

# The Justification of the Law of the Sea in Early Modern Europe

by

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The Buddhist monk and author Thich Nhat Hanh invited his readers to view the act of walking as a sort of meditative offering. Walking, from this perspective, is not merely a means to an end but a way of acting on behalf of others who have not experienced the joy of going down a particular path. It is to those loved ones with whose feet I now walk - Olga, Maria, Marfa, and Jon - that this dissertation is dedicated.

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## **Abstract**

The Justification of the Law of the Sea in Early Modern Europe

by

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The dissertation investigates the origins of contemporary international society through the lens of the seventeenth century free seas debate. My inquiry focuses on the interplay between normative beliefs and political institutions in the formulation of states' legal claims and their international adjudication. I illustrate how ideas on the role of the individual in the political community and theories of government legitimacy are not only evoked in the justifications presented (i.e., the reasons given for the appropriateness of certain actions), but determined the institutions regarded as legitimate actors on the world stage and the mechanisms used to evaluate competing claims. After linking the evolution of the law of the sea to the transformation of these philosophies, I trace the justifications made in early modern Europe by Spain, Portugal, the United Provinces, and England in their claims to sovereignty over the sea. The attendant shift in justification from one based on Catholic scholasticism to one that draws upon the humanist ideals of the Reformation, I claim, reflects the existence of a fundamental change in the underlying principles, institutions, and adjudicating mechanisms of international society.

The result of this shift is the increasing role played by state power as a determi-

nant for behavior - the defining characteristic of Hobbesian state of anarchy frequently employed as a metaphor for the international system. The prominence of power in post-Westphalian international society is accompanied by the development of domestic and international institutions that can be seen as having their intellectual foundations in post-Reformation understandings of the individual and his relationship to the political community. Sovereignty and challenges to it as the basis for state behavior in early modern Europe, I argue, could only be established given the presence of a certain set of philosophical prerequisites. The movement from a God-centered mental universe to one based on the individual provided that basis. By concluding with this understanding of change within international society, I suggest a more prominent role to be played by domestic political theories and institutions than has previously been recognized in the literature.

## Chapter 1

# The Normative Dimension of International Society

In a speech marking the 350th anniversary of the Treaty of Westphalia, NATO General Secretary Javier Solana juxtaposed contemporary Western ideals with the morally agnostic underpinnings of post-Westphalian interstate relations: “What sets [the European integration] process apart from the Westphalian system is the willingness of states to cede elements of national sovereignty for the common good of a united Europe. It thus aims directly at eliminating those root causes of conflict that Westphalia could not overcome.”<sup>1</sup> In his call for a security policy guided by normative principles, Solana argued that it was the absence of moral guideposts in the Westphalian order that created many of the military conflicts in the centuries following its conception. Solana’s central question - “where does the sovereignty of a state end and where does the international obligation to defend human rights and to avert a humanitarian disaster start?”<sup>2</sup> - illustrates a view of the post-Westphalian world order in which moral principles are secondary to more pragmatic strategic considerations.

The theoretical support for Solana’s interpretation of the post-Westphalian order among international relations scholars is both substantial and contested.<sup>3</sup> In

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<sup>1</sup>Solana

<sup>2</sup>Solana

<sup>3</sup>See March and Olsen (1998) for a clear statement on the principles of the post-Westphalian international order. Krasner (1993), Osiander (2001b), and Beaulac (2000) provide critiques of the use of the Treaties of Westphalia as a historical marker in international relations scholarship.

the most orthodox formulation of the neo-realist position, “states in anarchy cannot afford to be moral.”<sup>4</sup> Given the uncertainties and constant struggle for survival that characterize the Hobbesian state of nature that defines international society, behavior derived from notions of good and evil is an effective guarantor of failure. The post-Westphalian order has been defined as one in which states seek to ensure their security through the accumulation and management of power. Considerations of justice and morality are, by necessity, secondary concerns in this realist account. Rational choice scholarship on institutional formation is largely silent on the role to be played by subjective values in the determination of state behavior. States and their leaders seek to balance competing demands and resolve difficulties of coordination, two goals in which morality is secondary to more sober, Machiavellian calculations of strategy and utility. Constructivist scholarship on identity formation, in contrast, replaces the dictates of power politics and self-interest with that of intersubjective understandings. Collective definitions of right and wrong, good and bad, define state identity and thereby shape state behavior. Here, power and self-interest can only be understood in the context of a state’s beliefs about itself and the social role assigned to it by its identity.

Extending this understanding of the relationship between normative principles and state behavior into the sphere of international institutions, these three distinct bodies of literature provide three different accounts of international order: one grounded in material capabilities, one derived from conscious choice in institutional design, and one based on the role of ideas in constructing actors’ perception of reality. Order may be a product of the political equivalent of Adam Smith’s invisible hand, an aggregation of individual acts of self-interest, or the unintentional product of socially determined roles. Each of these approaches provides valuable insights into the nature of order in international relations, yet they, when examined individually, are arguably incomplete

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<sup>4</sup>Art and Waltz (1983), 6

in their capacity to explain the emergence of the contemporary, post-Westphalian state system due to their inability to reconcile the dictates of self-interest with the exigencies of individual morality. In adopting positions of extremes - arguing that normative principles are either irrelevant or divorced entirely from their material and strategic contexts - existing literature seeking to understand the formation of broad international ordering principles such as those found in the post-Westphalian world has been largely mute with respect to the theoretical possibilities arising from an approach that examines the role of normative principles in defining self-interest and the ways in which power may be deployed in the pursuit of these interests.

These theoretical frameworks have also colored our understanding of state formation and research on international society. Efforts to apply modern concepts such as state, sovereignty, and authority to the early modern period are frequently fraught with conceptual and semantic difficulties as the fifteenth century understanding of these terms differs greatly from how these ideas have been deployed in twenty-first century scholarship. This has led one author to observe that “We think far too much in terms of independent territorial statehood even when talking about past ages - caught up as we are in what R.B.J. Walker calls the modern ‘discourse of eternity’ that represents the international system based on the sovereign territorial state as timeless in its essence. . . . Almost all discussions of medieval politics that are offered in IR are in a positivistic mode that looks at ‘objective’ developments quite independent of the minds of the actors themselves.”<sup>5</sup> This critique implies an opening in the literature for further exploration - an exploration based on the premise that understanding how concepts such as state and sovereignty evolved into the foundational principles of contemporary international society can be a fruitful area of inquiry yet requires elucidating how the actors during this formational period understood themselves as political communities and sovereign entities.

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<sup>5</sup>Osiander (2001a), 119

The magnitude of a task involving a comprehensive integration of morality, self-interest, and power is beyond the scope of this project. Instead, this dissertation seeks to take a first step towards exploring these three components of international order by examining the relationship between normative principles and the institutions which comprised international society as expressed through the seventeenth century free seas debate in Europe. I argue that the defining features of the post-Westphalian state system, understood as an international institution, are rooted in a set of normative principles originating in domestic societies rather than existing international institutions or state interaction. The notion of sovereignty that has defined the post-Westphalian order is a principle grounded and expressed first in domestic political contexts in the justifications expressed by international actors for foreign policy decisions. To explain the existence of state sovereignty as a principle of interstate relations requires an explanation of the *idea* of state sovereignty: its intellectual foundations and the way that philosophy has been deployed in relations between polities. The normative principles articulated by domestic political actors provide the basis for the formation of international society by defining the role of the individual vis-à-vis the political community and the source of political legitimacy for those who assert leadership over those communities. These principles are equally expressed in the domestic institutions constructed to articulate these values and the means by which political disputes are adjudicated. International institutions reflect the normative debates and institutional structures of the domestic sphere.

The project assumes that there exists an international society defined by a set of commonly recognized principles. In the case of the post-Westphalian order, these principles center on the domestic and international sovereignty of the territorial state. The state is recognized as the primary actor in world politics, characterized by a defined territory, identifiable population, domestic monopoly of the legitimate use of force, possession of an administrative apparatus, and the ability to enter into

relations with other states. According to realist and rational choice accounts, these characteristics of the post-Westphalian system as an international institution define state interests and shape state behavior. While the definition of self-interest and expectations for behavior vary among scholars, the broad consensus that there exists a relationship between self-interest, behavior, and international institutions forms the basis of the argument made in this dissertation. Elucidating the relationship between these three elements lends additional theoretical and historical support to existing work on the structure of the international system, the nature and parameters of strategic interaction, and the role of individual self-interest and domestic factors in institutional formation. In contrast to the constructivist view of identity acquisition through international interaction and learning, the approach adopted here is based on the presumption of conflict in the spread of values and their impact on institutions. In doing so, I assume that actors exercise conscious choice in their evaluation of normative principles and their employment in institutional formation.

The inquiry presented here focuses on the interplay between normative beliefs and political institutions in the formulation of states' legal claims and their international adjudication. I illustrate how domestic definitions of legitimate political authority and the duty of the government are not only evoked in the justifications presented, but determine the institutions regarded as legitimate actors on the world stage and the mechanisms used to evaluate competing claims. After linking the evolution of the law of the sea to the transformation of these fundamental understandings of political life, I trace the justifications made in early modern Europe by Spain, Portugal, the United Provinces of the Netherlands, and England in their claims to sovereignty over the sea. The attendant shift in justification from one based on Catholic scholasticism to one that draws upon the humanist ideals of the Reformation, I claim, reflects the existence of a fundamental change in the underlying principles, institutions, and adjudicating mechanisms of international society.

The result of this shift is the increasing role played by the capacity to exercise coercive power as a determinant for behavior - the defining characteristic of Hobbesian state of anarchy frequently employed as a metaphor for the international system. The prominence of this type of power in post-Westphalian international society, furthermore, is accompanied by the development of domestic and international institutions that can be seen as having their intellectual foundations in post-Reformation understandings of the individual and his relationship to the political community. Sovereignty and challenges to it as the basis for state behavior in early modern Europe, I argue, could only be established given the presence of a certain set of philosophical prerequisites. The movement from a God-centered mental universe to one based on the individual provided that basis. By concluding with this understanding of change within international society, I suggest a more prominent role to be played by domestic political theories and institutions than has previously been recognized in the literature.

This chapter begins with an elaboration of the historical jumping off point for the dissertation through a brief discussion of the case study upon which the thesis is based. The topic of changing international maritime norms is then situated within international relations literature on change in international society and the various explanations for that institutional variation proposed by scholars. The divisions one sees in the scholarship on institutional formation and the role of normative principles in that process is largely the legacy of the Weberian division between the ethics of responsibility and conviction later reformulated by March and Olsen as the logics of consequences and appropriateness. In the section following that overview of relevant literature in the field I argue that one way the apparent irreconcilability between these two apparently opposed logics of behavior is by reconceptualizing political leaders as proponents of normative principles that they pursue through strategic means. I then turn to a discussion of how this reconceptualization of the role of the normative



principles in institutional formation can serve as the basis for understanding the Dutch choice to reject international maritime norms and instead propose an alternative world order. The final section in this chapter then reiterates the dissertation's argument and provides an outline for the following chapters.

Chapter two is the first of three historical chapters in the dissertation and provides a broad historical overview of the international context for the seizure of the *Santa Catarina*. As will be shown in the chapter, the maritime interaction between nations occurred within a common framework prior to the emergence of the Dutch Republic as an actor on a truly global stage. During the period preceding the age of discovery, maritime law was highly technical and localized. Law was based on custom and largely promulgated orally. In the instances where laws take codified form, as in the Digest of Justinian, the objects of regulation are the individuals and tangible property at sea rather than the sea itself. Regulations addressed such concerns as the area allocated to passengers and the right to jettison cargo while at sea. The sea as an entity - extending to the winter high tide on shore - is declared incapable of possession. "When the sea was declared to be by the law of nature incapable of becoming the object of private property, the matter was closed. When the shores of the sea were declared free of access to all men for the exercise of the right of fishery, by the *ius gentium*, there was no sovereign power which could override this law and annul it."<sup>6</sup>

In the period following the Protestant reformation in the mid-sixteenth century, we witness a dramatic transformation with respect to the law of the sea. The medieval understanding of law as founded on custom gave way to a unique view of law as something created rather than discovered. Whereas feudal Europe lacked the legal vocabulary required to extend territorial jurisdiction seaward, sixteenth century scholars, diplomats and theologians turned to natural law to articulate claims

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<sup>6</sup>Fenn (1926), 466

of property over broad, unexplored swaths of the globe.<sup>7</sup> Through the discussion of the Treaty of Tordesillas, in particular, we find an injunction to adopt a more holistic view of uncertainty in international society. The more common view of the period - an anarchical world rife with uncertainty and populated by states in various stages of development at odds with the Church - must be questioned when we find the Papacy serving as a court of first appeal and last resort in the arbitration of international matters. “According to the prevailing belief of the time, the Pope as the Vicar of Christ on earth had the power of the disposition of both Christian and unoccupied lands.”<sup>8</sup> This is most clearly reflected in the international discussion surrounding the status of the sea.

If maritime law in pre-Reformation Europe acknowledged a common authority in the Papacy, the law of the sea after the mid-fifteenth century collapsed as a clearly-defined guide to behavior. The law of the sea became the “law of the stronger and, ultimately, of effective occupation. Everything that occurred ‘beyond the line’ remained outside the legal, moral, and political values recognized on the other side of the line.”<sup>9</sup> The following chapter will trace the development of this emergence of international uncertainty as articulated by the law of the sea. The historical outline addresses these three stages: the ancient and medieval world; the dawn of the age of discovery; and the challenge to the recognized status of the sea presented by Grotius and the Dutch seizure of the Santa Catarina.

Chapter three turns to the justifications of states’ claims to the sea. The Spanish and Portuguese derived the legitimacy of their conquests and claims to possession not from their naval capacity to defend their claims, but from the recognized authority of the Pope as the final arbiter of international law. To appreciate the role of the Vatican in facilitating the treaty between the Spanish and Portuguese, we must momentarily

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<sup>7</sup>Fenn (1926), 470

<sup>8</sup>Servin (1957), 256

<sup>9</sup>Schmitt (2003), 94

step away from the more common understanding of the papacy as being at odds with secular authorities and, instead, appreciate the degree to which the leader of the Christian commonwealth served as “a court of supreme international appeal.” Because he “had no sailors through whom he could discover and claim for himself new lands,” Pope Alexander VI can be viewed as the most impartial source of authority at the time. As a judge over secular matters, his was “a court of consensual jurisdiction.” Europe at the close of the fifteenth century regarded itself as an organized, Christian body and independent leaders frequently employed their resident representatives in Rome to avail themselves of the formal, technical, institutionalized processes of the *Curia Romana* to address legal questions both secular and divine in nature.<sup>10</sup>

Justification, in this context, took the form of reference to ecclesiastical law. In contrast, Grotius sought to create a set of propositions which functioned along the lines of mathematical axioms. To provide the foundation for this objective theory of law, Grotius returned to the ancients and the Stoics’ argument that man’s behavior was determined by his desire for self-preservation. His innovation was to transform this statement into a moral, universal right. “No one could ever be blamed for protecting themselves, but they could never be justified in doing anything harmful which did not have the end in view. This was the content of God’s will for mankind, which could be deduced simply by looking at the natural world.”<sup>11</sup>

In the final historical chapter, chapter four, I will integrate the accounts presented in the previous two chapters through the lens of normative principles held by domestic actors that bore upon international maritime law and the institutions that defined the post-Westphalian international order. The tenants of both Catholic scholasticism and Protestant humanism will be presented with a focus on four elements: 1) the philosophical understanding of the individual in relationship to the political community; 2) the sources of political legitimacy; 3) the expression of these concepts of the indi-

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<sup>10</sup>Dawson (1899), 471-472

<sup>11</sup>Tuck (1991), 506

vidual and political legitimacy in domestic institutions; and 4) the methods for the adjudication of political disputes contained within domestic institutions and based upon the understanding of the individual and the sources of political legitimacy.

## Examining Change in International Society

While the dissertation's historical scope draws upon the development maritime law extending from the fourteenth through the eighteenth centuries, the central pivot point of the historical narrative is the February 1603 capture of a Portuguese carrack, the *Santa Catarina*, in the East Indies by Dutch captain Jacob Van Heemskerck. Van Heemskerck did not spontaneously attack the Portuguese merchant ship in response to a direct threat and the *Santa Catarina*'s capture did not occur in the context of a battle between two national navies. Van Heemskerck and his crew did not face an immediate military challenge from the Portuguese and the *Santa Catarina*'s armaments can be regarded as that era's naval equivalent of pop-guns. On December 4, 1602, Van Heemskerck's Broad Council<sup>12</sup> unanimously agreed to remain in the port of Pulau Tiunan to lie in wait for Portuguese merchant ships. The policy document which emerged from that meeting justified an attack against the Portuguese for three reasons: 1) any attack on Portuguese trade would ultimately weaken the Habsburg efforts to quell revolt in the Netherlands; 2) the "ravenous Portuguese" had encouraged indigenous rulers to prohibit Dutch merchants from their markets and harbors; and 3) the Portuguese would continue to try to eradicate the Dutch presence in the East Indies and the only option remaining was to "attack and harm [the Portuguese] wherever we can or may."<sup>13</sup>

Upon van Heemskerck's return to Amsterdam in July 1604 after the successful seizure of the *Santa Catarina*, the Amsterdam Admiralty Court launched an inquiry

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<sup>12</sup>The Broad Council was a body comprised of all naval officers in the fleet and held responsibility for decision-making while at sea.

<sup>13</sup>van Ittersum (2003), 520-521

into the circumstances surrounding the seizure and whether the booty could be considered a legitimate prize of war, ultimately, if not unsurprisingly, deciding that the seizure was legitimate. The capture of the *Santa Catarina* and ensuing legal debate served as the catalyst for Dutch jurist Hugo Grotius's work on the freedom of the seas, *Mare Liberum*. To provide a legal foundation for the company's continuance of the practice of privateering in the East Indies, the Dutch East India Company (*Vereenigde Oost-Indische Compagnie* or VOC) commissioned Grotius to articulate a set of principles of the "free seas" which would justify continued involvement by the Dutch in the East Indies trade. The treatise centered around the concept of the sea as something that, due to the ephemeral nature of the tides and the impossibility of constructing fixed borders on the open water, could not be the object of property. Although laws dating as far back as ancient Rhodian maritime practices hinted at a similar impossibility of possessing the sea, Grotius's argument marked a turning point for not only the development of a universally-recognized law of the seas, but for defining the legitimacy of state action in what, in the era of global exploration and colonization, would emerge as the foundational principle of contemporary international society. The publication of the defense initiated an intellectual discussion on the nature of property and sovereignty which would remain unresolved for decades.

In sharp contrast to the Spanish and Portuguese discussions on the global distribution of oceanic space a century earlier, neither Grotius nor the Amsterdam Admiralty Court appealed to a higher arbiter of justice in the form of the Papacy. Although Grotius would take up this point in his more lengthy defense, the Court's deliberations do not appear to contain any element of concern for delegitimizing the authority of possession by papal donation. The Court defended the VOC's right to the *Santa Catarina*'s cargo first and foremost in its own language and on its own terms - a language and terminology which gained legitimacy by its growing capacity to enforce that authority through military means. This "Protestant vision of justice and order"

translated seamlessly into the Court's emphasis on "national interests, individual responsibilities and opportunities, a market economy, and a public spirit."<sup>14</sup>

How is it that the Dutch chose to justify their actions with a logic so antithetical to the period's dominant conception of legitimacy? Prior to 1603, international actors more commonly employed the sacred to justify the profane. International law - the mutually recognized structure of customs and treaties which provided order to relations between actors - reflected the very essence of faith and justification for behavior came not from a body of legislation, but through the discovery and application of the laws of God. By promulgating a justification based in the rights and interests of the individual and the nation, the Dutch rejected that common language which had characterized international relations for centuries. What was the source of this justification? If the Dutch did not turn to international society, what was the origin of their justification? What impact did the justification of the *Santa Catarina's* seizure have on later Dutch diplomacy?

