor's [or anyone's] Dominion over the world is manifestly false.²⁰⁵

If Grotius were correct that we couldn't possess inexhaustible things (non-rivalrous goods) Selden contends, then we would be forced to concede that the world, which in its entirety is more inexhaustible than the sea, could not be possessed.

Correspondingly, we would not be able to possess any part of the world, an absurdity that Selden is unwilling to accept.

Having dealt Grotius what he believed to be a crushing blow, Selden concludes on a magnanimous, conciliatory note. "These things," he writes, "were not spoken so much against Hugo Grotius, as against that natural Right of communitie at Sea (injuriously pretended to) which many men have defended more expressly and plainly then himself; but none, with so much learning and ingenuitie."²⁰⁶

Fitting Selden with de Freitas and Grotius

In total, Selden had two lines of argumentation aimed at Grotius. First, Selden argued that the sea and the land possessed all the same characteristics pertinent to

²⁰⁴ Selden, 141.

²⁰⁵ Selden, 143.

²⁰⁶ Selden, 174.

possessability because the sea was not marked off as separate from land in being common in a pre-flood natural state as Grotius had suggested. In Selden's view, the fact that nothing was held privately did not necessarily suggest that everything in the pre-flood state of nature was held in common merely that an absence of greed allowed for the sharing of privately held goods and resources. Insofar as the sea and the land possessed the same relevant characteristics, they could be occupied and possessed in the same way, namely, by general consent of interested parties. After trolling through history and received precedent in the form of Common Law, Selden concluded that no interested party had ever objected to English claims of sovereignty and, thus, that those claims were legitimate. To his argument that English Common Law traditions were sufficient to justify English claims to sovereignty in territorial waters, Selden added several responses to Grotius including a compelling *reduction ad absurdum* analysis of the logical conclusions of *Mare Liberum* and, like de Freitas, an argument for using navigational techniques to bound the ocean and render it private.

Yet, like de Freitas, Selden did not address Grotius's claim that the sea was naturally, principally, and ontologically common. Though he did develop a complex position using the implications of shortcomings he attempted to point out in Grotius's conception of the development of property from a natural state, Selden brought *Mare Clausum* even further into the practical realm and away from Grotius's principled natural law claims by justifying *Mare Clausum* through the English Common Law tradition. Ultimately, when put in dialogue with one another, it seems

apparent that Grotius's principled claims for *Mare Liberum* survived Welwod, de Freitas, and Selden's discursive attacks argumentatively intact.

Conclusion

Mare Liberum vs. Mare Clausum in Retrospect

*Where are your monuments, your battles, martyrs?
Where is your tribal memory? Sirs,
In that gray vault. The sea.
The sea has locked them up.
The sea is History.*

Derek Walcott, "The Sea is History"²⁰⁷

In *War and Peace*, Tolstoy wrote disparagingly of history, lamenting that it "would be wonderful to tell the story of humanity, if only it were true."²⁰⁸ Tolstoy is half right. He was right to protest that history can never be entirely true, but history is only inherently false if one adopts an omnipotent perspective on the past. In comparison to other forms of relating the past like myth, narrative, or memory, history rings true. At the same moment that historical work does violence to the nuanced story of human existence in all its divine complexity, it makes intelligible a past otherwise benighted. To do violence to history in the name of coherence is the historian's job description. The question by which we evaluate historical work is the degree to which it does so. Though the level of violence will never be zero, and I take that point to be Tolstoy's objection, it can be minimized.

In tracing Hugo Grotius's, William Welwod's, Serafim de Freitas's, and John Selden's intellectual acts of genealogy construction in dialogue with one another, I have sought to make the early modern web of ideas more coherent while at the same time minimizing the violence I've done to its complexity.

²⁰⁷ Derek Walcott, *Selected Poems*, ed. Edward Baugh (New York: Farrar, Straus and Giroux, 2007), 137.

²⁰⁸ Leo Tolstoy, *War and Peace* (New York: Vintage Classics, 2008), 298.

There are three ways in which I have tried to accomplish that goal. First, I have not put jurists in dialogue with each other artificially. By this I mean that they were already, in large part, in dialogue with each other. With the exception of Selden, who likely did not know about de Freitas's work, and Welwod, whose work did not figure prominently in de Freitas's or Selden's, it is reasonable to suggest that the jurists at least knew of each other. In many cases the jurists mentioned each other explicitly in their work, but in any event, the early modern intellectual world was not a large one. In fact, one of the assumptions I made in this thesis was that ideas travelled across borders as intellectuals did. Alberico Gentili traveled from the continent to Oxford. Serafim de Freitas, originally from Portugal, spent much of his life in Valladolid. John Selden, though he may never have left his study, travelled the world through his wide ranging and linguistically diverse source material. Hugo Grotius travelled to England for trade negotiations, accompanied ambassadors at an early age, and late in his life was even appointed the Swedish ambassador to France.²⁰⁹ Ideas, especially politically powerful ideas like *Mare Clausum* and *Mare Liberum*, travelled.

Second, I have, where possible, tried to include the voices of the jurists so as to allow others to evaluate my analysis of their arguments. To substitute the voices of the sources for my own instead of display them side by side would have been too reductionist in my opinion.

Third, I have attempted to highlight the intellectual agency of each jurist.

Michel Foucault writes, "there is no power relation without the correlative

²⁰⁹ Jon Miller, "Hugo Grotius," in *The Stanford Encyclopedia of Philosophy*, Spring 2014 Edition, ed. Edward Zalta.

constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.”²¹⁰ The selection of ideas from the pool of ideas, the generation of new ideas, and the arrangement of ideas to form novel arguments are constitute constructive acts that transmit power to the architect. In this light, the power of Grotius’s, de Freitas’s, Welwod’s, and Selden’s ideas resided in their acts of construction. Their acts, their picking and choosing from the well of ideas, their intellectual patrimonies, their arguments: that is what I have chosen to highlight. They built the genealogies; I have merely sought to trace them.

This thesis began by asking the question how did genealogies of *Mare Clausum* and *Mare Liberum* fit together in the early modern period and what did they disagree about. In conducting analysis, I have come to the conclusion that *Mare Clausum* and *Mare Liberum* in 1652 both had arguments left standing. For *Mare Liberum*, Grotius’s baseline contention that the sea was naturally free and common to all was under-refuted by Welwod, de Freitas, and Selden. On the other hand, the justification of *Mare Clausum* insofar as it was a long-standing tradition underwritten by English Common Law and accepted by many nations (Selden’s move) or insofar as it was conducive to evangelism and sanctioned by papal power (de Freitas’s move) was no doubt sufficient in the eyes of England and Portugal. The fact that each genealogy of ideas had arguments left to recommend it in 1652 illustrates the fact that debate was happening on two fundamentally different levels: what is and what ought. At heart, Selden, Welwod, and de Freitas responded to

²¹⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Paris: Éditions Gallimard, 1975), 27.

Grotius's claims for *Mare Liberum* by making arguments about the state of the ocean in the early modern status quo (that many nations believed they owned it, that closed seas were conducive to evangelism, etc.) while Grotius's claims were primarily about what state the ocean ought be in, namely, common to all. In short, the dialectic was insoluble given the form of arguments for, and constitutive of, *Mare Liberum* and *Mare Clausum* from 1603 through 1652. The insoluble nature of their intellectual debate was reflected in the inter-imperial tangle of jurisdictional corridors that scholars of sovereignty like Lauren Benton have argued characterized of the early modern ocean.²¹¹

Arguably, the insolubility of their dialectic is in part reflected in the bifurcated nature of oceanic ownership we observe in the contemporary world. Under the United Nations Convention on the Law of the Sea, territorial waters are designated *Mare Clausum* through exclusive economic zones while the high seas outside of exclusive economic zones are *Mare Liberum*, free and open to any state to fish, lay pipe, and use as they see fit (in other words, held in common). The ocean as we know it today is partially *Mare Clausum* and partially *Mare Liberum*, which is remarkable since both *Mare Clausum* and *Mare Liberum* were conceived of as normative schemes meant to apply to the ocean in its entirety. The basic idea of *Mare Liberum* was that the *entire* sea is naturally resistant to ownership and the basic idea of *Mare Clausum* was that *any* part of the sea could be owned. Yet, we live

²¹¹ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2009), 161. Benton importantly makes clear that the justification of an extension of sovereignty is the primary intellectual work of empire and in the early modern world that required justification of sovereignty in the ocean.

in a world where neither premise is accepted; instead, the sea, under the current framework, is partly owned and partly common.