The questions raised by the Dutch justification of the *Santa Catarina's* seizure provide a historical entry point for a discussion on normative principles in institutional formation via the role of justification in international relations and the degree to which changing justifications reflect transformations in the values that underly international institutions. The case provides an opportunity to examine closely an instance of competing legal claims justified by dramatically different philosophical perspectives. The Spanish/Portuguese hegemony over the high seas rested on a view of sovereignty grounded in a Christian world order. The Dutch legitimized their aspirations in a Protestant view of sovereignty which permitted the individual the right to interpret and execute the laws of nature. The tension between these two notions of sovereignty had swept through Europe in the Protestant Reformation of the sixteenth century; however, the revolts on the continent occurred in the framework provided by the

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<sup>14</sup>Berman (2003), 24

presence of secular and ecclesiastical authorities. The conflict was manifested in claims for terrestrial authority which found arbitration through the deployment of force. In contrast to the comparatively straightforward territorial battles on the content, the sea presented a challenge for those who would claim ownership of it. The technology of the period did not allow for the physical occupation one would find on land. The sheer scope of the oceans defied any nation's efforts to construct barriers in the form of naval patrols. Absent a reliable and consistent means by which force could be used to buttress their claims, actors relied upon the strength of their justifications.

As the focus of this dissertation is on the use and adjudication of divergent justifications in international law, justification as a topic of interest merits its own justification.

Justification provides us with a window on how norms are revealed in the world. It is a way of seeing norms in action. It is also a way of beginning to understand the parameters - both domestic and international - for the translation of normative concepts into strategic action. Following Jürgen Habermas's theory of communicative action, to justify is not to string together a sentence that makes logical sense. It is to string together a sentence that refers to principles which the speaker views as the legitimate basis for action. Justification has a normative reference point and that reference point is contained within a particular justification.

The seizure of the *Santa Catarina* illustrates how this normative dimension of relations between states is negotiated domestically, articulated internationally, and adjudicated in the absence of a sovereign authority. Taking the Dutch perspective, we see the internal debate within the Amsterdam Admiralty Board on the legitimacy of the seizure. Although all parties agreed on the value of any successful attack on the Spanish, a portion of shareholders viewed Van Heemskerck's seizure as theft as it had not been in response to a direct attack. Once the Amsterdam Admiralty Board

developed a unified position supporting the seizure, Grotius began the task of refining that justification for an international audience. Dutch statesman Johan van Oldenbarnevelt applied the principles of Grotius's justification, unaltered, to the 1608-1609 Dutch peace negotiations with the Spanish. Grotius's fundamental principles which legitimized action - the ideas which served as the basis for what he viewed to be rightful justification - found further development as key elements in John Selden's rebuttal to Grotius, *Mare Clausum*. Although Selden arrived at an opposite conclusion, arguing that the seas could be the object of ownership, he adhered closely to Grotius's view of the rights of the individual to interpret and enforce natural law absent a sovereign power. This, in turn, served as the justification for England's later struggle with the Dutch for control of the North Sea.

In short, the Spanish and the Dutch justified their claims to the world's oceans in very different ways. The Dutch justification became the commonly-recognized basis for legitimate action. The nature of the different justifications, their philosophical foundations, and the expression of these principles in institutional structures will be the subject of this dissertation.

Intuitively, scholars have long acknowledged the possibility that ideas may play a role in shaping the world we inhabit. Rendering this intuition into a practical research agenda, however, has been more problematic. Recent work on justification has been conducted almost exclusively within the constructivist framework. These scholars take as their starting point Habermas's theory of communicative rationality. In *The Theory of Communicative Action*, Habermas distinguishes the concept of communicative rationality as something distinct from instrumental rationality and explores the centrality of language in the understanding of rationality. For Habermas, to justify an action is to claim one's views are more than capricious impulses. A justification is a claim to legitimacy, but also a way of situating oneself in the world - a device to orient oneself and others. This model of communicative rationality requires



the existence of shared norms and values as, without them, communicative rationality has no foundation. “If the variety of worldviews and forms of life entails an irreducible plurality of standards of rationality, then the concept of communicative rationality could not claim universal significance and a theory of society constructed upon it would be limited from the start to a particular perspective.”<sup>15</sup> Constructivist analyses have employed Habermas’s model to illustrate the degree to which international norms are created through interaction between states, assuming that “human behaviour evolves in a realm of social norms, and that actors reproduce and, at times, change these norms in and through their practice”<sup>16</sup> In these accounts, justifications serve the purpose of sharing a form of information with others - justifications are beliefs about how the world works. This act of communication then offers an opportunity for others to learn and, consequently, re-evaluate their own beliefs.

Given the logic of communicative rationality, one would assume that the peace negotiations between the Dutch and Spanish would lead to some shift in perspective or understanding. The historical record does not bear out this interpretation. Dutch justifications referenced domestic norms grounded in a Protestant understanding of legitimate political action just as the Spanish and Portuguese retained their reliance on the philosophical underpinnings provided by their understanding of the Catholic world order. Neither reflected a culturally pluralistic international society based on shared worldviews.

Shared norms and values are assumed as a starting point for these constructivist accounts and Habermas is frequently interpreted as advocating the universal applicability of his model. Habermas’s prerequisite for communicative rationality - a common lifeworld - is accepted as a given by virtue of interaction between two nations (as this interaction must have some common “language” for it to take place). As the case of the *Santa Catarina* illustrates, however, international relations contains within it a

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<sup>15</sup>Habermas (1981), xi

<sup>16</sup>Müller (2004), 412

multiplicity of languages, both literally and figuratively. In the East Indian Ocean, the Dutch and Portuguese justified their behavior based on their own beliefs - beliefs indeed constructed socially, but socially through conflict-laden domestic politics rather than interaction with others politics and cultures at the international level. Constructivist accounts presume that actors adjudicate between competing beliefs based on their evaluation of the justification against a common set of norms. Although both Grotius and the Amsterdam Admiralty Board were cosmopolitan in their outlook and recognized the context for their actions that the broader world provided, their justifications came entirely from domestic ideologies. Those who have applied theories of communicative rationality to international discourse also presume a degree of openness to learning on the part of those engaged in the communicative act. In his preparations for negotiations with the Spanish, Oldebarnevelt can be regarded as viewing the situation as a strategic one, arguably caring neither for the normative principles underlying competing arguments nor to change the United Provinces's ambitions during the negotiations.<sup>17</sup>

Those who have applied the logic of communicative rationality also presume a moral component to the discourse. When actors are discussing the legitimacy of norms and justifications for their actions, they are determining good and bad. These scholars would suggest that a single, sovereign power is irrelevant as values can emerge through interaction in society. "Morality is not a natural attribute adhering to individuals but a social construct. To prove sincerity is thus not a matter of signaling facts, but of entering a moral discourse on the basis of a common treasure of signals, of established clues as to authenticity, and of common interpretation."<sup>18</sup> The view of communicative action as moral discourse may address the issue of how notions of good and evil are determined, but it does not lead us to an understanding of how

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<sup>17</sup>See, for example, the discussion in Israel (1990) on the domestic interest groups that formed around Oldenbarnevelt during the truce negotiations.

<sup>18</sup>Müller (2004), 400

competing moral claims are adjudicated. It also further develops the presumption that actors communicate with the intention of reaching mutual understanding and compromise rather than conveying information. In this theoretical framework, actors arrive at the bargaining table open to having their interests and their understandings of the world changed as a result of discourse: “Constructivism assumes that human behaviour evolves in a realm of social norms, and that actors reproduce and, at times, change these norms in and through their practice.”<sup>19</sup> What is unclear is whether or not any discernible change in attitude in behavior is the result of communication or if it is the outcome of strategic action grounded in norms and values rooted in domestic political interests and articulated internationally via justifications of policy.

When we speak of international society, we do speak of an irreducible plurality of standards which Habermas’s conception of communicative rationality precludes. This is not to suggest that norms, values, and intersubjective meaning have neither meaning nor relevance to understanding actor behavior. It means that instead of asking *if* intersubjective meaning matters, we instead look to *where* and *how* it matters. Through their emphasis on the moral rather than information aspects of justifications, constructivist accounts fail to recognize that morality cannot exist in a state of anarchy. This is not to suggest that ideas do not matter and that all behavior is reducible to crass, material self-interest. It is, however, to suggest that, if we seek to understand the role of norms in international society, we must turn to their source - the domestic sphere.

While some have argued for a view of states as having a homogenous moral purpose centered around their constitutional structures,<sup>20</sup> I would instead suggest that different groups within individual states have their own conceptions of the relationship between the individual and the political community and how political power is legitimized. Domestic institutions reflect the outcome of these internal debates and

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<sup>19</sup>Müller (2004), 412

<sup>20</sup>Reus-Smit (1999)

serve as the vehicles by which the interests derived from these normative principles are articulated. Rather than characterizing the state in its entirety, this “moral purpose” is one of many politically salient characteristics of the population as a whole. At the state level, conflicts between competing claims to moral legitimacy are adjudicated by domestic institutions. Here, claims are justified with reference to common understandings. Given the absence of a commonly-recognized adjudicating authority internationally, justifications cannot have the same meaning because there cannot be a single, stable set of norms and values absent a sovereign authority.

The Dutch seizure of the *Santa Catarina* incorporates each of these elements: the tension between two radically different worldviews and the absence of any adjudicating mechanism save the threat of lethal force; and the development and articulation of actor identity domestically and its stability internationally. Whereas the Portuguese claimed title to half of the world’s oceans based on Papal donation, Grotius defended Dutch claims on the right of the individual to interpret natural law and punish its transgressors. Both arguments meet the standard of instrumental rationality through their internal consistency, yet we cannot evaluate their communicative rationality as they established their reference points in mutually exclusive lifeworlds.

## **Approaches to International Order**

When explaining the question of order in international society, international relations theory draws largely from one of three approaches. In the first approach, the anarchical international environment exerts a constant threat on states’ survival and order emerges as states develop strategies to cope with the challenges presented by the existence of anarchy. If anarchy creates a set of preconditions that require the constant acquisition of power, order emerges as the constellations of power and capabilities by which this drive for security is manifested and managed. Scholars in the second approach view order in international society as emerging from the creation of

the contemporary nation-state. To understand the creation of the state as the fundamental unit of analysis in world politics, then, is to understand order in international society. The third approach views the existence of states as unproblematic and instead seeks to understand the international social structures derived from interaction between these units of analysis. Here order is a quality that is not determined by the nature of the units, but as a product of their interaction. The institutions which regulate state interaction are not dependent on the units of analysis, but of the different ways in which they interact. These patterns of interaction lead to a consensus with respect to identity and appropriate behavior which, in turn, lends them a degree of predictability that can be defined as order.<sup>21</sup>

The first approach to order in international relations is most commonly associated with the neo-realist school of thought. Much like a painter's canvas imposes geometric parameters on an artist's work, for neo-realists international society as defined by anarchy creates a set of limits and incentives for state action. Kenneth Waltz's market metaphor illustrates this point. Waltz sees the creation of international order as analogous to the emergence of markets based on "the activities of separate units - persons and firms - whose aims and efforts are directed not toward creating an order but rather towards fulfilling their own internally defined interests by whatever means they can muster."<sup>22</sup> The actors themselves - their internal structure and interests - are treated as uniformly dictated by the environment in which they interact. States are, to adopt Wolfers' term, "billiard balls:" homogeneous units with identical interests.<sup>23</sup> Order is not a conscious creation of state actors, but a spontaneously generated, unintentional consequence of state interaction. Order, in this context, is inexorably linked to a state's capabilities and it is change in a state's capabilities that produces

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<sup>21</sup>Given the range of scholarship within the schools of thought presented here, these three approaches would best be understood as stylized categories used to illustrate different assumptions and analytical focal points.

<sup>22</sup>Waltz (1979), 90

<sup>23</sup>Wolfers (1962)

transformations in international order.<sup>24</sup> These transformations, however, are viewed as relatively minor shifts in alliance patterns or the status of great powers. The overarching “texture of international politics remains highly constant, patterns recur, and events repeat themselves endlessly.”<sup>25</sup>

When applying these broad concepts of order to the particular case of the post-Westphalian state system, Stephen Krasner<sup>26</sup> has argued that the principles of territorial state sovereignty that define the post-Westphalian order have been regularly violated due to the exigencies of power politics and opportunities presented by changing capabilities of individual states. The condition of anarchy, absence of a moral consensus among states, and asymmetries of power result in an order that cannot be understood as order in the ordinary usage of the term. Order is not a sustained pattern of behavior in the sense of enduring institutional structures, but rather a series of prescriptions regarding how a state is to behave in order to ensure survival.<sup>27</sup> State behavior in the post-Westphalian world order cannot be accounted for by recourse to the principles of territory, autonomy, recognition, and control embodied by that order. Instead, the capabilities of individual states to coerce and impose is a far more reliable determinant of state behavior with post-Westphalian norms only adhered to in the absence of the capability to do otherwise. It is, in effect, an order in which the “strong do what they can and the weak suffer what they must.”<sup>28</sup>

Scholars who examine the rise of the nation-state as the source of order in international relations may broadly be characterized as falling into one of two bodies of institutionalist literatures:<sup>29</sup> 1) historical institutionalism and its focus on the environmental conditions of the late Middle Ages and early modern Europe in order

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<sup>24</sup>Waltz (1979), 88

<sup>25</sup>Waltz (1979), 66

<sup>26</sup>Krasner (1999)

<sup>27</sup>For a detailed account of the “rules” of the balance of power, see Kaplan (1957).

<sup>28</sup>Thucydides (1998), 5.89

<sup>29</sup>For a more developed analysis of institutionalist research in political science, see Thelen (1999) and Hall and Taylor (1996).

to explain the creation of the state; and 2) rational choice institutionalism and its assumption that actors face a series of coordination and efficiency problems whose effects are ameliorated by the creation of institutions. Illustrating this first category, Charles Tilly has approached state formation as linked to the challenges and benefits of large-scale warfare which took place in Europe from the fourteenth through the eighteenth centuries. According to Tilly, warfare led to two parallel sets of processes: socio-economic change and political modernization. Rulers were required to address the upheaval caused by socio-economic developments and, at the same time, direct that social change to enhance the leader's ability to maintain power.<sup>30</sup> The state existed as "an apparatus which effectively drew the necessary resources from the local population and checked the population's efforts to resist that extraction of resources."<sup>31</sup> Alongside this domestic challenge, conducting war created a set of circumstances that required an administrative apparatus that would supply rulers with the resources required in order to triumph over their external rivals.<sup>32</sup> Rulers in this period faced multiple challenges to their power and maintaining their status demanded the ability to subjugate competitors. The characteristics of the state as an institution - its "territorial consolidation, centralization, differentiation of the instruments of government from other sorts of organization, and monopolization (plus concentration) of the means of coercion."<sup>33</sup> - embodied a set of characteristics that made it difficult to conquer by any authority that did not likewise bear such features.

Hendrik Spruyt's account points to the growth of trade in the Middle Ages and the subsequent emergence of new social elites with interests that could not be met within feudal institutions.<sup>34</sup> Like Tilly's rulers, the actors in Spruyt's analysis recognize and capitalize upon changes in societal hierarchies, using their status to develop specific

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<sup>30</sup>Tilly (1975), 39

<sup>31</sup>Tilly (1975), 40

<sup>32</sup>Tilly (1975), 24-29

<sup>33</sup>Tilly (1975), 27

<sup>34</sup>Spruyt (1994)

institutional arrangements. These new institutional forms are rooted in individual interests and beliefs as functions of these individuals' position within society (defined by their relationship to modes of production). In the Middle Ages, these new elites – centered around an emergent merchant class – formed coalitions amongst each other in order to create new forms of political organization better suited to their needs: the sovereign state, the city-state, and trading leagues. Once established as alternatives to the feudal order, these three units competed among each other for dominance. The sovereign state emerged victorious due to its comparative strengths in efficiently managing the challenges to cooperation and coordination posed by the growth of trade.

Spruyt's evolutionary principles clearly define the relationship between institutions and behavior. Actors create institutions to benefit themselves and the type which boasts the highest degree of evolutionary fitness emerges as dominant. This results in cases of policy and institutional convergence internationally for the same reasons we see the triumph of the nation-state. Successful strategies and institutions do better because they are more adept at serving actors' interests. Actors are assumed to be both purposive and in full control of institutional development. According to Spruyt, actors create social structures which reflect interests and cognitive frameworks defined by the source of change in the systemic equilibrium. In the Middle Ages, the growth of trade led to the creation of a new merchant class which required efficient organization, the ability to create credible commitments, and well-defined scopes of authority.

Each of these explanations for order in international relations - neo-realist and institutionalist - view order in international society as inexorably linked to the its constituent parts, the state. An elucidation of international order requires either a statement on the origins of the state or the adoption of a comprehensive set of assumptions on the nature of the state. This necessarily binds any theory of the



source of international order and change within it to specific temporal limits. As a result these theories may account for the creation of the state or state behavior, but are silent on a role to be played by non-state actors, the impact of non-state forms of political organization on the structure of international society, and, of particular relevance in this study, normative principles. Realist and institutionalist scholars have both incorporated a “substantive conception of rationality” in which behavior is “optimally adapted to the situation.”<sup>35</sup> Critics of this scholarship have pointed to the difficulties in the cognitive and behavioral assumptions underlying the claim that actors are able to accurately determine the best courses of action in particular situation, but of greater concern in the context of this dissertation is the implicit limitations on actors as moral agents. Political man is equated unproblematically with economic man in the pursuit of specific goals tied to material and physical well-being: financial wealth, political power, national security, etc. That both individuals and states pursue multiple goals simultaneously is not in question; however, existing literature on state formation and the international system has neglected to include normative objectives in the range of possible goals that actors can seek to achieve.

The focus on state formation and state behavior under conditions of anarchy is clearer when viewed as an ontological concern with the units of analysis in international relations. The positivist underpinnings in this scholarly tradition seeks to explain the nature of “reality” in international relations through recourse to the actors and structures that form that reality. In contrast, the third approach to order in international society views the study of international relations as being epistemological in nature. Actors are defined solely by their social identities and understanding their behavior requires an explanation on the process by which states acquire knowledge of these social roles. This third approach to order in international relations draws from the constructivist emphasis on identity formation (understood as knowledge creation)

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<sup>35</sup>Simon (1985) quoted in Keohane (1988), 381

through the process of interaction. The idea most famously expressed as “anarchy is what states make of it”<sup>36</sup> approaches international order as a social construct. In this understanding of the constructivist account, international institutions are “determined primarily by shared ideas rather than by material forces” and “the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature.”<sup>37</sup> One of the key assumptions in this approach is the possibility of consensus and the view of communication between states as fundamentally non-conflictual and contributing to shared understandings. The patterns of behavior that define international order emerge from states’ internalization of exogenously given identities determined by these shared understandings.