New Paths for Further Historical Research

I want to conclude by suggesting what I think is an interesting and potentially fruitful path that I, or someone else, might take in future research based on my conclusions. Grotius, Selden, de Freitas, and Welwod collectively abstracted what it meant to own something from physical enclosure. To varying degrees each jurist was willing to at least entertain the idea that what it meant to own something might not have been strictly to possess it in hand. In fact, Selden, de Freitas, and Welwod were more or less in agreement that one could own something one never physically possessed or physically demarcated. Instead, they generally agreed in response to Grotius that imaginary demarcation through various devices was sufficient provided one signaled through various behavioral means intent to possess. I do not think that it was a coincidence that the very first company to argue that they owned their ideas – the Dutch East India Company – did so at around the same time that the debate regarding the law of the sea between Grotius and his opponents was taking place.²¹² From a philosophical perspective, I think it is one step further in an abstraction of ownership that jurists of *Mare Clausum* had begun in their response to Grotius.

Allow me to digress into philosophy to demonstrate how I think the law of the sea and a philosophy of intellectual property might have been theoretically

²¹² See, Peter Drahos, *A Philosophy of Intellectual Property* (Abingdon, U.K.: Routledge Publishing, 1996), especially chapter 3 on choosing community and common.

connected. Think for a moment about what it means to own something – don't think too long for that would defeat the purpose of the exercise, just think for enough time to get a rough snapshot in your mind. Having thought for a moment, you might decide that what it means to own something is to have possession of it – the classic conception of ownership. Yet, most people would find that an unacceptable conception of ownership after a moments consideration. After all nobody would really support a, "finders keepers" world, so perhaps you modify your original thought. To own something, you reason, is to take possession of it when nobody before you possessed it. For instance, if you find an island with no trace of human habitation, unmarked on a map, and you occupy it, perhaps it is yours. Yet that doesn't provide any explanation of the ownership of things previously owned. So, now you decide, well, if the previous owner agrees to transfer ownership to me, I probably have ownership of the thing in question but that, you realize, raises the tricky question of what constitutes an appropriate transfer of possession (see the case of Botrojan farm in chapter four). How can one tell if the previous person had ownership at all, how does one take possession of something, and honestly, what is it even to possess something? Sufficiently boondoggled yourself, you might begin to wonder how you've gone from a very simple question, one, which we tacitly, if not explicitly, deal with every day of our lives, to a very intractable series of problems.

You might, if truly perplexed, begin to approach the issue by attempting to avoid the problem entirely by denying the existence of property at all, but even its most ardent skeptics are hard pressed to deny the existence of property writ large. French anarchist Pierre Proudhon once famously proclaimed that all property is

theft – that the true tragedy of the commons is not the degradation of common resources, but the very notion that there are such things as resources that are not held in common. To take land out of common use was, in Proudhon’s opinion, to steal from humanity, a principally immoral act for which no amount of utility derived from the theft, even utility spread evenly throughout the population, could ever compensate.²¹³ Proudhon’s belief, in its literal form, is self-refuting. How is it possible to steal without granting property some validity insofar as theft is the taking possession of property that rightfully belongs to others? In order for Proudhon’s assertion to make any sense at all, commonly held property has to be a valid concept, so his assertion, charitably construed, does not in fact suggest that all property is theft, just private property. Even Karl Marx admitted that a means of production used solely to produce for private consumption that is produced, maintained, and used privately without the denial of use to other private individuals who wish to use said method, tool, or mean of production can be held and possessed.²¹⁴ So it seems that there is no avoiding the problem of what it means to own something.

In fact, if this brief treatment of theories is any indication, denying the existence of property seems just as hard as explaining the theoretical underpinnings of its existence. If I pick up a rock that does not belong to anyone, use the rock to build a wall on ground that nobody has tread before, and some years pass, it seems

²¹³ See Pierre Joseph Proudhon, *What is Property? Or, An Inquiry into the Principle of Right and of Government* (Paris: 1840; republished, London: Forgotten Books, 2008).

²¹⁴ See Karl Marx, “Relation of Wage-Labor to Capital,” *Wage Labor and Capital* ed. Friedrich Engels, available online https://www.marxists.org/archive/marx/works/download/Marx_Wage_Labour_and_Capital.pdf, accessed January 10, 2017.

as if the rock is certainly mine, but it also seems difficult to explicate precisely what about my invisible, imagined relationship to the rock has changed.

In any event, it seems fair to suggest that ownership, political ideology notwithstanding, proceeds from possession either through occupation or apprehension.²¹⁵ To put it formally, possession is a necessary, though by no means sufficient, precondition for a conception of ownership. To own the rock is, in part, to possess the rock. What then of fundamentally unpossessable things, intangible things like ideas for instance, or things too large and unstable to possess, like the ocean? If one is to argue that they may be owned, as many throughout history have, then some way to transform the unpossessable into the possessable is required. The emergence of concepts of ownership pertaining to the ocean may have formed an important origin of theories of property undergirding the ownership of ideas insofar as concepts like *Mare Clausum* provided arguments that transformed the ocean from an unpossessable thing into a possessable thing through the operation of imaginary lines bounding the ocean. I think if a historian could find sources that demonstrate that the Dutch East India Company was looking to the debate over the law of the sea as it attempted to defend its claims of ownership over its ideas and proprietary practices, then the above argument would be on solid ground.