Drawing upon some of these constructivist understandings, Christian Reus-Smit provides an account of order in international relations in his discussion of an international society defined by “fundamental institutions.” These fundamental institutions - “elementary rules of practice that states formulate to solve the coordination and collaboration problems associated with coexistence under anarchy.”<sup>38</sup> - provide actors with “a stable set of norms, rules, and principles.”<sup>39</sup> Unlike the underlying dynamic behind Waltz’s market metaphor, in the constructivist view order is not imposed on states by the political equivalent of Adam Smith’s invisible hand. Instead, international order is created through the reproduction of the constitutional structures that define international society. These “coherent ensembles of intersubjective beliefs, principles, and norms”<sup>40</sup> create a state’s international identity which is then the basis for fundamental international institutions. According to Reus-Smit, constitutional structures are comprised of three sets of values that, taken together, form the basis of international order: 1) “a hegemonic belief about the moral purpose of centralized,

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<sup>36</sup>Wendt (1992)

<sup>37</sup>Wendt (1999), 1

<sup>38</sup>Reus-Smit (1999), 14

<sup>39</sup>Reus-Smit (1999), 12

<sup>40</sup>Reus-Smit (1999), 30

autonomous political organization” that contains within it a specific understanding of the social goals to be achieved by political organization; 2) “an organizing principle of sovereignty” that defines and demarcates political authority along territorial lines; and 3) “a norm of pure procedural justice” that specifies the procedures to be followed by states in their interactions.<sup>41</sup>

Order in international society is, for Reus-Smit, “an ideological consensus [that] exists among the majority of states about the primacy of the prevailing systemic norm”<sup>42</sup> and he establishes the existence of this consensus through an examination of the justifications used by states. As mentioned in the previous section’s discussion of Habermas, justification is a crucial part of identity formation for the information it conveys and the opportunity for learning and change it presents. “[W]hen states are forced internationally to justify their actions there comes a point when they must reach beyond mere assertions of sovereignty to more primary and substantive values that warrant their status as centralized, autonomous political organizations. This is a necessary feature of international communicative action, and historically it has entailed a common moral discourse that grounds sovereign rights in deeper values that define the social identity of the state: ‘We are entitled to possess and exercise sovereign rights because we are ancient polises, absolutist monarchies, or modern democracies.’”<sup>43</sup> For Reus-Smit, Westphalian international society reflected those “intersubjective beliefs about the moral purpose of the state” expressed in states’ justifications. International society was equated with the preservation of a hierarchical social order legitimized through recourse to divine will. Monarchs were regarded as receiving their authority from God, justice flowed through authoritative channels, and law originated in the will of the monarch. “These values not only provided the justificatory foundations for sovereignty, they shaped the basic institutional practices of

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<sup>41</sup>Reus-Smit (1997), 566

<sup>42</sup>Reus-Smit (1997), 569

<sup>43</sup>Reus-Smit (1997), 565

absolutist international society, licensing the development of naturalist international law and old diplomacy over contractual international law and multilateralism.”<sup>44</sup>

This explanation of order in international society bears some resemblance to the one presented by neo-realism in that international society is regarded as the primary venue in which state identities are formed and expressed. Where neo-realists would emphasize the condition of anarchy at the international level as the determinant of state behavior, Reus-Smit instead turns to the identities created by intersubjective beliefs among states interacting at the international level. In both cases the role played by domestic factors in the creation of state interests is given short shrift. Hegemonic beliefs are, by definition, values held by a majority of actors and, in Reus-Smit’s account, these relevant actors are members of international society rather than those individuals and sets of actors who make up the constituencies within polities. Because of this focus on identity formation at the international rather than the domestic level, the source of change in the constitutional structures that define international societies is unclear. One reason for that lack of clarity may be provided by Reus-Smit’s perception of conflict, or the lack thereof, in the determination of state identities at either the domestic or international level. He notes that “hegemonic beliefs, alternative conceptions of the moral purpose of the state have historically assumed an oppositional quality, their proponents often decrying the way in which prevailing beliefs condition admission to international society and shape its basic institutional practices”<sup>45</sup> yet the potential function of this opposition as a driver of change is unrecognized. In part this could be the product of the constructivists’ reliance on consensus in communication and, consequently, identity formation between states. If the neo-realist and institutionalist approaches can be characterized by the unescapable pervasiveness of conflict in political life, the constructivist explanation of order provided by Reus-Smit is notable for the absence of conflict. Just as the neo-realist and institutionalist

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<sup>44</sup>Reus-Smit (1999), 120

<sup>45</sup>Reus-Smit (1997), 566

analyses of order in international society relies on the assumption of material self-interest in lieu of values, Reus-Smit's narrative jettisons concerns with relative power and utility maximization in favor of an exclusive concern with normative principles. This may stem from the constructivists' views of international relations theory as a fundamentally epistemological endeavor, but "underpinning these positions is a commitment to a particular metaphysics that rejects the idea that the world itself plays a role in helping us adjudicate competing knowledge claims."<sup>46</sup>

This conflict between whether material or ideational factors are better suited to explaining international society can be traced to a deeper and more enduring concern with the very nature of political action. In their discussion of the logics of consequences and appropriateness, March and Olsen adapted Max Weber's concept of the ethics of responsibility and conviction to the study of institutions. Those who view actor behavior as driven by a logic of consequences "imagine that human actors choose among alternatives by evaluating their likely consequences for personal or collective objectives, conscious that other actors are doing likewise."<sup>47</sup> Behavior is strategic and based on rational calculation of utility and probability. According to a logic of appropriateness, "human actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations."<sup>48</sup> Actors match the roles they are assumed to play to the appropriate behavior in any given situation and act accordingly. March and Olsen note that the scholars do not universally view the two logics as mutually exclusive and their interconnectiveness may allow both to operate in different ways in different contexts. In situations where identities are clear and preferences less certain, it is expected that a logic of appropriateness will dominate. A second way in which the

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<sup>46</sup>Wight (2007), 41

<sup>47</sup>March and Olsen (1998), 949

<sup>48</sup>March and Olsen (1998), 951

two logics may interact is based on the type of decision. A logic of consequences may be used to establish the fundamental constraints of “big decisions” while a logic of appropriateness can be used for refinements. In a third approach, interaction between actors begins with strategic interaction but evolves over time into one grounded in roles and associated identities. Finally, it may be possible to conceptualize logics of appropriateness and conviction as variants of the same phenomenon. A logic of consequences may be a set of identities that operate in a particular context and a logic of appropriateness may enhance create predictability and thereby enhance cooperation in strategic interaction.

Thomas Risse has added a third logic - the logic of argumentation - to those elucidated by March and Olsen.<sup>49</sup> According to Risse, argumentation, deliberation, and persuasion constitute a unique realm of interaction distinct from behavior guided by the rational choice approach contained in a logic of consequences or behavior determined by identity in a logic of appropriateness. Actors often lack a shared definition of their negotiating situation and this common understanding is a prerequisite for strategic interaction. For bargaining to occur, actors must be in agreement as to what is being bargained over and the underlying “rules of the game” that would apply to that particular context. Even if actors do agree on a definition of the situation they face, they may differ as to what norm should apply in that context. “Human actors engage in truth seeking with the aim of reaching a mutual understanding based on a reasoned consensus,”<sup>50</sup> thereby defining the context in which bargaining takes place and the appropriate norms to apply. Central to this approach is the assumption that actors are “prepared to change their own views of the world, their interests, and sometimes even their identities.”<sup>51</sup> In contrast to the logics of consequences and appropriateness where preferences and norms are regarded as fixed, a logic of argu-

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<sup>49</sup>Risse (2000)

<sup>50</sup>Risse (2000), 1-2

<sup>51</sup>Risse (2000), 2

mentation assumes that actors' are capable of both a willingness to learn and an absence of constraints on their ability to do so.

Scholars whose work implicitly or explicitly address these different logics may be seen as grappling with the same fundamental question: what is the relationship, if any, between morality and self-interest in international relations? Are actors moral agents that are restrained by their conceptions of right and wrong? Does the pursuit of self-interest in a political context require that actors jettison all moral constraints on their behavior? Can actors change their views of what constitutes moral behavior and, if so, is that a genuine change of belief or a strategic response?

Each of these logics allow for the theoretical possibility of the state as capable of moral action and international society as a context in which morality can exist. The logic of appropriateness rests on the behavioral dictates of international norms and identities as superseding the logic of consequences and divorced entirely from domestic politics. The normative rules of behavior at the international level are viewed as having a constitutive effect on domestic identities. When Risse's human agents interact, they are able to learn and develop new beliefs and their ability to influence state foreign policy developed domestically is viewed as unproblematic. At the other end of the spectrum, the logic of consequences removes the sense of "good" and "bad" from the decision calculus entirely. Actors are viewed as amoral and rightly so as political action is, by Weber's and Machiavelli's definition, a realm in which considerations of right and wrong have no place.

If one may entertain the possibility that concepts of morality and self-interest are both relevant for understanding state behavior, the impact of normative concepts at the domestic level may a useful jumping off point for exploring the relationship between the two factors. To borrow from Hans Morgenthau, "There is a profound and neglected truth hidden in Hobbes's extreme dictum that the state creates morality as well as law and that there is neither morality nor law outside the state. Universal

moral principles, such as justice or equality, are capable of guiding political action only to the extent that they have been given concrete content and have been related to political situations by society.”<sup>52</sup> If “notions of right and wrong, justice and injustice, have there no place”<sup>53</sup> in international society, any attempt to explain state behavior by recourse to the existence of an international morality can only point to the presence of values shared at the domestic level by a collection of states. This is not to argue that international law based on treaties, customs, and legal precedent does not impact state behavior as “[positivism] proceeds on the assumption that the law, as it really is, can be understood without the normative and social context in which it actually stands.”<sup>54</sup> It is, however, to claim that understanding the source of law and the moral elements that buttress international law as an institution requires an understanding of the domestic sphere from which international law emerges and its ethical underpinnings that can only exist at the domestic level.

## **Reconceptualizing Weber’s Ethics**

If a particular understanding of Weber has contributed to the dichotomies in the literature on the formation of international society, a reexamination of Weber’s work may be useful in conceptualizing an alternative relationship between normative principles and self-interest. This process of revisiting the assumptions underlying theories of international order borrows elements key to each of the bodies of scholarship discussed in the previous section. From the neo-realist perspective comes a recognition of power as one of the defining features of political life. The acquisition and deployment of power - in its multiplicity of forms - distinguishes the political from other forms of social activity. In Weber’s words: “‘politics’ would mean striving for a share of power or for influence on the distribution of power, whether it be between states or between

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<sup>52</sup>Morgenthau (1951), 34

<sup>53</sup>Hobbes (1994), 78

<sup>54</sup>Morgenthau (1940), 267



the groups of people contained within a single state. . . . Anyone engaged in politics is striving for power, either power as a means to attain other goals (which may be ideal or selfish), or power ‘for its own sake’, which is to say, in order to enjoy the feeling of prestige given by power.”<sup>55</sup> The institutionalist perspective is valuable in its emphasis on the conscious choices made by actors. From this perspective we learn that institutions and behaviors are not the product of a passive evolutionary process. Instead, individual actors within polities act purposively in the identification of goals and their strategic pursuit. Constructivists point to the importance of identity and performance of roles associated with such identities. Identity carries with it explicit normative parameters that allows actors to distinguish “good” from “bad,” providing them a moral compass with which their actions may be oriented and evaluated. Weber’s work on the nature of the political sphere and the role of the individual politician in it provides us with the resources to understand the interaction between power, self-interest, and identities highlighted by each of these three approaches by drawing our attention to the necessity of creating meaning in political life and how this meaning is transformed in the pursuit of political goals.

Weber’s conception of political life is characterized by a fundamental, inescapable dilemma – the ethical ends to which political action aspires can only be achieved through means which are frequently at odds with the dictates that determines these ends. In his discussion of the sermon on the Mount, Weber emphasizes the uncompromising nature of moral dictates: “The commandant of the Gospel is unconditional and unambiguous – ‘give all that thou hast’ – *everything*, absolutely.”<sup>56</sup> An ethic of conviction (*Gesinnungsethik*) - a guideline for behavior based on normative principles - demands that one adheres to a particular understanding of right and wrong action, regardless of the actions’ consequences. Actors following this ethic relinquish ultimate responsibility for the outcomes of their actions, instead focusing on the intention be-

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<sup>55</sup>Weber (1994), 311

<sup>56</sup>Weber (1994), 358

hind their choices. In contrast, an ethic of responsibility (*Verantwortungsethik*) in which actors base their decisions on the expected consequences of a course of action demands that actors not only use the foreseeable outcomes of their actions as a guide to behavior, but accept ultimate responsibility for the consequences. To be “good” in the moral sense derived from the ethic of conviction requires the adherence to certain rules that serve to constrain the range of possible options for action. To be “good” in political contexts based on an ethic of responsibility requires that actors abandon all moral restraint in the pursuit of their goals.

The irreconcilability of the two ethics is grounded in the fact that, for Weber, “the decisive means of politics is the use of violence.”<sup>57</sup> Because all political action has the use of force as a potential means, what may be deemed “good” can never be achieved with instruments that are fundamentally opposed to that “good.” One can not *be* good and *do* good at the same time. Weber’s acknowledgement of the tragedy of this contradiction is clear. “[I]n spite of their soberness the [vocation lectures] are suffused with pathos. Many passages sound like an appeal. The speaker who appeals to us does not say what must be done, but unmistakably he tries to indicate what should not be done.”<sup>58</sup> There is at once a subtle despair and an understanding of Weber’s own role as a scientist seeking to understand the basis of political action. Yet by problematizing that absence of a moral compass in political life, Weber also indicates an interest in solving the apparent dilemma presented by a political world devoid of moral parameters with a genuine interest in morally noble behavior.

For many scholars, Weber consciously and unambiguously rejects the slightest possibility that the element of moral judgment characteristic of the ethic of conviction could be included in the political sphere. Weber’s discussion of the ethic of responsibility may be interpreted as one in which its adherents accept empirical, scientific knowledge as the ultimate guide to their action, comparing the embrace of facts with

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<sup>57</sup>Weber (1994), 360

<sup>58</sup>Roth and Schluchter (1984), 70

a similar devotion of a believer to his church. This perspective has been echoed in the previous section's presentations of neo-realist and institutionalist understandings of order in international society. In those two approaches, actors - whether they be individuals or states - reflect soberly on the evidence at hand and tailor their behavior accordingly. At the same time, however, seizing upon the calculated employment of an ethic of responsibility does not acknowledge the nature of the politician as expressed in *Science as a Vocation*. In this lecture, Weber notes that the tools of the politician are not only unscientific, they are hostile to the core features of scientific enterprise. Equating the politician with the demagogue, Weber emphasizes the fact that political discourse should only take place where the possibility of criticism exists. In contrast, the responsible scientist must "serve the students with his knowledge and scientific experience and not to imprint upon them his personal political views."<sup>59</sup> Just as genuine science cannot exist when influenced by political machinations, responsible political action can not occur in the absence of conflict and dialogue. The variance in interpretation of those mere facts essential to the ethic of responsibility is ill at ease with the subjectivity of the political sphere that drives conflict and dialogue within it. Politics is not a harmonious endeavor and the existence of debate over the interpretation of facts reflects that reality. Politicians, in Weber's view, are only problematically reconciled to the absolutes produced by scientific knowledge. Their world is defined by shades of grey that sits poorly with absolute conclusions to be drawn from evidence and facts provided by the scientific study of the world.

This creates a dilemma for understanding the nature of the politician. The ethic of responsibility presumes that politicians evaluate facts and develop strategies in the pursuit of their goals absent subjective preferences that may shape their interpretation of these facts; however, given the hostility of the politician to the absolutes created by scientific knowledge, the politician can never truly be impartial in their interpretation

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<sup>59</sup>Weber (2003), 146

of those facts. Constructivist accounts of international society resolve this dilemma by rejecting the possibility of objective interpretation in favor of a focus on how actors create intersubjective knowledge given the impossibility of truly knowing in any impartial manner the reality of the politically-salient world. In a constructivist view, Weber's politician would derive the ethical meaning of his act by the *a priori* commitment to a particular approach to action - what has been equated with state identity or the assumption of particular roles. Man does not create meaning for himself independent of action, but finds value in the framework he employs to guide his actions. The end goal of an action or its outcome is secondary to an evaluation of the means, determined by the assumption of socially appropriate roles, by which these goals are achieved. This, I would argue, contradicts Weber's discussion of the development of personality in those who serve politics as their vocation.

In his lecture *Politics as a Vocation*, Weber introduced the concept of the cause as one of the three defining characteristics of the professional politician. For politics to constitute genuinely meaningful human action, Weber requires that those who practice the vocation of politics direct their action towards a purpose beyond their vanity or personal enrichment – “to the god or demon who commands that cause”<sup>60</sup> – regardless of cause's nature or content. The significance of the pursuit of a goal outside one's self becomes apparent in light of the element of force which characterizes all political action. Weber's widely-recognized definition of the state as “that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory”<sup>61</sup> establishes force as a constant presence of all political activity. Because politics occurs in an environment defined solely by an institutionalized monopoly of force, political activity can never escape the possibility of violence as a tool. As a result, politics is incapable of adhering to any set of ethics that curtail the means by which ends may be achieved. When one recalls the

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<sup>60</sup>Weber (1994), 353

<sup>61</sup>Weber (1994), 310

instability and fear present in Hobbes's state of nature in light of a similar constant potential of violence, it comes as no surprise that Weber identifies power as the ultimate goal of all political activity: "Anyone engaged in politics is striving for power, either power as a means to attain other goals (which may be ideal or selfish), or power 'for its own sake', which is to say, in order to enjoy the feeling of prestige given by power."<sup>62</sup> Power, in this view, is both a tool with which other political objectives may be achieved, and a valued outcome in its own right. Rather than limit the constant undercurrent of violence to the state, Weber extends this definition to include all political associations. If one is to define a particular community as political, that community must assert its control over the "monopoly of legitimate physical violence."

While Weber identifies the 'cause' as an essential feature of the politician, the role allowed for the pursuit of power appears to offer a second imperative. Force is the defining characteristic of the political sphere and the capacity to gain and employ the means by which force is exercised may be considered one element of the definition of power. This leads us to the question of the goals of political activity laid out by Weber. Does the politician pursue his cause or power? The answer to this question has implicitly been provided by the various approaches to understanding order in international society. Neo-realist and institutionalist scholars have argued that political actors pursue power. Constructivist scholarship equates the formation of the politician's cause with the social creation of actor identity and is therefore of greater interest in understanding behavior. Because of these dichotomies, we once again return to the problem of reconciling the political actor's quest for power with Weber's argument that meaningful political action requires a cause.

According to Weber, the professional politician must possess three cardinal qualities: the existence of a cause or calling, a sense of responsibility, and the capacity

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<sup>62</sup>Weber (1994), 311

for distance to oneself and one's situation. The first of these, the calling, provides the politician with a direction for one's actions. "For the responsible politician, the 'cause' is the existential *a priori* of a consistent character, the thing that prevents him from 'becoming a [mere] actor.' The god or demon one serves provides the unquestionable foundation of one's conduct in the world, the organizing center that gives it unity, meaning and coherence."<sup>63</sup> The relative nature of moral virtue makes the search for an ethical compass outside the self impossible. One cannot be given or assigned a cause. Instead, the politician is required to create their own individual understanding of the ends of political action. Weber does not specify the origins of this cause apart from noting that it is derived from an individual's own character. If we can interpret Weber's view of the modern state and its leadership being, at least in part, dependent on the normative principles held by those ruled - the will of the people as it were, it may be possible to extend understanding of this will to include the non-tangible conception of a cause. Drawing upon Weber's *The Protestant Ethic and the Spirit of Capitalism*, we may incorporate into this discussion the concept of a community's *ethos* and its impact on the members of that particular society. "In order that this kind of conduct of life in attitude to one's 'profession', 'adapted' as it is to the peculiar requirements of capitalism, could be 'selected' and emerge victorious over others, it obviously had first to come into being, and not just an individuals, but as an attitude held in common by groups of people."<sup>64</sup> Weber's professional politician is not only a servant of these groups of people, but also a product. It is therefore possible to argue that the politician's selection of a cause may also reflect this community's dominant *ethos*.

This statement on the relationship between the politician's cause and the political community he serves has clear implications for understanding the normative aspects of order in international society. Individual actors may be regarded as possessing a moral

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<sup>63</sup>Villa (1999), 544

<sup>64</sup>Weber (2002), 13

dimension, but this normative component cannot be derived from a social role created from international interactions. The politician is inexorably connected to his domestic audience. The state - regarded as a multifaceted complex of individuals, institutions, and normative principles - can thereby be regarded as a vehicle for the promotion of a politician's cause that is the product of a self-aware political community rather than the empty receptacle of roles, identities, and values imposed upon it from external sources. The existence of this moral dimension of political life does not preclude strategic self-interest but is rather a prerequisite for it. Without what Weber calls personality, the politician is incapable of action in a world defined by competing interests, values, and strategies. "Personality for Weber is based in the final analysis on the consistency of one's inner relationship to ultimate values and life-meanings. How to make the choice between alternative ideal values, or even between alternative ethical viewpoints such as are represented by the ethics of responsibility on the one hand and the ethics of conviction on the other, cannot be determined by any set of formal rules."<sup>65</sup> The politician is confronted with a series of demands as broad as the range of values possible for any individual or collectivity to hold. Without personality, without a "consistency of its inner relationship to certain ultimate values and meanings of life, which are turned into purposes and thus into teleologically rational action,"<sup>66</sup> the politician is paralyzed. The cause, a sense of responsibility, and distance from one's self, form the basis by which any action or goal may be charged.