There is, nevertheless, the question of why this particular path might be worth pursuing. It is a legitimate question in a world where time is zero-sum. As I see it, there is one major reason in favor of pursuit: in the modern world the fate of the intellectual commons is in question. In our present day and age, there is a

²¹⁵ In truth, what is and is not considered properly possessed marks the boundaries of many political ideologies.

distinct and nearly unchallenged assumption that culture and the manifestations of it belong not to the consumer but to an owner or creator. The fact that there are resources that gain value from being kept free from control is a fact that is largely lost on us. Though I admit I am clearly partisan, I think that linking the origins of intellectual property to the early modern debate over the law of the sea might help check the overreach of intellectual property protections in contemporary life, especially since many jurists of *Mare Liberum* (Grotius in particular) argued for a capacious sense of the commons. As historian and legal scholar Lawrence Lessig, in his book, *The Future of Ideas*, points out, “A time is marked not so much by ideas that are argued about as by ideas that are taken for granted. The character of an era hangs upon what needs no defense.”²¹⁶ We certainly seem to have chosen to allow strong intellectual property protections to characterize our era. I think the operative question is, do we really want to?

²¹⁶ Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Cambridge: Harvard University Press, 2001; also published, New York: Vintage Books, 2001), 5.

Appendix I

Notes on *Do Justo Império Asiático Dos Portugueses*

According to Inga Clendinnen, the first question that ought confront the historian is, “may I trust this source to tell me what I believe it tells me.”²¹⁷ In the case of *Do Justo Império Asiático Dos Portugueses*, upon taking into consideration what might be problematic about the source, the answer is yes. I believe that I may trust *Do Justo Império Asiático Dos Portugueses* to be an accurate, complete, and relatively unaltered translation of Serafim de Freitas’s original treatise.

De Freitas originally wrote in Latin, the language of early modern scholarship. I, however, do not read Latin and so am working with a Portuguese translation completed in 1959 in Lisbon by Miguel Pinto de Meneses. At the time, Portugal was a fascist dictatorial state led by António de Oliveira Salazar (P.M. of Portugal 1932-1968). Salazar’s *Estado Novo*, or New State, as the regime was termed, was extremely protective of a very specific kind of national memory, which reified, “traditional,” Portuguese values like the insular family, Catholicism, and a quiet, agrarian lifestyle.²¹⁸ The regime claimed a monopoly on power because it claimed such a monopoly was necessary to maintain and protect these values, but further that a monopoly was in fact the natural outgrowth of those values insofar as those values favored strictly hierarchical society. National memory was a central building block in that ideology. Thus, the *Estado Novo* made extensive use of

²¹⁷ Inga Clendinnen, “A Question of Sources,” in *Aztecs* (Cambridge: Cambridge University Press, 1992), 281.

²¹⁸ Teresa Seruya, “Translation in Portugal during the *Estado Novo* Regime,” in *Translation Under Fascism*, ed. Christopher Rundle et al. (New York: Palgrave MacMillan, 2010), 120-121.

censorship through the Secretariado da Propaganda Nacional (SPN) and post-1945 through its successor the Secretariado Nacional de Informação (SNI) to eliminate any work that offered a picture of Portuguese history that did not highlight those values.²¹⁹ The *Estado Novo* was also concerned with protecting the supposed exceptionalism of Portugal in the twentieth century by linking the glories of Portugal's age of discovery and the Portugal of the *Estado Novo* through the continued possession of overseas colonies.²²⁰ Anything that suggested interrupted control or illegitimate control on the part of the Portuguese was suppressed.²²¹ So if the translation of *Do Justo Império Dos Portugueses* was affected at all the censorship it would be reasonable to assume it was so affected because it offended either the values which the Salazar regime wished to historically highlight, or because it suggested the illegitimacy of Portuguese colonial possessions.

There are two reasons why it is reasonable to assume that *Do Justo* is relatively free of censorial modifications. The first is that it is reasonable to think that the original treatise committed neither of the above sins. As originally written, *Do Justo* was a defense of Portuguese colonialism and the right of the Portuguese to subjugate non-Christian peoples so there would be no reason to interfere with the ultimate arguments of the treatise in the process of translation.