While Weber's politician requires a moral framework in order to judge competing priorities, this in and of itself does not determine the content of those priorities. From a theoretical perspective, this would allow for a wide range of values to serve as the politician's cause that orients his behavior: national security, material wealth, religious dogma, personal aggrandizement, etc. Personality and the source of that

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<sup>65</sup>Mommsen (1992), 134

<sup>66</sup>Roth and Schluchter (1984), 73

personality in domestic political contexts allows the politician to distinguish between and evaluate competing goals presented to him internationally. What, then, is to be the guiding principle for political action? Scholarship in international relations theory has understood Weber as providing two mutually-exclusive alternatives: the ethic of conviction and the ethic of responsibility. When we examine the politician's effort to create meaning - an orienting device used to select among competing goals - as a crucial component to the pursuit of these goals, we find that a degree of synthesis between the two ethics is possible. In this synthesis, the politician's cause, the moral purpose determined by an ethic of conviction, stands as the end goal of action oriented by an ethic of responsibility.

## **Framework for Analysis**

The reconceptualization of Weber's work presented in the previous section claims that political actors do pursue self-interested goals strategically; however, doing so requires a moral framework with which to judge competing priorities. Multiple courses of action may lead to a desired end. The various ends of political action may also be equally valuable, requiring a set of criteria by which this possible range of outcomes to be pursued may be evaluated against each other. This argument raises a number of ancillary questions regarding the expression and nature of this moral framework, its origins, and how it may be studied.

The first of these questions - the presence of a framework against which international actors judge competing goals and the means by which they are achieved - is answered by examining the definition of international society provided by the English School. Following Hedley Bull, an international society is "a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one



another, and share in the working of common institutions.”<sup>67</sup> Interaction between states creates, according to Bull, an international system. What distinguishes the order of an international system from that of international society is the presence of a shared set of rules that structure relations between states in that society. These rules “require or authorize prescribed classes of persons or groups to behave in prescribed ways.”<sup>68</sup>

This definition of international society as a group of states that are bound by a shared set of rules provides the basis for how the concept of normative principles is to be understood in the context of this dissertation. The terms normative principles, morals, and ethics are used interchangeably in the following chapters and refer to a particular class of “ideas which treat human action as right in themselves and not merely as a means to an end, as categorically and not merely hypothetically imperative.”<sup>69</sup> Among individuals and within societies, normative principles identify good from bad and distinguish right action from wrong. Drawing upon the discussion of Weber presented in the previous section, normative principles provide a yardstick by which the rules which define international society may be evaluated. In short, the existence of an international society is predicated on the presence of a set of shared principles among member states that allow these states to collectively evaluate a set of rules as good or bad. When we discuss how normative principles shape actor behavior at the international level, then, we are speaking of the ways in which moral principles create the system of rules that define international society.

If international society is defined as a set of rules grounded in shared moral principles, understanding the origins of international society implies understanding the origins of a particular set of ideas. That may be further developed by providing an account of how those ideas came to define what constitutes legitimate behavior

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<sup>67</sup>Bull (1995 [1977]), 14

<sup>68</sup>Bull (1995 [1977]), 52

<sup>69</sup>Bull (1995 [1977]), 75

within a society. Linking the study of international society to the study of the ideas that form the basis of that society incorporates a clear domestic dimension. While states may express and exchange ideas with other states, the formation and initial articulation of these normative principles takes place primarily at the domestic level - within "the largest political unit that recognizes no political superior."<sup>70</sup> Before it can be expressed internationally through state action, any discourse on what constitutes the appropriate set of normative principles to guide a society must first occur within political communities. This point reflects a much longer tradition, expressed in Thomas Hobbes's *Leviathan*, that sees political authority as an essential prerequisite for moral discourse. Hobbes denies the possibility of drawing moral conclusions absent a sovereign authority. "For the uses of good, evil, and contemptible are ever used with relation to the person that useth them, there being nothing simply and absolutely so, nor any common rule of good and evil to be taken from the nature of the objects themselves, but from the person of the man (where there is no commonwealth), or (in a commonwealth) from the person that representeth it, or from an arbitrator or judge whom men disagreeing shall by consent set up, and make his sentence the rule thereof."<sup>71</sup> Extending this to international society, we find that individual commonwealths may establish normative meaning by virtue of the presence of a sovereign power. Absent this sovereign or a commonly-recognized judge, however, the notions of good and evil are devoid of content. Relations between commonwealths cannot incorporate the moral dimension found in domestic politics precisely because the notion of morality cannot exist without the definitions that the *Leviathan* provides.

The third question raised is one that centers on identifying how normative principles are expressed internationally. The study of international society and its origins as the study of ideas requires the ability to identify the clear manifestation of ideas. For this we turn to the justifications provided by political actors at the international

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<sup>70</sup>Organski (1961), 18

<sup>71</sup>Hobbes (1994), vi.7

level in defense of their legal claims. As discussed earlier in this chapter, justifications contain within them an appeal to a shared set of principles regarded as legitimate by relevant actors. The choice of justification may be strategic or sincere, it may be directed towards domestic or international audiences, but in either case a justification is more than a string of words. It points to an understanding of what is appropriate in a normative sense. Justifications are statements concerning why a certain course of action is right, good, and appropriate.

Justifications can draw upon a wide range of moral ideas, but it is argued here that each of these normative principles contained within justifications may be reduced to one of two categories: the role of the individual in the political community and the legitimate basis of government. The role of the individual in the political community reflects a period's understanding of authority that is not dependent on a conception of sovereignty. Examining the individual within the political community seeks to identify the locus of power in a society based on Hobbes's distinction between author and actor: those who authorize acts on their behalf (authors) and those who are tasked with executing the directives given by those authors (actors). Contemporary international relations theory draws heavily on the notion that politically salient segments of society authorize political leaders to act on their behalf; however, this understanding of representation is historically contingent. Representatives, those who "are able to speak and act for those they represent because they have been specifically authorized to do so,"<sup>72</sup> can indeed act on behalf of citizens, interest groups, etc. At the same time, we can also conceive of societies where the author of action taken by secular authorities (viewed as actors) was not *theoretically* drawn from a local population but, for example, from divine will or another authority foreign to that society. By asking who or what is being represented and who is the author of actions taken by political representatives, we are asking about the locus of power. This locus

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<sup>72</sup>Vieira and Runciman (2008), 9

of power can assume the qualities that one would normally associate with sovereign authority, but it need not. That conceptual flexibility allows us to examine normative principles across time without the semantic constraints imposed by a definition of sovereignty that has meant different things to different societies at different times.

The legitimate basis of government - the “degree to which institutions are valued for themselves, and considered right and proper”<sup>73</sup> - is closely tied to the author/actor distinction contained in an analysis of an individual’s relationship with the political community. If identifying the individual’s role in the political community points to the locus of power, the legitimate basis of government explains why this is the case. Although the concepts are distinct - a subjective theory of rights is not synonymous with legitimate authority - they are closely related and one contributes to the meaning of the other. Taken together, the two provide a description of the source of authority in a political community and why this arrangement is valued among its members.

While theories on the individual in the political community and the source of legitimate government form the basis of the normative principles to be examined, these ideas are also articulated through political institutions and the dispute adjudication mechanisms in societies. Just as this dissertation argues that international society as a set of international institutions contains within it a moral dimension, so, too, domestic institutions. When we speak of a constitutional structure designed to promote individual liberty that is based on the will of the governed, in theory at least we are discussing how the idea of subjective rights bears upon the fundamental institutions of a polity. The source of adjudicative authority likewise bears the mark of theories of the individual’s relationship to the political community and sources of government legitimacy. A theory of adjudication “provides an accurate description of how judges really do decide cases, and, at the same time, strives to tell judges how they *ought* to decide them.”<sup>74</sup> It is both a normative and a descriptive theory and, by taking into

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<sup>73</sup>Lipset (1959), 71

<sup>74</sup>Leiter (1996), 255

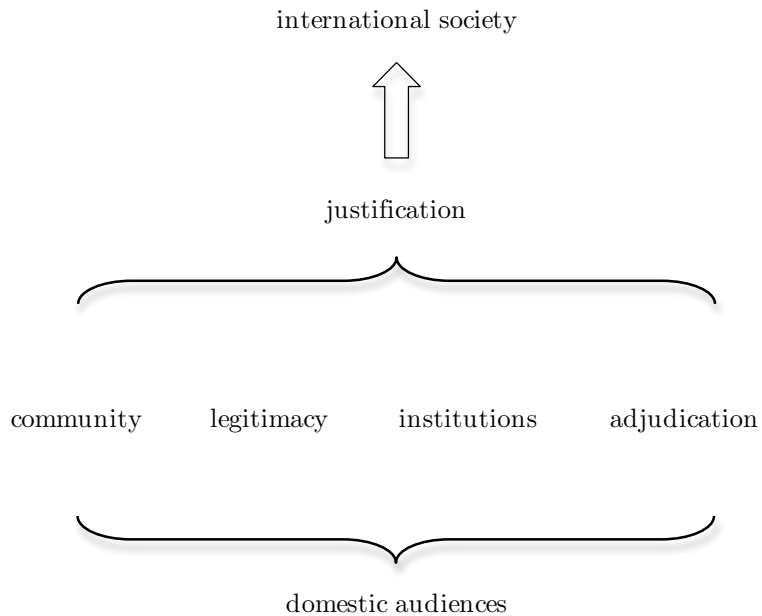


Figure 1.1: Normative Principles, Justifications, and International Society

account both of these dimensions, serves as a bridge between the normative principles discussed in the context of justification and the behavior of international actors.

Figure 1.1 illustrates this relationship between domestic audiences, ideas, justification, and international society. Drawing upon the previous section’s discussion of Weber’s concept of personality in the professional politician, the model is grounded in the idea that each political community possesses a dominant *ethos* that is expressed in its account of the individual’s relationship to the political community, the source of government legitimacy, political institutions, and a theory of dispute adjudication. Political actors are at once products of this set of ideas and a channel for their expression through the justifications provided for legal claims. The normative principles

contained in the justifications, in turn, serve as the moral foundation for international society.

Such a parsimonious account of the ideas underlying international society necessarily leaves open a number of salient questions. Power, defined as the ability to successfully coerce others to do what they ordinarily would not, is noticeably absent from this model. This is not to suggest the irrelevance or marginalization of power in the formation or promulgation of these ideas. Rather, power belongs to a separate line of inquiry. The dissertation seeks to provide an exposition of how ideas have been articulated in actors' justification of legal claims and how these ideas contain within them the foundational principles of international society. An analysis that contained considerations of power could potentially tell us a great deal about the success of these ideas and their promulgation both internationally and domestically; however, the ideas themselves are examined absent of those considerations. For similar considerations, the concept of domestic audiences has also been left deliberately vague. Diverse groups have enjoyed varying levels of political salience at different historical moments. While they are bearers of these normative principles, the influence they exert on the decision to articulate certain ideas through justifications would also best be served as the topic of a separate line of inquiry.

The dissertation argues that the justifications provided by international actors in the context of the seventeenth century free seas debate signal a fundamental shift in the normative principles upon which international society had been based. International society as a unified body of institutions and norms contains within it a dominant set of ideas that guide actors in their behavior, expressing, in Weber's terminology, the "personality" of those who pursue politics as a vocation. This "personality" enables actors to evaluate competing goals and then pursue them strategically according to an ethic of responsibility. These ideas are expressed through actors' justifications for their claims and draw upon four dimensions: the relationship of the individual to

the political community, the source of government legitimacy, political institutions, and the adjudication of disputes.

Through this historical analysis we find the presence of two distinct international societies predicated on two very different sets of ideas. Figure 1.2 illustrates the medieval world order expressed through in Spanish and Portuguese justifications in defense of their hegemony over the world's seas. Reflecting the Augustinian understanding of the unity of Christendom, the Spanish and Portuguese demonstrated a consistent reliance on a set of Catholic scholastic principles. These included: a subjugation of the pursuit of individual self-interest in the interest of the common good and pursuit of salvation through the community; a divine mandate as the basis for legitimate government; feudalistic institutional structures for the administration of ecclesiastical and secular affairs; and common recourse to the Church and canon law as adjudicator and mediator between God and man.

Figure 1.3 elucidates the principles that formed the basis of the justifications presented by the English and Dutch in defense of their maritime claims. In contrast to those presented by the Iberian powers, here we see a set of principles grounded in an ardent individuality: a theory of subjective rights; popular consent as the basis for legitimate government; political institutions that had the ostensible goal of promoting and guaranteeing individual freedoms; and the adjudication of disputes based on coercive power.

This account of the normative dimension of the justifications presented in defense of Anglo-Dutch claims to the sea provides a clearer understanding of the central principles of the post-Westphalian world order and its moral underpinnings. By examining the sources of these ideas we thereby gain a perspective on the origins of international society not as a function of state formation or the product of medieval war-making, but as the conspicuous manifestation of the ideas contained within the society that comprised this international community.

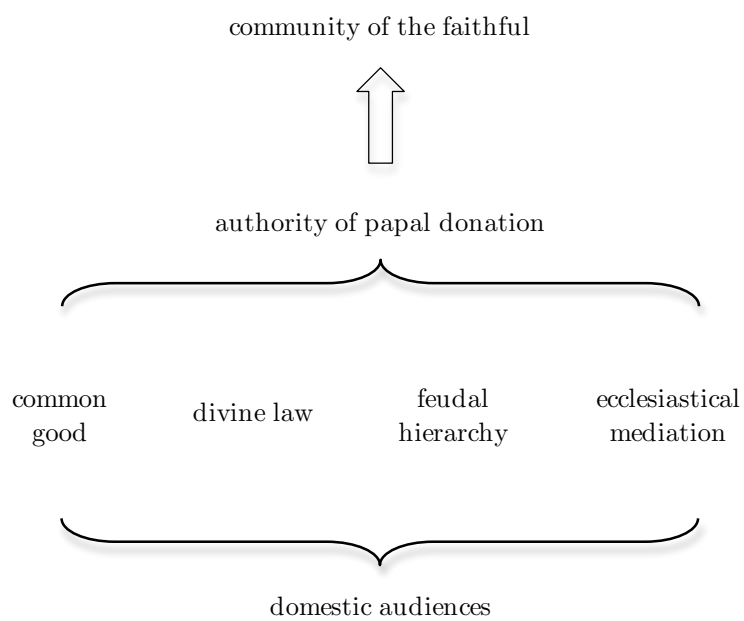


Figure 1.2: Medieval International Society



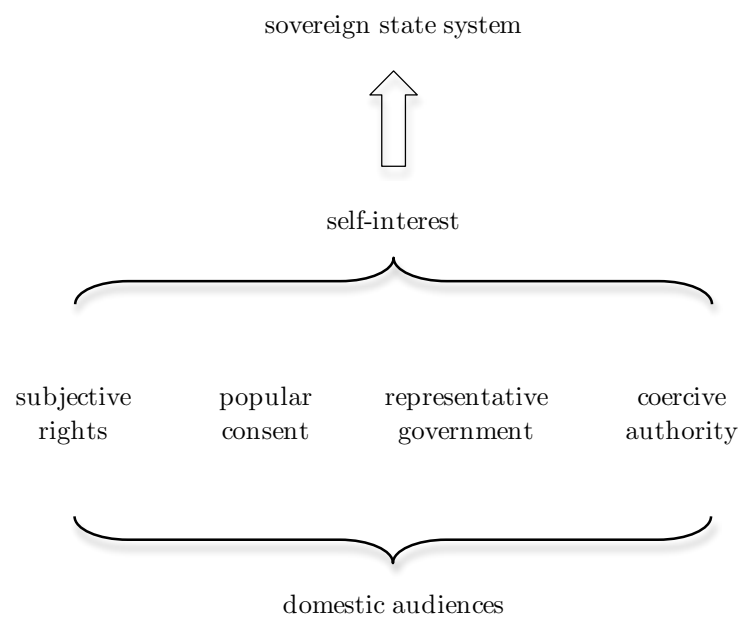


Figure 1.3: Early Modern International Society

## Structure of the Dissertation

The theoretical discussion presented in this chapter began by establishing the division between morality and self-interest as one of the defining features of the debate on institutional structures in international society. Efforts to explain the origins of international society have approached the issue from three different perspectives - emphasizing the role of power, interests, and identities - yet all implicitly refer back to the distinction between what March and Olsen have termed a logic of consequences or a logic of appropriateness. In the neorealist and historical institutionalist models of behavior, self-interested actors pursue their goals. Institutions may emerge as a product of this pursuit, as in the neorealist's view of the international system as analogous to a market. Institutions may be a tool for the pursuit of self-interest, as seen in Tilly's and Spruyt's historical accounts of institutions as the conscious creation of actors facing problems of efficiency and cooperation. Alternatively, institutions may be the product of identities and states' understandings of appropriate behavior given a certain role in a particular environment.

The difficult reconciliation of norms and institutions, morality and self-interest in existing studies of international institutions can largely be understood as a product of a particular reading of Weber's ethics of conviction and responsibility. In this reading, the two ethics are posited as diametrically opposed to one another. Actors may base their actions on calculated self-interest or a set of moral principles, but the two cannot exist at the same time. The previous section's reconceptualization of the logics of consequences and appropriateness through Weber's understanding of the politician provides a foundation for reconsidering the relationship between normative principles and institutional formation in international relations theory. The meaning to political action provided by normative principles provides actors a set of criteria required to orient their actions in the world. These criteria likewise offer guidance to the goals to be pursued. The meaning and value that actors attribute to particular

goals is determined by their normative value. Actors consciously select a normative framework from competing alternatives and objectives inherent in this framework are pursued through strategic means.

This reconceptualization creates two theoretical avenues to be explored in greater depth in the body of the dissertation: 1) the selection of a particular normative framework by actors; and 2) the translation of these principles into the conscious creation of international institutions. Returning to the historical case study briefly presented in this first section of this chapter, we that the early modern world presented actors with two alternative normative frameworks for action. The first, based on a Catholic scholastic understanding of the political universe as a hierarchically-ordered system based on divine will, had defined international institutions for centuries. The second, drawing from a Protestant humanist conception of the individual at the heart of all social activity, offered an alternative foundation for international institutions by situating at the heart of the discourse the rights of the individual, territorial sovereignty, and political legitimacy based on representation of individual interests. When drafting his defense of the seizure of the Santa Catarina, Grotius could have drawn upon existing Catholic conceptions of world order and legitimate action in the justification. Instead, he rejected international norms and promulgated a statement on international order and adjudication based on concepts of the individual in political society and legitimate government that existed among domestic audiences within the United Provinces.

The definition of sovereignty in the medieval world encompassed two particular aspects: first, ultimate authority stood as an essential and inalienable property of the sovereign power; and second, the sovereign stood outside the whole as something transcendent rather than at the top of a hierarchy. Sovereignty as a set of characteristics belonged to that which held this authority, above and independent of the body which it led. Sovereignty did not accommodate degrees or gradations, but rather

stood as absolute and untransferable. Leaders held their position by virtue of divine authority and subjects could not legitimately deny them their unreserved honor and obedience. Although the secular world clearly stood in secondary importance to the spiritual realm, sovereignty's fundamental characteristics – transcendent and absolute authority – touched both.

This view of sovereignty permeated the practical realities of Spain's discovery, exploration, and conquest of the Americas. Exploration brought with it a host of theoretical concerns. How could a relationship with non-Christian peoples be justified in the vocabulary of a Christian world view? The Spanish scholastics found their answer to this in a view of natural law - understood as a subjective interpretation of God's will - as a binding force on the conduct of men and nations. To violate a law of nature – including the natural freedom to trade – is to open oneself to punishment for the breach and “if the barbarians... persist in their wickedness and strive to destroy the Spaniards, they may then treat them no longer as innocent enemies, but as treacherous foes against whom all rights of war can be exercised, including plunder, enslavement, deposition of their former masters, and the institution of new ones.”<sup>75</sup> Individuals did not, in and of themselves, serve as the independent holders of rights. Natural law and the capacity to exercise the rights of nature existed as something external to the individual.

In Grotius, we find that the individual may indeed be the bearer of rights, in particular in reference to the possession of his own person. Van Heemskerck's view of the Portuguese as enemies did not require a formal declaration of war by the Dutch Republic. As “men of bad faith, assassins, poisoners, and betrayers,” the Portuguese created a situation of war against the Dutch in the Indies.<sup>76</sup> As individuals with a fundamental right to self-preservation, the Dutch were entirely justified in responding to what they perceived as Portuguese acts of aggression. Grotius maintained that the

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<sup>75</sup>de Vitoria (1991), 283

<sup>76</sup>Grotius (2006), 202

situation in the Orient was such that no independent judge was possible - the region lay “beyond the line” and beyond the reach of European public law. In such a case, “the right to self-preservation allowed private persons to be judges in their own cause and punish transgressors of the natural law.”<sup>77</sup>

Grotius’s rejection of existing international norms suggests that existing work on identity formation as created by interstate interaction may have overstated the impact of international norms on the creation of states’ interests. Recalling Hobbes’s statement on the impossibility of concepts of good and bad existing in the absence of a hegemonic power required to give the terms meaning, it may be more fruitful to instead regard normative principles articulated at the international level as an expression of values shared by a certain set of states. The normative principles that are expressed internationally are formed within states rather than between them. While domestic values have international ramifications, as will be seen by the impact of humanist philosophy on the foundational principles of the post-Westphalian world order, it is misleading to assume that “unlike psychological variables that operate at the individual level, norms can be systemic-level variables in both origin and effects.”<sup>78</sup> If right and wrong can have no meaning absent a hegemonic power and there exists no such figure at the international level, understanding the impact of normative principles on institutional formation requires an examination of normative principles in the domestic sphere - the arena defined by the presence of the authority required to differentiate good from evil.

To approach this concern with the normative basis of international society, the case of the Dutch justification will be examined from two different perspectives. The first perspective will focus on the historical evolution of international norms regarding maritime law from approximately the mid-fifteenth century and the Treaty of Tordesillas to the seventeenth century and John Selden’s rebuttal to Grotius in *Mare*

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<sup>77</sup>van Ittersum (2003), 54

<sup>78</sup>Finnemore (1996), 154

*Clausum*. The time frame is meant to strike a balance between a historical narrative so broad it loses significant detail, and a case study so narrow it cannot claim any sort of universality. It also provides a sufficient context for understanding the seizure of the *Santa Catarina* in terms of establishing the laws and customs in place before 1603, a discussion of the seizure itself, and an analysis of the incident's long-term implications. The second perspective will be entirely domestic and look to how political power and authority is legitimized within the boundaries of a polity. What is a state's domestic conception of sovereignty? I would suggest that the mid/late-sixteenth century presented philosophers and statesmen with a choice between traditional Catholic conceptions of sovereignty grounded in divine authority, and a view of the state as sovereign by virtue of its capacity to protect and promote the rights of the individual (which would later be re-articulated as Weber's monopoly on the legitimate use of force). Bringing justification to bear on these two perspectives, I will then provide an account of how states justified their maritime claims. When presented with a political choice requiring justification, do we see actors attempting to accommodate international legal norms or domestic justifications for sovereignty?

In examining the Spanish and Portuguese claims for global hegemony in the fifteenth and sixteenth centuries, we encounter a situation in which domestic sovereignty is identical to the dictates of international norms. France and England perpetuated this structure by petitioning Spain and Portugal for an accommodation of their interests within the Treaty of Tordesillas's structure. The Dutch, in contrast, rejected these international norms entirely as a guideline for behavior, instead transferring their domestic notions of sovereign power into a justification for international behavior.

## Chapter 2

# The Evolution of Maritime Law

The following chapter explores the evolution of maritime law as an international institution by tracing its development along two dimensions: 1) the legal instruments that regulated maritime issues; and 2) methods of adjudicating competing claims to ownership of the seas. Taken together, these two dimensions form the basis of maritime law as an international institution. Individually, each of these two dimensions illustrate areas of significant change within that broader institutional context. Through the examination of the evolution of legal framework and adjudication mechanisms from the ancient to the early modern world I hope to illustrate the presence of three unique sets of maritime institutions that provided a framework for interactions among polities on maritime issues.

In both the ancient and early modern world, states, merchants, and seafarers all sought to regulate activity on board ships by setting standards for jettison in case of possible shipwreck, medical care for sailors at sea, salvage, injury, and other matters that arose when dealing with the transportation of goods and individuals across the world's seas. These sets of issues benefitted from uniformity across cultures and domestic political institutions and a degree of legal homogeneity in response to these concerns can be seen as early as Hammurabi's Code of Laws (circa 1780 B.C.) and the Sumerian Laws Handbook (circa 1700 B.C.). Claims to ownership of the sea are

equally ancient with a long line of rulers having made grand statements on possessing the sea (as well as the moon and the stars) throughout the centuries. Despite these similarities, there also exist notable differences in maritime law over the centuries. A gradual increase of interaction between a more diverse set of polities accompanied technological advances that extended the seafaring range of ships and the accuracy of maps. With this opening of the world came a corresponding change in claims to maritime jurisdiction. Individual polities stood as both the source and legitimation of their claims to the sea and a declaration of supremacy served as a sufficient basis for ownership. As the Catholic Church grew in influence after the decline and collapse of the Roman empire in the fifth century it assumed a dual role with respect to the formation of maritime law. In some instances, as in the 1344 donation of the Canary Islands, the Church served as the source of jurisdiction over particular territories and their adjacent seas. As the heir to Christ's kingdom on Earth, the Holy See assumed the right to dispose at its discretion of God's lands unoccupied by Christian rulers. In other instances, such as the 1481 bull ratifying the Treaty of Alcáçovas between Castile and Portugal, the Church served as the ultimate legitimator of secular agreements. In the sixteenth and into the seventeenth centuries we see yet another shift in the orientation and legitimacy of maritime law. Maritime law became the outcome of conscious negotiation between states rather than the result of individual fiat or mediation by the Vatican.

The earliest claims to sovereignty over the seas were so vague as to be almost meaningless in practice. For the ancient Greek ruler Polycrates to call himself master of the seas brought little new with it in terms of expectations for the behavior of other polities. With the emergence of spheres of influence granted to Spain and Portugal by the Catholic Church we see a different understanding of law. From the thirteenth to the seventeenth centuries maritime law incorporated an element of administrative delegation. Lacking the military resources required to convert indigenous peoples in



newly discovered lands the papacy turned to the Catholic kings of Europe. Maritime law embodied a certain set of tasks - clear specifications of reciprocal duties and obligations characteristic of feudal law and fiefs - assigned secular powers by ecclesiastical authorities. The growth and the centralization of the modern nation-state brought with it yet a third perspective of maritime law. From the beginning of the seventeenth century, the law of the sea incorporated a greater interest in coordination and the establishment of expected behaviors among states. Maritime law seen in bilateral agreements specified with increasing precision the boundaries of the state, as well as the penalties that came with the violation of those boundaries.

The development of maritime law as an international institution will be traced in four stages. The first section provides a general overview of the ancient maritime law later incorporated into the medieval legal canon through the *Digest* of Justinian and medieval maritime law based on local custom. As alluded to above, the content of maritime law during this period emphasized the technical legal aspects of maritime trade and largely excluded any claims to jurisdiction over the seas. The first claims to jurisdiction over the sea and their legal foundations will then be the subject of the second section. In much of this period, jurisdiction over the sea came only as a by-product of claims to jurisdiction over territory accrued through the wave of exploration and colonization spearheaded by Castilian and Portuguese rulers. Only with the 1479 Treaty of Alcáçovas and the 1494 Treaty of Tordesillas do we see the sea recognized as an object of possession in its own right through these early divisions of the globe into spheres of influence. The third section presents a brief overview of the historical events leading to an explicit break with the role of the Church as the arbiter of maritime jurisdiction and ultimate source and legitimator of possession of the sea. The bulk of this discussion focuses on the first Dutch expeditions to the East Indies following their 1581 declaration of independence from Spanish authority and the 1603 seizure of a Portuguese carrack, the *Santa Catarina*, that precipitated the

publication of Hugo Grotius's statement of the freedom of the seas, *Mare Liberum*. The chapter concludes by other nations' understanding of the law of the sea, in particular the English, and the legal instruments that emerged from the seventeenth century struggle between the English and Dutch for control of the North Sea fisheries.

## Ancient and Early Medieval Maritime Law

Early historical sources are replete with examples of claims to dominion over the seas. Herodotus,<sup>1</sup> and Thucydides,<sup>2</sup> both chronicled claims to dominance of the sea. The fourth century bishop, Eusebius, drew upon ancient sources in his list of maritime rulers between the Trojan War and Alexander's invasion of Persia (approximately 1100 to 334 B.C.) and Plutarch recorded an international conference to address piracy in the Mediterranean.<sup>3</sup> Treaties between Greek seafaring communities in the ancient world existed but focused entirely on defining and regulating behavioral expectations between the contracting parties and did not involve the status of the sea as an object of possession. For example, an alliance between Hierapytna<sup>4</sup> and Rhodes in the late third century B.C. includes the Hierapytnians' promise to fight piracy on the sea between the two polities. The captured pirates and ships would be given to Rhodes and the remaining booty would be split equally.<sup>5</sup> The 431 B.C. treaty between Oeantheia and Chalaenum regulated the practice of reprisals, forbidding the seizure of property as retribution on land, but allowing the same practice on the open sea.<sup>6</sup>

Greek maritime law focused almost exclusively on regulating the behavior of those

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<sup>1</sup>"... for Polycrates was the first Greek we know of to plan the dominion of the sea, unless we count Minos of Cnossus and any other who may possibly have ruled the sea at a still earlier date. In ordinary human history at any rate, Polycrates was the first; and he had high hopes of making himself master of Ionia and the islands." Herodotus (1996), 201

<sup>2</sup>"Minos was the earliest known in our tradition to acquire a navy, and he controlled most of the sea now called Hellenic, ruled the Cyclades, and in most cases was also their first colonizer." Thucydides (1998) book 1.4

<sup>3</sup>Plutarch (1910), 130

<sup>4</sup>a community in what is now Crete

<sup>5</sup>Phillipson (1911), 65

<sup>6</sup>Phillipson (1911), 70-71

on board ships, their commerce and cargo, and the interactions between merchant and mariner. The earliest of these, the Rhodian Sea Law,<sup>7</sup> first recorded in Justinian's *Digest* yet dating from the second century B.C., exemplifies this emphasis on the technical aspects of seafaring.<sup>8</sup> While maritime law was primarily unwritten and based on custom, both the Greeks and their neighbors shared similar views on equal treatment of foreign merchants before the law, the non-binding nature of contracts, a common interest rate (ranging from 12 to 18 percent), and the use of special commercial courts to arbitrate certain matters.<sup>9</sup> Although there did exist remarkable similarity in maritime codes in the ancient Greek world, it would be misleading to depict a complete absence of variation. For example, the Greeks differed from the Rhodesians in their conception of general average - the principle that those who jettison cargo in order to ensure the ship's safety must take part in reimbursing the owner of the abandoned cargo for his loss.

Like their Greek predecessors, Roman law made no claims to jurisdiction over the sea. The sea was free to all and the power of the state ended at the shores of the Mediterranean. Characteristic of the precise definitions which distinguished Roman from Greek law, however, Roman law specifically defined the sea as being community property in both ownership and use. Both the sea and the shore, by their very nature, could not be appropriated.<sup>10</sup> In practical terms, this meant that the ancient Roman state could not forbid, for example, fishing from the shore: "When a fisherman erected

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<sup>7</sup>A thorough overview of the Rhodian Sea Law is provided by Ashburner 1909. For a discussion of Ashburner's work, as well as a broader investigation of ancient and medieval maritime law, see Sanborn (1930). Additional overviews of ancient maritime law are provided by Fulton (1911) and Anand (1982).

<sup>8</sup>The following excerpts from the Rhodian Sea Laws reflect this focus: 1) "The merchants and the passengers are not to load heavy and valuable cargoes on an old ship. If they load them, if while the ship is on its voyage it is damaged or destroyed, he who loaded an old ship has himself to thank for what has happened." Ashburner (1976), 91-91; 2) "A passenger's allowance of space is three cubits in length and one in breadth." Ashburner (1976), 59; and 3) "A ship is lying in harbour or on a beach and is robbed of its anchors. The thief is caught and confesses. The law lays down that he be flogged and that he make good twice over the damage he has done." Ashburner (1976), 77

<sup>9</sup>Sanborn (1930), 6-8

<sup>10</sup>Fenn (1925), 721-173

a hut on the shore, he acquired a right of ownership in it which lasted as long as the building remained standing, provided, of course, that he did not abandon it. When the building fell, this right was extinguished, the site became common once again, and some one else might build a structure there, and in his turn possess a property right in it.”<sup>11</sup> The limits of government ended at the high water mark.

While some differences may have existed in the ancient world with respect to local maritime customs and the degree of specificity used in legal language, there existed considerable consistency in the ancient Greek and Roman world in terms of their regulation of navigation and commerce on the Mediterranean. Even more remarkable in light of modern scholarship on the characteristic behavior of powerful states, no ancient political community has been recorded as claiming ownership of the sea itself on legal grounds. Naval supremacy did not create incentives for ancient Mediterranean powers to limit the freedom of the sea. The exercise of legal jurisdiction on the sea was not accompanied by a declaration or a right to the sea itself.<sup>12</sup> When the Roman Emperor Antonius (138 - 161 A.D.) declared, “I am, indeed, the Lord of the World, but the Law is the Lord of the sea,” he articulated the age’s understanding of maritime law - a set of rights and duties that originated through contract and that regulated behavior on the high seas but not ownership of the sea itself. This is not to suggest that rulers did not make broad statements of lordship over the seas. As noted above, Herodotus stated that “Polycrates was the first Greek we know of to plan the dominion of the sea,”<sup>13</sup> a plan which one may reasonably assume was accompanied by overt claims to jurisdiction. These claims, however, are best understood within the context of ancient maritime law. During this period, “the oscillations of power and hegemony counted for much in the adoption of this or that point of view, and in the application of this or that doctrine.”<sup>14</sup> The particular contingencies of individual

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<sup>11</sup>Fenn (1925), 723

<sup>12</sup>Fenn (1925), 726

<sup>13</sup>Herodotus (1996), 201

<sup>14</sup>Phillipson (1911), 91

circumstance determined claims to jurisdiction, not the constraining influence or tacit acknowledgement of norms that regarded the seas as capable of possession. In this context, claims to ownership of the seas may be interpreted as claims of influence rather than actual possession.<sup>15</sup>

Given the understanding of property at the time, such a claim to ownership of the sea would have been unlikely, if not altogether impossible. Jurisdiction did not constitute an immediate association with property rights. The early Roman conceptualization of law (*ius*) held law to be something fundamentally good that could be objectively known through a process of discovery. The notion served as a standard of behavior and existed as the product of an agreement or promise between two independent parties. Whereas property or ownership had a taken-for-granted quality to it (stemming from the fact of possession in the physical world), early Romans viewed law as coming into being through the result of custom and personal interaction. In reference to the sea, legal authority could be extended to maritime matters for the purposes of punishing piracy or levying taxes on trade and other commercial activities, yet authorities limited their focus to the tangible – men, ships, and goods. While interactions could be, and were, regulated, the sea as an inanimate object could not be.

Rights, including rights to the sea, and their recognition by legal institutions came to exist only through the provisions contained in contracts.<sup>16</sup> These agreements created a set of rights and obligations and the ancient world's maritime courts could not recognize the rights of an individual outside those proscribed in the contract. Without a contract stipulating one's duties, an individual could not claim that their

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<sup>15</sup>Phillipson (1911), 376-377

<sup>16</sup>Examples of this understanding of rights as emerging through contract may be seen in Athens's maritime courts. The primary surviving record of the Athenian maritime court's proceedings is contained in speeches attributed to the Greek orator, Demosthenes (Orations 32 - 35). For an overview of the features and procedure of the Athenian maritime courts, see Cohen (2005), Vinogradoff (1922), Cohen (1973), chapter 6 of Lanni (2006) and chapter 3 of Reed (2003). Cohen (1973) also argues that maritime law is the sole branch of contemporary international law which may be viewed as a direct descendent of Hellenistic thought rather than ancient Roman legal code.

rights had been infringed upon. Justice here emerged as the result of a contract. Independent of this contract, a notion of rights and obligations between the parties did not exist. To speak of a nation's or an individual's right to a thing is to speak of appropriate behavior in a particular situation. Given the existence of an agreement detailing the specific duties of the contracting parties, what was acceptable behavior? In the absence of such a contract, the concept of legal rights could not be applied. Extending this to the current discussion on the nature of maritime law in the ancient world, we may interpret this as an instance where rights only existed through mutual recognition - in this case, through the form of a contract. Outside an explicit agreement, it could not be said that a person or a polity possessed an inherent, inalienable "right" to a thing.

This relationship between the ancients' understanding of rights and the possibility of ownership of the sea is also echoed in the *Corpus Juris Civilis*. Formulated between 529 and 534 by Justinian I, the *Corpus* compiled various legal documents from the second through the sixth centuries into a single collection. This collection was comprised of four separate works: 1) the *Institutiones*, a student textbook; 2) the *Novellae*, a compendium of all laws passed after 534; 3) the *Digest*, a collection of opinions and interpretations of classical law; and 4) the *Codex Justinianus*, the Roman imperial statutes.

These earliest surviving written statements on the sea are consistent and unequivocal on its status as public property: "By the law of nature these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations."<sup>17</sup> This clarity of understanding reflected a general consensus among the ancients with respect to maritime practice. Polities could, and did, claim

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<sup>17</sup>*Institutes* Book I. Title 1.1 Sandars (1917), 90

jurisdiction over individuals at sea and both their commercial and personal interactions; however, a clear line separated the issues of jurisdiction and that of actual ownership.<sup>18</sup>

Although the shores were considered common to all, both the state and individuals could use its resources without rights to ownership. One example of this use is given in the *Institutes* in the instance of a fisherman erecting a cottage to rest or dry his nets in.<sup>19</sup> As long as the cottage or any other structure that marked a physical occupation held, an individual's property on the shore was respected. If the tide collapsed those buildings or if they were otherwise destroyed, the area returned to its status as communal property. To quote the *Institutes*:

Of things that are common to all any one may take such a portion as he pleases. Thus a man may inhale the air, or float his ship on any part of the sea. As long as he occupies any portion, his occupation is respected; but directly his occupation ceases, the thing occupied again becomes common to all. The sea-shore, that is, the shore as far as the waves go at furthest was considered to belong to all men. For the purposes of self-defense any nation had a right to occupy the shore and to repel strangers. Individuals, if they built on it, by means of piles or otherwise, were secured in exclusive enjoyment of the portion occupied; but if the building was taken away, their occupancy was at an end, and the spot on which the building stood again became common.<sup>20</sup>

The collapse of the Roman Empire did not appear to precipitate a shift in attitudes towards the sea as an object of possession. Nor did it represent a change in the object of maritime law, making it possible to speak of a unified set of international norms with regard to maritime activities from the ancient to the medieval worlds. While decentralized and fragmented across the continent, medieval Germanic folk law and local customs share common features that permit scholars to speak of a common legal style that provides a distinctly non-Roman source of maritime law. As throughout the non-Roman world, the earliest Germanic law differed little from habit. The

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<sup>18</sup>Fenn (1925), 716

<sup>19</sup>*Institutes* Book II, title 1.5 Sandars (1917), 91

<sup>20</sup>*Institutes* Book II, title 1.5 Sandars (1917), 91

formal proclamation and legal expression of these customs took place through local courts rather than legislative bodies or statutes issued by individual rulers. Local folk assemblies declared appropriate practice through *dooms*, or judgements.<sup>21</sup> These dooms were seen to be “divinely inspired affirmations of ancient custom. They were the will of the gods - or, after the introduction of Christianity, the will of God.”<sup>22</sup> The dooms’ legitimacy stemmed largely from the common perception of its roots in ancient practice. “The law of which they spoke was binding because it was old; it was old because it was divinely instituted. ‘Right’ changed slowly and surreptitiously; overt changes in the legal order required very strong justification.”<sup>23</sup>

As seen in Roman maritime law, these Germanic folklaws viewed the high seas and inland seas as communal property and open to common use.<sup>24</sup> Accordingly, the sea itself was not regulated, but the manner of its use was. The legitimacy of these regulations stemmed from their perceived timelessness and the associations with divine revelation that came with that view of the law’s eternal nature that complemented the growing influence of canon law in the medieval period. The introduction of Christianity did not challenge the Germanic legal order. Instead, the new religion complimented local rituals of nature worship by offering a new orientation of the practices. God had created the natural world and all in it to serve man.