²¹⁹ See, Ellen W. Sapega, *Consensus and Debate in Salazar's Portugal: Visual and Literary Negotiations of the National Text, 1933-1948* (University Park: Pennsylvania State University Press, 2008), 9-47.

²²⁰ It is not a coincidence that the downfall of the *Estado Novo* came because it desperately clung to overseas colonies like Angola.

²²¹ Seruya, "Translation in Portugal during the *Estado Novo* Regime," in *Translation Under Fascism*, ed. Christopher Rundle et al.

The second is the peculiar path taken by the version of the source I am working with. De Meneses completed his translation in 1959 and had it published at the *Instituto de Alta Cultura* in Lisbon. The translated version included an introduction written by Marcelo Caetano, who would go on to be the prime minister of the *Estado Novo* regime upon Salazar's death.²²² In 1961, the same institution published an edited version of de Freitas's original Latin text. In 1983, the *Instituto Nacional De Investigação Científica* re-released both the Latin volume and the Portuguese volume as part of a European Exposition on Art, Science and Culture.²²³ There is no readily appreciable difference between the 1983 versions and the 1959 and 1961 versions of the text. However, the version of the text that I have is missing the jacket with the seal of the *Instituto de Alta Cultura* that accompanies each of these versions and was acquired from the Digital Library of India. Additionally, the word Pissurlekaw is written on the front of the text. It is possible Pissurlekaw is a misspelling of Pissurlem, which is a precinct of Goa, or it could refer to Shri Chandrakant Pissurlek, who was the civil registrar of Goa in 1991, or something else entirely. Whatever the word might refer to, it seems reasonable to tie the text geographically to Goa, which was a Portuguese colony until it fell to the Indian Armed Forces on December 19, 1961.

This geographic link in combination with the lack of a jacket suggests that the version I have from the Digital Library of India may have been sent out to Goa in order to be published where the censorship arm of the *Estado Novo* couldn't reach it

²²² In 1959, Caetano was already a well-established scholar and his participation in the translation suggests the relative importance of the translation to the state.

²²³ The exposition was a sort of international showcase organized under the aegis of the European Economic Community.

as a precautionary measure by the translator de Meneses, who, according to Pedro Cardim at the Universidade Nova de Lisboa, had a reputation for caring about publishing accurate translations.²²⁴ If so, when Goa fell to Indian troops in 1961, the copy remained in India and was digitized by the DLI many years later. Surprisingly, the version of the text published in Lisbon and the Goa text are exactly the same. If the theory regarding the Goa text's route to Goa is correct, then that means that the text published in Lisbon was not censored because it is exactly the same as the text published in Goa and the text published in Goa could not have been censored.

However, there are other considerations in trusting the text other than whether it was censored or not. For instance, is the translation from Latin reliable? Surely, the threat of censorship could have affected how de Meneses translated the work, regardless of whether or not the work was ultimately censored. One might argue that if anything, a lack of censorship indicates that de Meneses translated the work to conform to the *Estado Novo's* standards. Arguably, this was unlikely. Since de Meneses apparently had a penchant for accuracy, there is little reason to think the Portuguese translation is an intentionally inaccurate translation, especially if he did indeed send a copy to Goa in case his translation was altered by censorship in Lisbon. Admittedly though, the degree to which it is unintentionally inaccurate is beyond my knowledge since I do not read Latin and therefore cannot evaluate the translation to Portuguese line by line.

²²⁴ Professor Cardim, who is familiar with Caetano's work, and I spoke via email during the spring of 2017. Before I returned to the United States from Lisbon in the fall of 2015, I also had the opportunity to speak with him in person. In both instances he expressed the opinion that Caetano is generally considered an accurate and skilled translator of Latin who cared about the quality of his work more than the possibility of backlash from censors.

Assuming for a moment however that the translation from Latin to Portuguese is entirely accurate there is still the question of my translation from Portuguese to English. To my knowledge I am sailing into relatively uncharted waters in systematically translating sections of the treatise into English so there is no way to cross-reference my translations against another, perhaps more skilled translator's.²²⁵ In light of that fact, I have attempted to be up front about my translations. With each translated passage that I explicitly quote, I've listed the original Portuguese in a footnote so that others may evaluate my translation. Moreover, I tried to clearly state it when I was less than 100 percent confident in my translation. So, in short, in answering Clendinnen's question, I think I may trust the source to mean what I argue it does insofar as it seems free of censorship and is likely to be an accurate Portuguese translation of the Latin, but where I am less