With the decline of Rome, these local customs gained primacy over more sweeping maritime legislation employed within the Roman Empire. Despite this shift, however, maritime legislation in the medieval world retained a general similarity in its focus on regulating property and interactions on the sea rather than the claiming ownership or jurisdiction of the sea itself. The *Consulate of the Sea* served as a written collection of local ordinances used to guide mercantile tribunals (known as *Consulatus Maris*) in major port cities ruled by the kings of Aragon. These courts emerged in the eleventh

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<sup>21</sup>Hübner et al. (1918), 5

<sup>22</sup>Berman (1983), 62

<sup>23</sup>Berman (1983), 62

<sup>24</sup>Hübner et al. (1918), 279



century as the product of merchant and marine guilds' authority to arbitrate maritime disputes. Like the merchant law that developed to regulate trade in the continent's commercial fairs,<sup>25</sup> customary laws governing conduct on the sea was unique to each city yet quite similar in terms of content.<sup>26</sup> Other prominent bodies of maritime law from the period - the Ordinances of Trani, the Tables of Amalfi, the Rolls of Oleron, the sea laws of Wisby, and Barcelona's Counsuls of the Sea - served as written accounts of long-standing customs designed to provide clarity and continuity. Maritime law in this period accommodated new conditions, but it did so through a metamorphosis in custom rather than by legislative or executive proclamation.<sup>27</sup>

This absence of a meaningful discussion on appropriating the sea may be seen as the product of the nature and acquisition of property in the ancient and medieval world. It may also be interpreted as a natural extension of a cultural aversion: "The ocean was generally regarded by [the Romans], not so much as a means of communication, and a connecting link between the different and most distant countries of the globe, but rather as an insurmountable barrier; and so, to navigate it was usually thought to be an offense against the gods."<sup>28</sup>

This centuries-long continuity in maritime legal practices allows the distillation of a number of characteristics that together form a coherent set of international norms during the period from the seventh through the twelfth centuries. Individual trading communities created similar statutes that provided a uniform administration of justice among seafarers and merchants. The influence of these legal instruments stretched across Europe as "many of the customs were derived from very early practices, and the influence exerted was such that for a long period the Consulate [of the Sea] was recognized as the law governing prizes in many states, including England."<sup>29</sup> The

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<sup>25</sup>For a more detailed discussion of these fairs and the evolution of merchant law, see Greif et al. (1994)

<sup>26</sup>Jados (1975), v-xiv

<sup>27</sup>Sanborn (1930), 43

<sup>28</sup>Phillipson (1911), 369-370

<sup>29</sup>Ogilvie (1920), 35

decline of these laws as the foundation for maritime interactions came with the dawn of the age of exploration in Europe from the twelfth and thirteenth centuries.

## **Spanish and Portuguese Appropriation of the Seas**

If, following Rousseau, the first enclosure of land marked the origins of civil society,<sup>30</sup> a similar observation may be made about the first global appropriation of maritime space and its role in the creation of international society. In the ancient and early medieval periods we find a largely un-codified system of maritime law, based on local custom, limited to the regulation of commerce and behavior on board ships. With the discovery of the Americas and the wave of exploration burgeoning forth from Europe, maritime law began to incorporate more explicit proprietary elements. In the fifteenth century, papal bulls and treaties between maritime powers referred to the sea as reference points for territorial possessions absent a more certain means of identifying large swaths of yet-unexplored territory. Of these global appropriations of space, three are of significant concern in this context: Venice's twelfth century claims to hegemony over the Adriatic; the fourteenth century papal donation of the Canary Islands, one of the most important legal precedents for later appropriations of land and sea; and the 1494 Treaty of Tordesillas that divided the world into Spanish and Portuguese spheres of influence.

With the collapse of Rome, Pisa and Tuscany attained hegemony over the Tyrrhenian Sea and Genoa gained control over the Ligurian Gulf and Venice established naval superiority over the Adriatic. Each of these powers levied tolls on those passing through the waters,<sup>31</sup> yet the rights claimed by these polities do not appear to have been codified - either in domestic laws or in treaties. This absence of codification suggests that the case of Venice may best be understood as similar to those instances

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<sup>30</sup>"The first man who, having enclosed a piece of land, thought of saying 'This is mine' and found people simple enough to believe him, was the true founder of civil society." Rousseau (1984), 109

<sup>31</sup>Potter (1924), 36-37

of jurisdictional claims to the sea seen in the ancient world: a reflection of Venice's naval superiority in the region.<sup>32</sup>

Venice stands as the clearest exception to this near-universal focus on maritime law as regulating the activities on and in the sea rather than the sea itself; however, interpreting Venice as an anomaly belies the extent to which its history also serves as representative of the age and a site of anticipatory discourse on the early seventeenth century debates on the nature of the sea. Even though her territorial borders did not encompass both coasts, by the thirteenth century Venice had claimed sovereignty over the entire Adriatic.<sup>33</sup> To a certain extent, this may be seen as a reflection of Venice's naval superiority in the region. They could assert their claim to jurisdiction over the sea because their military strength compelled respect even without consent. At the same time, there is doubt as to whether or not this claim was widely accepted or recognized outside Venice - a point strengthened by the observation that the forcefulness of these claims to sovereignty declined with Venice's military and economic power.<sup>34</sup> Rather than debate the degree to which Venice may or may not be seen to have exercised sovereignty over the Adriatic, it may be more fruitful in the context of this discussion to examine how Venetians themselves justified their claims. How did they perceive and justify their claims to sovereignty in legal terms? The answer depends in large part on the timing of the question.

The defining episode centers on a historical episode at the foundation of Venetian self-perception as one of the greatest powers of the day centers on the 1177 victory of Pope Alexander III over the Holy Roman Emperor, Frederick I. Frederick I's conquests in northern Italy in 1158 represented an open confrontation between the "secular Romanism" of the Holy Roman Empire and the ecclesiastical authority of the Holy See.

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<sup>32</sup>Fenn (1926), 468-469

<sup>33</sup>Fulton (1911), 3-4 Between the eleventh and fourteenth centuries, the Venetian Republic controlled a number of port cities primarily along the eastern Adriatic coast from the Istrian peninsula to Durazzo (Durrës in modern Albania).

<sup>34</sup>Fenn (1926), 468-469

Frederick I (alone among the Christian rulers) refused to recognize Alexander III's contested election to the Papacy in 1159 and, in turn, Alexander III excommunicated Frederick I. For almost 20 years, Frederick I led numerous campaigns into Italy until an overwhelming defeat by the Lombard League opened the door to negotiations that concluded with the Peace of Venice in 1177.<sup>35</sup> More detailed, colorful accounts of the narrative focus on the Venetian role in providing refuge for the Pope (fleeing from Alexander III's armies) and acting as a mediator in the struggle between church and state.

When news came that, one after the other, the Italian communes were being defeated by the emperor, Alexander III fled south. Upon discovering a conspiracy, he then disguised himself as a simple monk and, on a fishing boat, crossed the Adriatic to Venice. There, he lived in humble hiding in a convent for some six months. When the government discovered his presence, the doge solemnly recognized the pope and pledged to help him negotiate a compromise with the emperor. Ambassadors were sent to Frederick with this purpose, but the emperor angrily demanded that Alexander be delivered to him in chains, and threatened otherwise to bring the imperial eagle on top of St. Mark's. To prove his point, the emperor sent his own son at the head of a fleet of 75 galleys, against which the Republic hastily put together a much smaller force of thirty. Yet, under the supreme command of the doge and with the help of God, they reached and defeated the imperial fleet, capturing the prince himself. The return to Venice was a triumph, with the galleys greeted at the Lido by a jubilant pope. The defeated emperor then also came to Venice, where the doge acted as intermediary to enable a peace agreement. In recognition of the doge's crucial role, the pope gratefully gave him a series of symbolic gifts, including (as in all good stories) a ring. This was presented by the pope to the doge, as a symbol of dominion over the sea, and it was in memory of this that every year, on Ascension Day, the marriage of

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<sup>35</sup>Ullmann (1972), 193-197

the sea was performed.<sup>36</sup>

Even allowing for a certain mythological flourish, this narrative is a story of property rights based on Papal donation. While nations could claim rights to property in the sea, in the twelfth century these claims could only be legitimized by the Vatican's official recognition.<sup>37</sup> By the early seventeenth century, however, a dramatically different justification was promulgated. In 1612, Paolo Sarpi - the legal and theological advisor to the Republic of Venice - wrote a series of briefs that renewed Venice's claims to sovereignty, albeit on a radically different basis than that of papal donation. He argued for a complete lack of distinction between the ownership of territory and the ownership of the sea. Each was originally free. Each could be possessed by those able to assert their authority over it.<sup>38</sup>

In contrast to the legal ambiguity that surrounded Venice's claims to the Adriatic, the earliest instances of papal donation provided a much more straightforward legal basis for jurisdiction over non-European lands and served as the basis for the later discussion on the ownership of the high seas. One of the earliest, if not the first, exercise of papal authority over non-European lands came in 1295 with Pope Boniface VIII's gift of two islands - Gerba and Kerkeni - off the coast of Tunis as a fief to the Sicilian admiral, Roger Doria.<sup>39</sup> In 1344,<sup>40</sup> Pope Clement VI granted Don Luis de la

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<sup>36</sup>de Vivo (2003), 160-161

<sup>37</sup>Alternatives to papal donation as the basis of maritime sovereignty did exist in the Mediterranean world in the twelfth and thirteenth century and, given their extensive trade with other nations, Venice would have been aware of these laws. For example, classical Islamic law defined a polity's territorial waters as extending to the distance at which the top of a ship's masts could be seen from land. The Andalusians maintained a coastal fleet that could seize and inspect ships up to six miles off the coast. For additional information see Khalilieh (1998).

<sup>38</sup>de Vivo (2003), 171

<sup>39</sup>O'Callaghan (1993), 289

<sup>40</sup>There is a lack of clarity in the historical record as to the exact title of the bull and the date of its issue. According to HARRISSE (1897), the bull *Sicut Exhibits Nobis* was issued on November 15, 1344. This view is supported by de Viera y Clavijo (1772). According to Verzijl et al. (1971), the bull was titled *Tuae devotionis sinceritas* and issued on November 28, 1344. Meliá (2000) cites November 15, 1344 as the date the bull *Tuae devotionis sinceritas* was issued. A comparison of the bulls' reprinted in Marín (2009) and de Viera y Clavijo (1772) points towards the existence of only one document pertaining to Don Luis's jurisdiction over the Canary Islands. Variations in translation from the original Latin to Spanish may account for some of the textual differences (although the general meaning remains the same). Here the citations in the text indicate the source for the material. To

Cera - a prince of Castilian origin serving as the French ambassador to the Holy See - ownership and temporal jurisdiction over the Canary Islands.<sup>41</sup> In return, Clement VI required the annual payment to the Vatican of 400 florins in pure gold. Should the payment not be made, the bull stipulated specific punishments in increasing degrees of severity. Were the property tax to fall in arrears, the Prince would first be excommunicated. If the outstanding sum was not paid in full within a year, ownership of the Canary Islands would then return to the Church of Rome.<sup>42</sup>

There are two points of interest in language of donation employed in the bull. First, the Church's appears to view its right to dispose of territories unoccupied by Christian rulers as absolute and not dependent on any external recognition or acceptance. No precedents or other legal foundations - secular or ecclesiastical - are cited as grounds for the donation within the bull. The Canary Islands are given to Don Luis "by virtue of full Apostolic authority, in [the Church's] own name, in [the name] of the Roman pontiff's successors, and in [the name] of the Holy Roman Church."<sup>43</sup> Second, Clement VI delineated a clear lord-vassal relationship between the Church and Don Luis. This is evident in the title of prince (rather than one of royalty) and Luis's jurisdiction over the islands being contingent upon his payment of annual taxes.

Both Afonso IV of Portugal and Alfonso XI of Castile issued letters of protest to the Vatican in February 1345, but later indicated their willingness to provide support to Don Luis.<sup>44</sup> These statements against Clement VI's decision are revealing for the insight they lend to understanding the nature of the relationship between the Church and the Castilian and Portuguese monarchs. In his letter, Alfonso IV expressed his regret with the donation and argued that the Portuguese should receive the exclusive

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avoid any confusion, the papal authorization will not be referred to by name or exact date.

<sup>41</sup>Harrisse (1897), n. 161

<sup>42</sup>de Viera y Clavijo (1772), 8

<sup>43</sup>de Viera y Clavijo (1772), 7

<sup>44</sup>O'Callaghan (1993), 291

right to promulgate the faith in the Canaries due to the fact that they were the first discoverers of the islands. The king also raised the issue of the Portuguese wars with the Castilians as a cause for their failure to solidify their conquest after that discovery.<sup>45</sup> At no point, however, did Alfonso IV challenge the pope's right to donate the islands to Don Luis. There is no sense of disobedience or a challenge to the Church's authority. While secular authorities actively petitioned their claims and did not merely act as passive recipients of the Pope's largesse, there does seem to have existed a recognition and acceptance of the pope's authority as both a mediator and the ultimate source of legitimation for territorial claims among secular rulers.

If the Pope was recognized as the final authority among secular rulers in matters of extra-European territorial expansion, infighting within the Church raised a dilemma - which Pope would be accepted as the legitimate source of law? Between the late twelfth and early fourteenth centuries, the papal court routinely left Rome for lengthy periods.<sup>46</sup> Shortly after the election of archbishop of Bordeaux, Bertrand de Got, to the papacy as Pope Clement V (1305-1314) the papal administration moved permanently to Avignon in southern France.<sup>47</sup> Avignon remained the seat of the papacy until Pope Gregory XI (1370-1378) returned the Church's administrative apparatus to Rome in 1377. The Sacred College of Cardinals - an advisory body to the pope comprised of all the Church's cardinals - selected a second pope, Clement VII, to assume the seat in Avignon while Gregory XI and his successors ruled the Church in Rome. Through this division between the cardinals and the pope, two parallel centers of Church authority existed between 1377 and 1417: one in Avignon and a second in Rome. In what would later be called the Great Schism, each group claimed legitimate authority over Church affairs and each body produced a series of popes.<sup>48</sup>

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<sup>45</sup>Marín (2009), 29

<sup>46</sup>It is estimated that between 1198 and 1304, the popes spent approximately 60 percent of their time outside the Eternal City. This has been attributed to unhealthy living conditions due to poor sanitation in Rome during the summer months and regular civil unrest and conflict in the area.

<sup>47</sup>Zutshi (2008), 653-654

<sup>48</sup>In the interest of maintaining continuity with the predominant body of literature on the topic,

It is in this context that French explorers Jean de Béthencourt and Gadifer de la Salle initiated their conquest of the Canaries in 1402 supported by a bull from antipope Benedict XIII (*Apostolatus officium*) and the encouragement of French King Charles IV. After encountering unexpected difficulties, the two explorers appealed to Henry III of Castile for assistance shortly after their arrival in Lanzarote. In response to Béthencourt's homage and willingness to conquer the island in the name of Castile, Béthencourt was named king of the islands by Henry III. At the same time Portugal continued to pursue its own colonization efforts in the islands. Both Portugal and Castile continued to claim jurisdiction until the matter was finally resolved in the 1479 Treaty of Alcáçovas ending the War of Castilian Succession (1475-1479). In it, Afonso V of Portugal recognized Castilian possession of the Canaries and the Spanish monarchs, Ferdinand of Aragon and Isabella of Castile, recognized Portuguese claims to the Azores, Madeira, Guinea, and the Cape Verde Islands. The treaty also acknowledged Portugal's right to:

all the islands hitherto discovered, or in all other islands which shall be found or acquired by conquest [in the region] from the Canary Islands down toward Guinea. For whatever has been found or shall be found, acquired by conquest, or discovered within the said limits, beyond what has already been found, occupied, or discovered, belongs to the said King and Prince of Portugal and to their kingdoms, excepting only the Canary Islands. . . <sup>49</sup>

Pope Sixtus IV confirmed the Treaty of Alcáçovas with his 1481 bull, *Aeterni regis*. With it he reiterated papal approval of Portugal's claims to exclusive rights in Guinea contained in the bulls *Romanus pontifex* (1455) and *Inter caetera* (1456) and affirmed Portugal's rights to exploration off the West African coast, thereby bringing "the weight of papal authority. . . to bear against any attempt on the part of Castile

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the following discussion self-consciously embraces a version of historical events written by the victors. The title "antipope" will be used to refer to the the Avignon popes in the period between 1377 and 1417. The highest Church authority based in Rome will be referred to as "pope" for that same period.'

<sup>49</sup>Davenport (1917), 44



to evade her agreement.”<sup>50</sup> While not stated explicitly, the treaty and subsequent papal bull effectively created Spanish and Portuguese spheres of influence. This then provided the legal precedent for the unequivocal division of the globe that would follow in the Treaty of Tordesillas.

Upon his return to Europe in March 1493, Columbus met first with the King of Portugal.<sup>51</sup> During their interview, the King informed him of Portugal’s intent to claim the “Indies” and adjacent seas based on a series of treaties and papal proclamations.<sup>52</sup> Immediately after learning of the Portuguese claims, Spain sent envoys to Rome to state their case and receive Papal confirmation of Spain’s right of ownership. The dilemma presented to Pope Alexander VI by the Spanish petition centered on how to establish Spain’s ownership without nullifying or contradicting the series of bulls and treaties which legitimized Portugal’s existing rights. Nicholas V’s *Romanus pontifex* of 1455, granted Portugal exclusive rights to a region stretching from Ceuta (on the southern coast of the Strait of Gibraltar) to the yet-unexplored regions south of Guinea. It clarified the 1452 bull, *Dum diversas*, and unequivocally confirmed Portugal as the lawful owner of the African west coast.<sup>53</sup> The 1456 bull *Inter caetera* issued by Nicholas V’s successor, Calixtus III, confirmed *Romanus pontifex* and granted Portugal “all kinds of ordinary jurisdiction, both in the acquired possessions. . . and in the other islands, lands, and places, which may hereafter be acquired by the said king. . .”<sup>54</sup>

Alexander VI responded to the Spanish request in a series of four bulls: 1) *Inter*

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<sup>50</sup>Davenport (1917), 49

<sup>51</sup>Inclement weather had prevented the Niña from landing on the Spanish coast and Columbus was forced to dock in Lisbon.

<sup>52</sup>Dawson (1899), 492

<sup>53</sup>“ . . . have prohibited and in general have ordained that none, unless with their sailors and ships and on payment of a certain tribute and with an express license previously obtained from the [Portuguese] king or infante, should presume to sail to the said provinces or to trade in their ports or to fish in the sea. . . the said King Alfonso, or, by his authority, the aforesaid infante, justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbors, and seas, and they do of right belong and pertain to the said King Alfonso and his successors. . .”Davenport (1917),12, 22-23

<sup>54</sup>Davenport (1917), 31

*Caetera* (May 3, 1493) which granted the Spanish monarchs all newly-discovered territories “provided however they at no time have been in the actual temporal possession of any Christian owner;”<sup>55</sup> 2) *Eximiae Devotionis* (May 3, 1493), a more precise re-statement of the May 3 *Inter Caetera*; 3) *Inter Caetera* (May 4, 1493) which created a line of demarcation one hundred leagues west of the Azore or Cape Verde islands; and 4) *Dudum Siquidem* (September 26, 1493) a confirmation of the May 4 *Inter Caetera* and a specific revocation of any previously-issued bulls that might appear to grant Portugal jurisdiction over regions not in her possession.

In circumscribing Portugal’s aspirations and defining Spain’s rights to possession, Alexander VI “evidently distinguished between what he knew and what he did not know.”<sup>56</sup> Rather than speculate as to the earth’s circumference or define any uncertain latitudes or longitudes, the Pope began with a definite point - the most westward of the Atlantic islands owed by the Portuguese (the Azores or the Cape Verde islands). One hundred leagues west of that point, a line was to be drawn from pole to pole. All newly-discovered territories to the west of that line would belong to Spain. All territories to the east would belong to Portugal.<sup>57</sup> With the condition that no lands previously claimed by a Christian monarch could be possessed, Alexander VI effectively resolved any potential conflict that could arise if and when the Spanish and Portuguese met on the other side of the globe.

Following the series of Papal bulls, this first global ordering of the space of the sea was followed later in 1494 by the *partition del mar oceano* contained in the Spanish-Portuguese Treaty of Tordesillas. In that treaty, the two Catholic nations agreed that all territories discovered west of the line would belong to Spain and those east of the line to Portugal. These lines were followed by the line established in the Pacific Ocean through the Spanish-Portuguese Treaty of Saragossa in 1526. Although Spain

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<sup>55</sup>Davenport (1917), 62

<sup>56</sup>Dawson (1899), 493

<sup>57</sup>For a more detailed discussion on these initial steps towards a demarcation of a global order, see Schmitt 2003.

and Portugal accepted the necessity of a line of demarcation running from pole to pole, the Treaty of Tordesillas took the Cape Verde Islands (rather than the Azores) as the location of the initial meridian - placing the line 170 leagues farther westward than that of the bull.<sup>58</sup>

The *rayas* contained in the papal bulls and the Treaty of Tordesillas “were not global lines separating Christian from non-Christian territories, but were internal divisions between two land-appropriating Christian princes within the framework of one and the same spatial order.”<sup>59</sup> The *rayas* indicated a consensus in international law concerning and represented the historical moment in which the appropriation of land was no longer something distinct from the appropriation of the sea. Spain and Portugal entered the Age of Discovery within the order of a Christian republic and under the common authority of the Vatican. While the scale of the conquests was unprecedented, the means by which they were authorized were very much in line with that of the age. As seen as early as the thirteenth century, secular rulers regularly turned to the Church for legal authorization and the stamp of legitimacy of their expansionist projects.

Beyond the instrumental value - its institutions and bureaucratic apparatus - of the Catholic Church as an international organization, the role of the Vatican in establishing legitimate, recognized principles of international law reflected the moral and intellectual climate of the age. “The need for legal systems was not merely a practical, political one. It was also a moral and intellectual one. Law came to be seen as the very essence of faith.”<sup>60</sup> This system of law was not something to be legislated by a branch of government, but discovered and applied by the papacy. As important as the papacy’s role as international mediator was the existence of separate spheres of ecclesiastical and secular jurisdiction that did not correspond

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<sup>58</sup>Greenlee (1945), 160-161

<sup>59</sup>Schmitt (2003), 92

<sup>60</sup>Berman (1983), 521

with territorial boundaries. While the Church exercised its authority over spiritual matters, political rulers exercised their respective authority over secular matters - both carrying equal legitimacy at the same time in the same geographic location.

After the initial donation of jurisdiction to the Spanish and Portuguese, this division of institutional labor that characterized the relationship between secular and ecclesiastical powers gave way to increasing control on the part of the monarchs of the ways in which land and sea would be divided and used. The amity lines - the first exception to the global apportionment of the sea - in the 1559 Treaty of Cateau-Cambrésis between France and Spain occurred in the context of a growing interest on the part of non-Iberian powers to actively participate in this new age of discovery. Two decades prior, Portugal had granted French privateers permission to use Portuguese harbors to lie in wait for Spanish fleets returning from the colonies with treasure. These attacks alongside French explorer Jacques Cartier's successful expeditions to the Americas prompted Emperor Charles V to grant the French permission to trade in the Indies if they stopped all other exploratory activities (the agreement was not signed due to Portuguese opposition). The Treaty of Cateau-Cambrésis ended the struggle between France and Spain for control of Italy and a verbal agreement made at the negotiations granted France permission to "navigate west of the prime meridian and south of the tropic of Cancer at their own risk, and that what was done in those regions would not be regarded as violating international amity, since treaties would have no force beyond those lines."<sup>61</sup>

Although the precise latitude and longitude of what constituted "beyond the line" is a matter of some historical debate,<sup>62</sup> there did exist an awareness among European rulers of waters governed by law and a zone in which might made right. In a letter to England's James I from Spain's Queen Regent, Marie de Medici, the Queen writes, "And no matter how many times negotiators from both sides have met, they have

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<sup>61</sup>Davenport (1917), 3

<sup>62</sup>Mattingly (1963)

never found any resolution of this particular difficulty [on the exact location of the ‘line’], except to agree verbally and by word of mouth that, however many hostile acts occur beyond the meridian of the Azores to the west, and the Tropic of Cancer to the south, there shall be no occasion for complaints and claims for damages, but whoever proves the stronger shall be taken for the Lord.”<sup>63</sup>

England under Queen Elizabeth likewise made reference to the fundamental illegitimacy of ownership by papal donation. “[Elizabeth] would not persuade herself that the Indies are the rightful property of Spain . . . only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory, acts which cannot confer property. So that . . . this imaginary proprietorship ought not to hinder other princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the law of nations.”<sup>64</sup>

As Schmitt observes, “although the historical type of so-called *amity lines* was related to European land- and sea-appropriations of the New World, it was based on completely different premises. . . Essentially, they belonged to the age of religious civil wars between land-appropriating Catholic powers and Protestant sea powers.”<sup>65</sup> This dramatic difference in underlying premises is evident in a Spanish envoy’s letter to King Philip II of Spain: “They allege the ordinary argument that the sea is common and free, while we are relying upon the principles laid down in the bulls of Pope Alexander and Jules II.”<sup>66</sup> This move away from the Vatican as a legal reference point emerged even more markedly in the discussion following the seizure of the *Santa Catarina*.

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<sup>63</sup>Mattingly (1963), 149

<sup>64</sup>von der Heydte (1935), 459

<sup>65</sup>Schmitt (2003), 92

<sup>66</sup>Mattingly (1963), 458

## The Seizure of the Santa Catarina

While Spain's fortunes thrived with its colonial endeavors abroad, within Europe the Spanish monarchy faced increasing challenges to its authority. The most significant in the context of this discussion on the law of the sea came with the revolt of the Habsburg Netherlands and creation of the United Provinces. The same war between France and Spain that had given rise to the Treaty of Chateau-Cambrésis - the document permitting French exploration in Spanish waters - had also aggravated Spanish relations in the Low Countries. After a series of revolts beginning in 1566 and a brief period as a protectorate of England, the United Provinces emerged as a cohesive, functioning state by 1590. While the military dispute with Spain would continue well into the following century, by the end of the 1590s the United Provinces experienced a dramatic growth in wealth due to the expansion of commercial and shipping activities.<sup>67</sup>

Focused Dutch efforts to extend their maritime trading reach beyond Europe's boundaries began in 1592 when nine Amsterdam merchants sent Cornelis de Houtman and his brother Frederik to Lisbon to steal information on the Portuguese spice trade. The two were caught, convicted, and imprisoned. In the interim, the nine merchants had formed the *Compagnie van Verre* (Long Distance Company) in 1594. When the de Houtman brothers returned to Amsterdam in 1595, Cornelis was appointed captain of the first fleet of four Dutch ships that set sail for the East Indies. In economic terms, this first expedition is regarded as an unmitigated disaster. Out of 249 men who set sail in 1595 only 89 returned in 1597 on three ships with a small

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<sup>67</sup>The death of Portuguese King Sebastian I in 1578 precipitated a conflict between a number of challengers to the throne. The crisis ended in 1580 when Spain's Philip II united Spain and Portugal in the Iberian Union. At that time, Philip was also crowned Philip I of Portugal. The union continued until 1640. For the sake of clarity, the current discussion of Dutch foreign policy will collapse the Spanish/Portuguese distinction and only reference Dutch relations with Spain. Portugal will be used as a reference only when explicitly noted in the literature (as seen, for example, in the description of the *Santa Catarina* as being a Portuguese ship).

cargo of pepper.<sup>68</sup> As a rallying point for growing Dutch nationalism and as evidence of the viability of long distance trade, however, the trip was regarded as a tremendous success. The *Compagnie van Verre* made its second expedition to the East Indies in 1598, led by Admiral Jacob van Neck and Vice Admiral Jacob van Heemskerck. Van Heemskerck returned to the United Provinces in 1600 while van Neck and a portion of his crew remained in the Indies. Their 1601 execution by Portuguese authorities in Macao provided the central justification for what would become an international debate on the freedom of the seas.

Van Heemskerck departed for the East Indies in April 1601 as part of the third wave of Dutch trading missions to the East Indies. Upon the arrival of the eight ships off the coast of Java in February 1602, the expedition spent the following year trading and establishing Dutch posts at various ports in the region. Like many Dutch traders before him, van Heemskerck encountered a number of obstacles to his efforts. Inclement weather made some ports impossible to reach and the presence of the Dutch fleet triggered dramatic price inflation in some of the markets that could be accessed. Other ports had their spice stocks exhausted. The Sultan of Demak detained twelve of van Heemskerck's crew to serve as gunners in his war against the Mataram of Java. For all intents and purposes, it would be difficult to characterize the first half of van Heemskerck's expedition a success.<sup>69</sup>

Over the course of one of many military exchanges with the Portuguese, van Heemskerck learned of the execution of 17 Dutch sailors - van Neck and his men - by the Portuguese in Macao in November 1601. The historical account presented by Blussé (1988) paints a picture of violent acts of retribution by both parties. Upon his arrival in the region in 1601, Van Neck learned that Dutch sailors had been taken by surprise and "dismembered and hacked into pieces one by one in front of each

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<sup>68</sup>Israel (1995), 319

<sup>69</sup>van Ittersum (2003), 7-20

other”<sup>70</sup> by their Portuguese hosts after receiving a misleadingly friendly welcome in Tidore. Van Neck took revenge by (unsuccessfully) attacking Portuguese ships. After continuing his travels and facing inclement weather, Van Neck docked at the Portuguese settlement of Macao. Eleven members of his crew were captured by the Portuguese in an attempt to make contact on shore. A second set of six sailors sent as envoys were likewise promptly captured. The Dutch ships were isolated in the bay and prevented from making contact with either the Chinese or Portuguese. Van Neck and his remaining crew left the area shortly thereafter, leaving the captured sailors behind without knowing whether or not the prisoners were still alive. Van Heemskerck learned of the execution from letters discovered in the June 1602 capture of a Portuguese frigate and it was these executions which served as a rallying cry against the Portuguese for van Heemskerck and his crew.

To avenge what he believed to be their wrongful deaths and punish the Portuguese for their attacks against Dutch traders, van Heemskerck ordered his crew to lay in wait off the eastern coast of the Malay peninsula for Portuguese merchants. Van Heemskerck found a local ally in the Sultan of Johore. The Sultan had been attacked by the Portuguese for his decision to engage in trade with the Dutch. In retaliation, the Sultan provided van Heemskerck with information on the location of Portuguese ships in the region.<sup>71</sup> On February 25, 1603, the tensions came to a head with van Heemskerck’s capture of the Portuguese carrack, the *Santa Catarina*.

The financial impact of the seizure and its importance to the VOC were enormous and unprecedented. Accounts describe the cargo as consisting of: “1,200 bales of raw Chinese silk; chests filled with coloured damask, atlas (a type of polished silk), tafettas and silk; large amounts of gold thread or spun gold; cloth woven with gold thread; robes and bed canopies spun with gold; silk bedcovers and bedspreads; linen and cotton cloth, thirty last (approximately sixty tonnes) of porcelain comprising dishes

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<sup>70</sup>Blussé (1988), 651

<sup>71</sup>Borschberg (2002), 45



‘of every sort and kind’; substantial quantities of sugar, spices, gum, musk (also known as bisem); wooden beds and boxes, some of them beautifully ornate with gold; and a ‘thousand other things, that are produced in China’.” The ship also carried approximately 70 tons of gold and “a ‘royal throne’ that was inlaid with precious stones.”<sup>72</sup> At auction, the cargo was valued at roughly £300,000 (using seventeenth century exchange rates).<sup>73</sup> To provide some basis for comparison, England’s total revenue for 1600 amounted to approximately £170,000.<sup>74</sup> England’s income from direct taxes in 1600 totaled approximately £75,000.<sup>75</sup>

The value of the prize made it an opportune target for privateers and the Estates General placed its navy in the North Sea and English Channel on high alert. When the Dutch fleet intercepted the *Santa Catarina* in June 1604, eight out of eighteen sailors had survived the return voyage. The *Santa Catarina* docked in Emden (Germany) and Van Heemskerck and his crew on the *Witte Leeuw* (White Lion) arrived in Amsterdam in July 1604. Not surprisingly, a number of contending claims to the Santa Catarina’s cargo arose. The Holland and Zeeland trading companies had merged in March 1602 to form the VOC, the inheritor of Van Heemskerck’s commission. The VOC’s directors appealed to the Amsterdam College of the Admiralty Board for access to the *Boshuis* - a storage area for the most valuable cargo. The request was granted under the condition that two of the Board’s members be present to ensure an accurate inventory of the ship’s cargo. Dutch sailors guarding the Santa Catarina in Emden were said to have appropriated part of the cargo, selling Chinese porcelain on the city’s streets. The Frisian College of the Admiralty Board seized four Dutch ships involved in transporting the Santa Catarina’s cargo from Emden to Amsterdam. The Estates General instructed the Amsterdam College of the Admiralty Board to allow the VOC’s directors to auction off the cargo’s perishable goods. Amsterdam’s sheriff immediately

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<sup>72</sup>Borschberg (2002), 38

<sup>73</sup>van Ittersum (2003), 36

<sup>74</sup>O’Brien (2006), 56

<sup>75</sup>O’Brien (2006), 76

tore down the handbills announcing the sale, arguing that the Admiralty Board had encroached on his municipal jurisdiction. Amsterdam's burgomasters adjudicated the dispute, siding with the Admiralty Board, and the cargo was sold in two auctions in August and September 1604.<sup>76</sup>

The sale of the cargo did not, however, solve the question of who possessed rightful ownership of the prize. Three plaintiffs presented their cases to the Admiralty Court: Holland's Solicitor General on behalf of the County of Holland; Van Heemskerck and his crew; and the VOC's directors. During its deliberations the Admiralty Court issued bi-monthly summons for other claimants to the cargo which remained unanswered. On September 1, 1604, the Estates of Holland relinquished all claims to the cargo, leaving only the VOC and Van Heemskerck as the plaintiffs. The Admiralty Court ruled the carrack and its cargo to be good prize - property legitimately seized in war - and that the proceeds of its sale should be divided between Van Heemskerck and his crew and the VOC directors.<sup>77</sup>

Although Portugal did not present a claim to the *Santa Catarina* before the Amsterdam Admiralty Court, doing so would not have been unusual. Fighting piracy through the courts may not have amounted to a legal offensive against the practice, but both states and merchants did pursue their commercial interests through diplomatic and legal channels. England's privateering campaign had precipitated a prodigious amount of litigation, some with respect to treaty obligations and others regarding commercial interests. In 1597 an English privateer seized goods from a Dutch ship and sold the booty in Barbary. The English Admiralty Court gave the United Provinces' agent a commission to recover his stolen goods. After doing so, the agent was then sued in England's civil court system by the privateer.<sup>78</sup> In 1557, the King of Portugal sued an English privateer that had captured Portuguese goods

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<sup>76</sup>van Ittersum (2003), 115-116

<sup>77</sup>Grotius (2006), 510-514

<sup>78</sup>Prichard and Yale (1993), f. xciv-xcv

after they had been seized by French privateers. Although treaty provisions existed which required the goods to have been returned to the Portuguese after the provision of a salvage payment, the English Admiralty Court declared the property to be the English privateer's good prize.<sup>79</sup> In 1602, a Dutch ship sailing for the Zeeland VOC captured the Portuguese carrack *St. Jago*. The bulk of the captured cargo belonged to a group of Jewish traders in the Low Countries and a Florentine merchant, Francisco Carletti. Both parties petitioned the Middelburg Admiralty Court for the return of their property. Upon the rejection of their petition, the parties then appealed to the Dutch Estates General. Taken together, these cases raised questions of competing jurisdictions between different court systems and political authorities. They did not, however, touch on the issue of proprietorship of the high seas. The Amsterdam Admiralty Court similarly eschewed any mention of Spanish and Portuguese jurisdiction of the seas in their discussion on the future of the *Santa Catarina*'s cargo.

Rather than turn to any existing set of treaties or bulls defining international boundaries, the Amsterdam Admiralty Court's justification for the seizure of the *Santa Catarina* was entirely self-referential in the sense that the Court considered no law not promulgated by the Dutch themselves. Their first line of argumentation centered on the status of Spain and Portugal as enemies of the Dutch Republic. In the context of the Low Countries' revolt against their Hapsburg rulers, the Dutch Estates General passed a resolution on April 2, 1599 authorizing Dutch privateers to consider all Spanish and Portuguese ships open targets.<sup>80</sup> This declaration was reinforced by article 37 of the Dutch East India Company's charter (1602), which declared the Portuguese and Spanish enemies of the Dutch people.

The Court also grounded their approval of the *Santa Catarina*'s seizure on the basis of van Heemskerck's commission. In the commission granted him by Prince Maurice of Nassau, Lord High Admiral of Holland, Van Heemskerck received permission for

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<sup>79</sup>Sanborn (1930), 283

<sup>80</sup>For the text of the article, refer to Appendix B of Grotius's *De Iure Praedae*.

“the use of force in self-defense and... in order to obtain reparations for damages sustained.”<sup>81</sup> The Board failed to comment on how this commission would allow for an attack on a Portuguese vessel when Van Heemskerck had not been harmed. Nor did it elaborate on how a calculated capture could be described as something other than piracy. Grotius elaborated upon the Admiralty’s ruling and argued that Prince Maurice’s commission had made Van Heemskerck an agent of the Dutch Republic.<sup>82</sup> As such, Van Heemskerck’s actions were perfectly consistent with the Dutch Estates General’s 1599 policy on war against Spain’s Philip III (who also ruled Portugal at the time).<sup>83</sup> Although no direct order to seize the *Santa Catarina* had been given, “the lack of such authorization would nevertheless have been counterbalanced by the execution of a publicly advantageous enterprise, and by retroactive approval, so to speak.”<sup>84</sup> Van Heemskerck was neither a pirate nor a privateer. In his attack on the Portuguese, van Heemskerck acted as an extension of the Dutch state.

Third, the Amsterdam Admiralty Court supported the capture almost based on the decision made by the fleet’s Broad Council<sup>85</sup> while in port in the East Indies.<sup>86</sup> On December 4, 1602, the Broad Council unanimously agreed to remain in the port of Pulau Tiuman to lie in wait for Portuguese merchant ships. The policy document which emerged from that meeting justified an attack against the Portuguese for three reasons: 1) any attack on Portuguese trade would ultimately weaken the Habsburg efforts to quell revolt in the Netherlands; 2) the “ravenous Portuguese” had encouraged indigenous rulers to prohibit Dutch merchants from their markets and harbors;

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<sup>81</sup>van Ittersum (2003), 521

<sup>82</sup>Here Grotius necessarily incorporates a discussion on the right to revolt and the independent nature of the body politic as something distinct from that body’s ruler. The Dutch people were within their rights to declare war on Spain and, by association, Portugal. Having established the Dutch as an independent nation, Grotius then continues to elaborate upon Van Heemskerck’s role as an agent of the state in his support of the war against the Spanish. see Grotius *De Iure Praedae*, Chapter 13

<sup>83</sup>van Ittersum (2003), 28

<sup>84</sup>Grotius (2006), 305

<sup>85</sup>The Broad Council was a body comprised of all naval officers in the fleet and held responsibility for decision-making while at sea.

<sup>86</sup>van Ittersum (2003), 23

and 3) the Portuguese would continue to try to eradicate the Dutch presence in the East Indies and the only option remaining was to “attack and harm [the Portuguese] wherever we can or may.”<sup>87</sup>

The relevance of the decisions made by the Broad Council and the Amsterdam Admiralty Court for the United Provinces’s claims of the sea is more clearly understood in the context of its war against Spain. “A revolution, a truly great revolt of a kind which fundamentally transforms the course of history, can arise only where there has been a long gestation creating unbridgeable constitutional, social, ideological, and spiritual rifts.”<sup>88</sup> Factors such as Spanish military occupation, religious repression, taxation, and the Council of Troubles<sup>89</sup> had fostered the conditions for revolt and, in 1572, small-scale local rebellions against the Spanish had become a full-scale revolt. Calvinist troops (called *Geuzen*) seized the port of Brielle in April 1572 and shortly thereafter gained control of cities in Holland and Zeeland. In July 1572 regional magistrates met in Dordrecht and proclaimed William of Orange Stadtholder of Holland and Zeeland. In 1579 the seven provinces that had rejected Spanish rule<sup>90</sup> formalized their joint commitment to continued resistance in the Union of Utrecht, thereby creating the United Provinces of the Netherlands. The new state was formally led by the States General, a council of representatives from each of the provinces based in The Hague. Each province was led by a freely-elected Stadtholder with the exception of the Generality lands, those areas that fell outside the seven provinces and were governed directly by the States General.