²²⁵ There are many existent copies of *Do Justo Império Asiático Dos Portugueses* in libraries connected to the WorldCat search system. In fact, in the United States, there are at least four copies. There is one at the Harvard Law Library, one at the Brandeis University Library, one at the W.E.B. DuBois Library at the University of Massachusetts Amherst, and one at Brown University. These copies appear to be in either the original Latin, or the Portuguese translation, or both in consecutive volumes. However, there is only one English language copy listed on WorldCat as of November 27, 2016. That copy is housed in the collections of The British Library, St. Pancras. Having been to The British Library to explore the source, I can tell you that the WorldCat listing is a clerical error. Their copy is in Portuguese. According to Google Scholar, there also appears to be English language copies at La Trobe University and the National Library of Australia, however their card catalogues suggest their copies are in Portuguese and Latin as well. So as far as I can tell from WorldCat and Google Scholar searching, while there have been translations into French, German, and Italian, there has not yet been a systematic translation into English. This is not to say that bilingual scholars have not written about de Freitas's work (Mónica Brito Vieira for example), but they have, it seems, encountered him in Portuguese and then written about his work in English rather than undertaking extensive translations.

confident I may trust the source owing to my own fallible translations, I have made no attempt to disguise that lack of confidence.

Appendix II

Notes on Marchamont Needham's Translation of Selden's Work

In terms of Needham's translation, one may be reasonably suspicious of its fidelity to Selden's original work on account of the fact that his translation was intended as a piece of propaganda and pretext. In any case, there is no doubt that Needham's translated version diverged from Selden's original copy. Needham, for example, deleted Selden's original dedication to Charles I and replaced it with an, "Epistle Dedicatorie," to Parliament. Moreover, he inserted several appendixes at the end detailing arguments for closed seas not included in Selden's original. Many scholars including Fletcher and G.J. Toomer, in following the logic that Needham's translation was compromised by his partisan motives, note that one J.H. Gent published an, "improved" translation in 1663.²²⁶ Yet, the two translations, with the exception of the fact that Gent's edition replaced the, "Epistle Dedicatorie," with the original dedication to Charles I, are exactly the same – down to the very word. The fact that the pro-royalist 1663 version and the pro-Parliament/Commonwealth 1652 version are exactly the same should assuage fears that the translation is wholly different from Selden's original due to Needham's partisan motives.²²⁷

²²⁶ The identity of J.H. Gent has long been in doubt, but David J. Padwa makes a persuasive case that J.H. Gent is in fact James Howell, Gentleman, a royalist publisher of some repute. See, David J. Padwa, "On the English Translation of John Selden's *Mare Clausum*," *The American Journal of International Law* 54 (1960): 156-159.

²²⁷ As to Needham's qualifications as a translator and his ability to translate accurately, the fact that he secured the commission to translate the work with the help of John Milton, one of the foremost Latinists of the day, should partly assuage fears that the translation is entirely inaccurate. See, Padwa, 156-158.

Appendix III

A Broad Overview of the History of The Law of the Sea as a Subfield of the History of International Law

A History of International Law

In Mesopotamia and the present day Middle East there is a long tradition of agreements between empires. For example, the Stele of the Vultures details how the Lagash-Umma border conflict over water rights in the Tigris and Euphrates delta was settled through negotiations mediated by the sovereign of neighboring Kish.²²⁸ Similarly, the peace treaty between the Hittites and the Egyptian monarch Ramses II is well documented. In fact, archaeologists working at various sites throughout the Mideast have discovered clay tablets and other fragmentary shards in both Egyptian hieroglyphics and Hittite cuneiform detailing the treaty.²²⁹

Yet, what we would recognize as international law came into existence with the Roman Empire and *jus gentium*, or, the law of nations. Borrowing, as usual from Greek concepts, the *jus gentium* was meant to have jurisdiction over the interactions of foreigners and Roman citizens as it was thought of as having arisen from reason and therefore having universal application.²³⁰ Many thinkers including Thomas Aquinas used the *jus gentium* as a basis for constructing principles by which nation-

²²⁸ See, Jerrold S. Cooper, *Reconstructing History from Ancient Inscriptions: The Lagash-Umma Border Conflict* (Los Angeles: Undena Publications, 1983).

²²⁹ Stephen H. Langdon et al. "The Treaty of Alliance between Hattusili, King of the Hittites and the Pharaoh Ramesses II of Egypt," *Journal of Egyptian Archaeology* 179 (1920): unpaginated. For how this particular treaty (also known as the Treaty of Kadesh) fits into early traditions of international law see, Mortimer Sellers, "Parochialism, Cosmopolitanism, and Justice," in *Parochialism, Cosmopolitanism, and the Foundations of International Law*, ed. M.N.S. Sellers (Cambridge: Cambridge University Press, 2011), 255-258.

²³⁰ Gordon E Sherman, "Jus Gentium and International Law," *The American Journal of International Law* 12 (1918): 56-63.

states ought interact.²³¹ Aquinas, in addition to other theologians like Rabbi Moses ben Maimon (a Sephardic Jew born in Spain in the late twelfth century), sought to regularize relations between nation-states, which after the fall of the western Roman empire had occurred under ad hoc systems like the Rolls of Oléron or under no mutually agreed upon system at all.²³² Thinkers like Bartolo de Sassoferrato continued this tradition of regularization as the Hanseatic League and Italian city-states demonstrated how international commerce could bring a political entity wealth and prestige.

Sassoferrato's work presaged the Golden Age of Spanish thinkers in the sixteenth century as well as the work of Italian jurist Alberico Gentili at Oxford. The rapid expansion of the Spanish overseas raised a number of questions intellectual circles as to the propriety of their methods. Francisco de Vitoria, for example, was critical of the treatment of native peoples and articulated a sophisticated theory of sovereignty in order to defend his view that the treatment of native persons was unjust. Francisco Suárez similarly argued that the law of nations insofar as it was derived from the law of nature (law underpinned by reason and reflected in the workings of the natural world) applied to natives and afforded native persons some level of protection from ill treatment.

Following the Spanish thinkers, Hugo Grotius developed their ideas into a full-fledged explication of international law in *De Jure Belli ac Pacis*, published in

²³¹ Anton-Hermann Chroust, "Jus Gentium in the Philosophy of Law of St. Thomas Aquinas," *Notre Dame Law Review* 17 (1941): 22-28.

²³² On the Rolls of Oléron see, Timothy J. Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England," *The American Journal of Legal History* 19 (1975): 95-111.

1625. Grotius is traditionally considered the father of international law and, though that label may not be entirely justified, any history of international law would be amiss if it did not list him as a major contributor. As such, Grotius's work, and *Mare Liberum* in particular (published before *De Jure Belli ac Pacis*), receives extended treatment in the next chapter.

Traditionally, the thinkers following Grotius are subdivided into two categories: the positivists and the naturalists. German jurist Samuel von Pufendorf is considered the paradigmatic thinker of the naturalist camp. Born in 1632, Pufendorf published widely read commentaries on Hobbes and Grotius's work on natural law. His treatise, *De Jure Natura et Gentium*, was revolutionary when it was published in 1672. In *De Jure Natura*, Pufendorf challenged Hobbes's conception of a bellicose natural state and characterized the state as a collection of wills that ought provide the state no protection from the restrictions of natural moral reasoning incumbent on individual wills. In essence, Pufendorf's contribution was to show how the state naturally ought be subject to similar laws as individuals.

The naturalists took up Pufendorf's argument and applied it to a wide-ranging number of debates in international law where they argued for the supremacy of natural law as a constraint on state actors.²³³ Conversely, the positivists like Dutch jurist Cornelis van Bynkershoek (1673-1743) maintained that the actual body of accepted practices ought constitute the restraints on state

²³³ On the naturalists collectively see, Raymond Wacks, "Natural Law and Morality," in *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford: Oxford University Press, 2012), 10-57.

actors.²³⁴ For a number of reasons related to the ease with which statecraft could be practiced under constraints set by commonly accepted practice compared to rigorous natural law edicts, positivism, by the 19th century, was by far the more popular system of thought with state actors and their intellectual apologists.

Up until World War II, the positivist school maintained its intellectual dominance, but the war, and the subsequent decolonization that accompanied the immediate post-war period, eroded the intellectual stranglehold that positivism possessed. The horrors of war led indirectly to the establishment of international organizations dedicated to natural human rights (like the U.N.) and the plethora of new states and new ways of relating to the world in the form of regional alliances (e.g. Warsaw Pact or NATO) led to a decline in bilateral agreements and a rise in the type of multilateral agreements that define the state of international law at present.²³⁵

Neither Serafim de Freitas's nor John Selden's work on *Mare Clausum* (the topic of chapters three and four respectively) have been the focus of much scholarly work that relates them to international law, I think in part because they do not fit neatly into the positivist-naturalist distinction.²³⁶ Their omission has the important

²³⁴ On the positivists collectively see, Raymond Wacks, "Classical Legal Positivism," in *Understanding Jurisprudence: An Introduction to Legal Theory* (Oxford: Oxford University Press, 2012), 57-77.

²³⁵ For examples of successfully negotiated agreements under present norms of international law see, Jeremi Suri, *Foreign Policy Breakthroughs: Cases in Successful Diplomacy* (New York: Oxford University Press, 2015). Suri, in his introduction, outlines many of the norms of international law at present.

²³⁶ It might be an interesting topic to explore how Selden's work forecast the work of the positivists. As was hopefully clear from Chapter Four, Selden was also concerned with how actual practices and accumulated precedent functioned. In his argument, they (practice and precedent) functioned as defenses of *Mare Clausum*.

implication of suggesting ruptures between the history of international law and the history of the law of the sea, where both thinkers so clearly deserve notice. Not all parts of the history of the law of the sea are germane to the broad narrative of the development of international law.

Yet, questions of international law are frequently questions of sovereignty. In fact, the existence of international law at all suggests that a body of law is necessary to regulate the sphere in which no one state is sovereign, namely, the relations between sovereign nation-states. The nature the law of the sea takes therefore has important implications for international relations. In many ways, the ocean (with the current exception of territorial waters) is the place where the philosophical necessity of international law is given its most acute geographic representation.

Insofar as the acquisition of expanded territorial sovereignty is a goal of empire, the interaction of sovereign states the subject of international law, and the law of the sea the way in which sovereignty might be acquired (or denied) in the ocean, the law of the sea ought be considered a subfield of both the history of empire and the history of international law.

The Development of the Law of the Sea Prior to the Early Modern Period

Historically, the concept of sovereignty provided a foundation for the proscriptive power of state architecture, which, in the early modern period, was most often monarchical in nature. This conception of sovereignty applied to control over domestic affairs. Only once it became important from the perspective of the state to assert independent control over domestic affairs did sovereignty obtain its contemporary meaning, which denotes independence from the control of other

states within defined geographic limits in a system of sovereign actors. Maritime law evolved as an extension of the sovereignty of the state and, in provenance, was arbitrated by the imperium of heads of state. Thus, as states turned to the seas as profitable avenues for trade, maritime law advanced in lockstep.

It can therefore be inferred that the first state to engage in maritime trading must have had some practices that could be termed a rudimentary body of maritime law and, thus, that occurrence must be the first occurrence of maritime law. However, the first traditionally acknowledged occurrence of actual maritime law (as a body of regulations governing state and non-state activity in the ocean) is Rhodian Sea Codes in the Mediterranean. What we know about Rhodian sea law mostly comes from the Digest of Justinian and therefore, what we know is fragmentary and, in some ways, entirely hearsay. Historians are even in doubt as to whether or not there actually is such a thing as a collection of sea laws that would have been recognized by the Rhodian's themselves.²³⁷ In any event, Rhodes was a major maritime power and Roman jurists attribute many of their maritime laws to the Rhodians.

Recently, historians have turned to non-European history in the search for nodes of origin for maritime jurisprudence. Influenced by Edward Said, many scholars of Asia, for instance, have moved away from interpretations of Asian history that paint Asia as the receptor of European ideas and jurisprudence instead these scholars seek to demonstrate how Asian empires like the Sri Vijaya Empire in present day Java and the Sung Dynasty in China were independent innovators of

²³⁷ Robert D. Benedict, "The Historical Position of the Rhodian Law," *The Yale Law Journal* 18 (1909): 223-225.

maritime regulations.²³⁸ This would make maritime law approximately coeval in Europe and Asia.

Returning to Europe, following the Punic Wars, as Rome became the major maritime power in the Mediterranean, Roman maritime law, as borrowed from the Rhodians, became the accepted standard system. It remained as such through approximately the 13th century, when it was supplanted by the codes of individual city-states and principalities. Among these codes number the Rolls of Oléron, which emerged in the Bay of Biscay, the Consolat de Mar, which originated in Barcelona and was widely followed in the western Mediterranean, and the Laws of Wisby, which was the collective maritime codes of the Hanseatic League. The shared characteristic of these codes was that they were meant to have universal jurisdiction insofar as common law had failed to adequately adjudicate international maritime disputes in these various locales.²³⁹ Collectively, these law codes and Roman law became the inherited traditions of early modern maritime law.

²³⁸ R.P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1983), 19-35.

²³⁹ Gene R. Shreve et al., *A Conflict of Laws Anthology* (LexisNexis Publishing, 2012), chapter 2, section 3b.

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