By the beginning of the seventeenth century, the economic and military impact of continued war had created pressure on Landsadvocaat<sup>91</sup> Johan van Oldenbarnevelt

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<sup>87</sup>van Ittersum (2003), 520-521

<sup>88</sup>Israel (1995), 169

<sup>89</sup>The Council of Troubles (1567-1574) was a tribunal created by the Spanish governor of the Netherlands, the Duke of Alba, to suppress heresy and rebellion. Thousands were imprisoned or killed on orders of the Council.

<sup>90</sup>Holland, Zeeland, Utrecht, Guelders, Overijssel, Friesland, and Groningen

<sup>91</sup>The position of Landsadvocaat (Land’s Advocate) was a particularly powerful one in the United Provinces. Also known as pensionaries (*pensionaris*), the office originated as an advisory position to

and the States of Holland to end the fighting. In 1606, Oldenbarnevelt argued that the Republic faced a choice: it could either cede its sovereignty and seek the protection of French King Henry IV or agree to a truce with Spain. Spain, facing similar financial and military difficulties, conceded its interest in recognizing the United Provinces as a state in return for the new nation's withdrawal from the Indies. In a series of informal negotiations, Oldenbarnevelt agreed that the Republic would relinquish its position in the Indies - disbanding the VOC and relinquishing all plans for a West India Company - in exchange for its independence.<sup>92</sup> At the same time, Prince Maurice of Nassau (Stadtholder of Holland, Zeeland, Utrecht, Guelders, and Overijssel) and Count William Lewis of Nassau (Stadtholder of Friesland and Groningen) were ardently advocating continued war with Spain. Oldenbarnevelt found additional support for peace with Spain among economic elites while Maurice's policy of continued warfare received the endorsement of the military and Calvinist clergy.

The tension between the two domestic factions received a temporary reprieve with the 1607 armistice between the United Provinces and Spain. In that document, Spain recognized the United Provinces as "free provinces and states over which [the Spanish] had no pretensions."<sup>93</sup> Negotiations for a peace began in The Hague in February 1608 and focused on four issues: the recognition of the United Provinces's independence; the status of territories in Flanders and Brabant; toleration of Roman Catholicism in the United Provinces; and the Dutch trade in the East Indies. The justifications provided by the Dutch in support of their claims to the East Indies will be discussed in further detail in the following chapter. In the context of this chapter's discussion on the claims made to jurisdiction over the sea, however, the proposals made by the Dutch to the Spanish delegation are of particular relevance. Recognizing Spain's interest in preventing the expansion of Dutch trade, the Republic's representatives

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local and regional magistrates. In the United Provinces, the Landsadvocaat of Holland also served as the chair of the States General.

<sup>92</sup>Israel (1995), 400-401

<sup>93</sup>Davenport (1917), 259

submitted three options to Spain: “peace, with free trade to those parts of the Indies not actually possessed by Spain; peace in Europe, and a truce in the Indies for a term of years with permission to trade during that period; trade to the Indies ‘at their peril’<sup>94</sup> after the example of the French and English.”<sup>95</sup> The Spanish delegation favored the second option. The final agreement, the 1609 Treaty of Antwerp marking the beginning of what would be the Twelve Years’ Truce, stated that the United Provinces would be entitled to trade freely in the region except in areas already held by Spain.

These declarations of Dutch authority and the successful assertion of that authority in the 1609 Treaty of Antwerp are at once entirely novel and a continuation of previous practice. We saw that the above-mentioned 1598 Treaty of Cateau-Cambrésis had established a precedent in the creation of thematic and geographic areas exempt from Papal authority. After the initial Papal donation, Spain and Portugal clearly envisioned themselves as being able to control the distribution of the areas under their control as they saw fit. Completely independent of the Papacy, the Spanish and Portuguese also concluded that there existed regions in which law did not apply - the areas beyond the line set by the *rayas* of the Treaty of Cateau-Cambrésis. At the same time, by circumventing the Vatican in their claims to the right to trade in the East Indies, the Dutch explicitly contradicted the prevailing maritime institutions illustrated in the previous section; however, at the beginning of the seventeenth century there existed no clear indication that the alternative to international maritime order implicitly proposed by the Dutch case would become the basis of a new set of institutions that governed relationships between states on the high seas. Only with

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<sup>94</sup>This phrase may refer to an oral agreement made alongside the 1598 Treaty of Cateau-Cambrésis allowing French and English navigation in the Indies. Like the Dutch, the French had argued that the sea was common to all, but that they would consent “either that the French keep away from lands actually possessed by the aforesaid sovereigns, or, as an alternative, that, as in earlier treaties, the Indies should not be mentioned, and if Frenchmen were found doing what they should not they might be chastised.” Davenport (1917), 220 As discussed in the previous section, this understanding created amity lines beyond which European law and treaties would be seen to have no relevance.

<sup>95</sup>Davenport (1917), 261

England's promulgation of the same set of principles articulated by the Dutch could we begin to speak of an international order that replaced the one dominated by the Catholic Church.

## England's Response

Under the Tudors (1485-1603), England made no formal claims to sovereignty or jurisdiction over the seas. English fishers co-existed with the Dutch in the coastal waters off the British Isles and, while the development of local fisheries had been of interest to the monarchs, this interest had not been translated into a claim to the sea itself.<sup>96</sup> The fisheries did, however, provide the foundations of the policy dialogue that would later become the debate over the freedom of the sea. Two proposals for the development of fisheries (out of a number in circulation during the period) in particular illustrate the degree to which England, in particular under Elizabeth, served as a bridge between the principles of international law as understood by the Vatican, Spain, and Portugal and those later promulgated by Grotius.

The first of these proposals, presented by John Dee, appeared in 1577. In his *General and Rare Memorials pertayning to the Perfect Arte of Navigation*, Dee argued that foreign seamen should pay the Crown a tribute for fishing in English waters. That tribute would be collected by what may be considered a form of coast guard or a "petty navy royal." Dee provides a number of reasons for the creation of English territorial waters: economic benefits, military safety, historical precedent, etc. He also draws upon the idea that England may very well declare the seas to be hers as, in the most direct terms, the nation has the military might to defend that claim.

And though sundry other valiant Princes, and Kings of this Land, I could recite, which, in tymes past, have either by Intent gone about: or, by wise and valyant exploit, have meetly well prospered, toward this Ilandish appropriat Supremacy atteyning: Yet, Never, any other reasonable Means

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<sup>96</sup>Davies (1959), 21



was used, or by Humayn wyt, and Industry, can be contrived, to all purposes Sufficient, But onely, by our SEA-FORCES prevayling: And so, by our Inuincib[. . .] enioying All, within the SEA-LIMITS, of our Brytish Royallty, Conteyned. To which Incredible Politicall Mystery atteyning, No easier, readyer, or perfecter Plat and Introduction, is (as yet) come to my Imagination, than is, The Present and Continuall Seruice, of Threescore, good, and Tall, warlik Ships, with Twenty smaller Barks[. . .] and those 80, Ships (great and small) with 6660 apt Men, furnished: and all, singularly well appointed, for Service, (both on Sea and Land) faithfully and diligently, to be done, in such Circumspect and Discrete Order, As, partly, I haue in other places declared: and farder (upon good Occasion Offred) may declare.<sup>97</sup>

Two years prior to the publication of Dee's book, the English jurist Edmund Plowden had argued that English waters extended to the mid-point of the sea that separated England from another power. Because Queen Elizabeth also had title to France and Ireland, she had exclusive jurisdiction over the English Channel. Plowden did not extend this jurisdiction to ownership to the sea as "the water and the land under it were things of no value, and 'the fish are always removable from one place to another.'"<sup>98</sup> Dee agreed with Plowden's limits, but allowed for the possibility of the English monarch to own the sea rather than simply exercise her jurisdiction over it. Elizabeth I rejected Dee's ideas on claiming sovereignty to the seas surrounding England and continued to act as a strong proponent of a *mare liberum*. Like the Dutch, she rejected title based on papal donation and refused to recognize Spain and Portugal's global claims. She also rejected similar claims to maritime sovereignty made by Norway and Denmark.

The second of these proposals was published in 1580 as a "New Year's gift to England" by a Catholic naval officer, Captain Robert Hitchcock. Like Dee, Hitchcock also sought to strengthen England's fisheries, yet adopted an approach that relied more on strengthening England's ability to compete in the international marketplace than claim jurisdiction over the seas. Rather than pronouncing the adjacent waters

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<sup>97</sup>Dee (1577)

<sup>98</sup>Fulton (1911), 102

part of England's jurisdiction, Hitchcock developed a proposal that invested in the construction of a national fishing fleet. Funding for this new fleet would initially come from investors purchasing shares in the new enterprise.<sup>99</sup> England's competitive advantage came through their proximity to the fishing grounds and did not require exclusive use of the seas as he believed "there was enough fish in the northern seas for all, even if there were 1000 sail more than there was."<sup>100</sup>

Until Elizabeth I's death in 1603, England had only required that passing ships lowered their sails when passing through the English Channel, known at the time as the narrow seas. This policy of lowering a foreign ship's topsails in salute was, however, rigidly enforced. In his diary, Chief Secretary to the Admiralty Samuel Pepys (1633-1703) provided an account of this enforcement:

When [the Duke of] Sully was sent by Henry IV., in 1603, to congratulate James I. on his accession, and in a ship commanded by a vice-admiral of France, he was fired upon by the English Admiral Mansel, for daring to hoist the flag of France in the presence of that of England, although within sight of Calais. The French flag was lowered, and all Sully's remonstrances could obtain no redress for the alleged injury.<sup>101</sup>

After ascending to the English throne, James I took three crucial steps towards reversing Elizabeth's free seas policies: the creation of the King's Chambers; the recall of British sailors in foreign service; and instituting a license requirement for foreign fishermen off the English coast. Although he never issued the explicit claims to maritime jurisdiction made by his son, Charles I, Elizabeth I's advocacy of *mare liberum* no longer applied to the English understanding of the high seas.

The first of these steps occurred in March 1604 when James I presented the Admiralty Court with a series of charts defining twenty-six "King's Chambers,"<sup>102</sup> the boundaries formed by connecting the outermost points of the English coasts. Within

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<sup>99</sup>Hitchcock (1580)

<sup>100</sup>Fulton (1911), 98

<sup>101</sup>Pepys (1904), f.128

<sup>102</sup>England et al. (1605)

these inlets and bays, James I expressly prohibited belligerent acts by hostile parties. The decision was not without historical or legal precedent: a 1521 treaty between Emperor Charles V and Francis I of France protected ships in harbors and bays from attack. Both historically and in James I's case, however, these boundaries did not constitute a claim to ownership of the seas. They established areas in which ships could safely seek refuge - of particular relevance when considering the wars between Spain and the United Provinces at the time - but did not extend to protection of the fishing fleets.<sup>103</sup>

The recall of British sailors in foreign service came the year following the end of the English war with Spain through the 1604 Treaty of London. James I issued the measure, "A Proclamation for revocation of Mariners from forreine Services," in conjunction with a series of other ordinances designed to limit piracy and reverse Elizabeth's encouragement of privateering.<sup>104</sup> While not explicitly addressing the monarch's jurisdiction over the sea, the proclamation did mention a clear English sphere of authority - "within our Portes, Havens, Rodes, Creekes, or other places of our Dominion, or so neere to any of our sayd Portes or havens as may be reasonable construed to bee within that tytle, limitt, or Precinct..."<sup>105</sup> Precise definitions are not made with respect to the limits of the King's authority, but the implication is clear. Where ancient and medieval maritime law sought to regulate maritime activity on ships, the ordinances issued by James I sought to regulate maritime activity within a certain geographical area.

The third step in this gradual erosion of England's free seas principles took place in 1609 when James I's Privy Council took up proposals rejected by Elizabeth on the taxation of foreigners fishing in waters off the English coast. On May 6, 1609, James issued a proclamation in which he stated that "no person of what nation or quality

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<sup>103</sup>Fulton (1911), 150

<sup>104</sup>Burgess (2008)

<sup>105</sup>Marsden (1999), 356

soever, being not our natural born subject, be permitted to fish upon any of our coasts and seas until they have orderly demanded and obtained licenses from us.”<sup>106</sup> While nonspecific in its language, the clear intent of the proclamation was to limit Dutch fishing off the English coast. There exists no evidence that the new ordinance was enforced against the approximately one hundred French and Spanish fishing vessels also active in same waters.<sup>107</sup> The Dutch challenged James I’s ordinance with what is believed to be history’s first statement of maritime jurisdiction being determined by the extent of a state’s military power when they argued that “it is by the Lawe of nations, no prince can Challenge further into the Sea then he can Comand wth a Cannon except Gulfes wthin their Land from one point to an other. For that the boundlesse and rowlinge Seas are as Comon to all people as teh ayre wch no prince can prohibite.”<sup>108</sup>

As a statement of extended jurisdiction over the seas, the ordinance is of clear interest; however, little appears to distinguish James I’s statement from those made by Portugal centuries earlier with respect to navigation off the West African coast. Of particular interest here is the comments on citizenship made in both the proclamation requiring licenses for foreign fishing vessels and the proclamation prohibiting service in foreign navies. In the former, James I references his duty to prevent “the hurt and damage of our loving subjects, whose preservation and flourishing estate We hold ourselves principally bound to advance before all worldly respects” as the basis for any decision to limit fishing rights. In the latter, James I called upon his expatriate mariners to “retorne home into their owne Countrey, and leave all such forraine

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<sup>106</sup>Fulton (1911), 150

<sup>107</sup>Fulton (1911), 150

<sup>108</sup>Fulton (1911), 156 f.1. The English and Dutch held discussions on this issue in 1613, 1615, and 1619. Grotius attended the discussions in 1613 as a member of the Dutch delegation. The argument made here was not part of the instructions to the Dutch envoys to the negotiations England. In their journal the envoys make mention of “other reasons” cited to support the Dutch claims, one of which may be the range of guns argument presented here. Other work (published in 1614) records the existence of a discussion among negotiators as to the limits of a state’s reach into the sea. There is some evidence that suggests that Hugo Grotius was either directly involved or consulted in the question of the Dutch response to the fisheries question.

services, and betake themselves to their vocation in the lawfull course of merchandize, and other orderlie navigation, upon such paynes and punishments as by the Lawes of our Realme may be inflicted upon them. . . .”<sup>109</sup> In both examples, the legal language indicates a dramatic departure from that found in medieval maritime regulation and the papal bulls issued two centuries earlier. The rights and interests of the citizen replaced the political leader’s duty towards God.

With James I’s death in 1625, the throne passed to his son, Charles I. If James I’s ordinances referencing the sovereignty of the sea represented a pull away from the *mare liberum* policies of his royal predecessor, Charles I represented a complete break. In light of challenges by the United Provinces to the English restrictions on fishing in the North Sea, James I acknowledged that the sea itself was free for navigation. He limited his claims to maritime sovereignty to the territorial waters encompassed by the King’s Chambers and English fishery rights. Charles I, in contrast, put forward “the most exorbitant claims to dominion over the surrounding seas”<sup>110</sup> in English history through a series of actions: 1) Charles I’s declaration of his sovereign rights to the Sea of England - the North Sea and English Channel; 2) a prohibition against foreign fleets patrolling these waters; 3) a prohibition of any non-English interdiction or blockade of foreign ships (as Flanders was being blockaded by the Dutch and the French); 4) a renewed effort to collect the taxes of Dutch fishers instituted by James I; and 5) the symbolic recognition of English sovereignty by the striking of sails of foreign ships. Failure to comply with any of these declarations would result in attack.<sup>111</sup> Both France and the United Provinces resisted these measures, with France actively challenging English claims to sovereignty with their own demand for English vessels to lower their flags to salute the French. According to the French position, the seas England claimed as her own were donated to France by the pope.<sup>112</sup> To enforce these

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<sup>109</sup>Marsden (1999), 356

<sup>110</sup>Davies (1959), 216

<sup>111</sup>Fulton (1911), 209-210

<sup>112</sup>Fulton (1911), 212 - 213

claims, Charles issued writs of ship money, a series of taxes which required coastal communities to provide ships or money in times of war. The first fleets launched in 1635 under orders to demand the striking of the sails and to compel Dutch fishers to purchase licenses.<sup>113</sup> That same year John Selden published *Mare Clausum* as a philosophical and legal statement on the legitimacy of Charles I's actions.

Charles I's explicit rejection of any conception of the seas that did not recognize English sovereignty ended all domestic discussion on the topic and established a baseline understanding of maritime jurisdiction from which succeeding rulers would not deviate. The clarity with which England articulated her claims to maritime sovereignty and the eagerness with which she dispatched naval forces in their defense continued in the wake of the English Civil War (1641-1651) during the Commonwealth and Protectorate. The passage of the 1651 Navigation Ordinance by the Council of State came in response to the Dutch rejection of English efforts to form a Protestant alliance between the two nations against Spain and Portugal.<sup>114</sup> At the time the Dutch enjoyed a lucrative income from their monopoly on the carrying trade - the business of transporting goods from the country of production to the country in which they were to be sold. The 1651 Ordinance required that all goods imported to England from Europe use the fleets from the shipments' country of origin.

The legal documents that emerged from the ensuing wars between the English and the Dutch reflect an overwhelming interest in the trappings of sovereignty with comparatively little discussion of its substance. Article 13 of the 1654 Treaty of Westminster ending the first Anglo-Dutch War includes a provision instructing the ships of the United Provinces to strike their flags when meeting a British ship. Little changed

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<sup>113</sup>Davies (1959), 217

<sup>114</sup>Until his death in 1650, William II, Prince of Orange and Stadtholder of the United Provinces, had worked for the restoration of his brother-in-law, Charles II, to the English throne. The States of Holland (one of the seven provinces that comprised the United Provinces) had approached Cromwell with the idea of union in order to counter what they perceived to be William II's monarchical ambitions. In response, Cromwell sent a diplomatic mission to make an explicit request for an alliance that was immediately rebuffed.

with the Restoration government. The Navigation Acts of 1660 and 1663 passed by Charles II created more stringent regulations for imports. The Treaty of Breda (1667) ending the Second Anglo-Dutch War and the second Treaty of Westminster (1674) ending the Third Anglo-Dutch War again reiterated the importance of striking the flag.<sup>115</sup>

During this same period of conflict between the English and the Dutch in the seventeenth century, other European nations began to incorporate notions of maritime jurisdiction into their diplomatic correspondence. Christian IV, King of Denmark, issued an ordinance in 1598 establishing a zone of Danish maritime authority around Iceland in response to the increased presence of foreign fishermen off the Icelandic coast. The ordinance instructed Danish fleets to capture “any English vessels... found hovering and fishing in the waters between Vespeneø[the Westman Islands] and Iceland, or *two Norwegian leagues*<sup>116</sup> northeast from Vespeneø.”<sup>117</sup> Christian IV followed this with a second ordinance in 1636 prohibiting prize seizures within 45 km. from the shore.<sup>118</sup> In 1691 the French Ambassador to the Danish-Norwegian government noted that “respect of the coasts of any part of Europe whatsoever has never been extended further than cannon range, or a league or two at the most.”<sup>119</sup> Shortly thereafter, in 1692, the Norwegian government forbade foreigners from hunting whales within ten leagues from land.

Of notable absence in this era of maritime law in the seventeenth century are Spain, Portugal, and the Italian states. The earliest mention of maritime jurisdiction in Italian treaties comes in a 1740 peace treaty between the Kingdom of the Two Sicilies and the Ottoman Empire that prohibited naval captures within sight of the coast. Spain’s first bilateral agreement in the seventeenth century came in 1667 in

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<sup>115</sup>Pepys (1904), 175

<sup>116</sup>approximately 15 km.

<sup>117</sup>Crocker (1919), 513

<sup>118</sup>Crocker (1919), 514

<sup>119</sup>Crocker (1919), 519

a commercial treaty with Great Britain establishing cannon range as the prohibited zone for privateers. In 1787 Portugal concluded a treaty with Russia prohibiting naval attacks within cannon range from the shore.<sup>120</sup>

## Conclusion

The history of maritime law is replete with the pretensions of leaders to claims of ownership over the sea. From ancient Greece to medieval Venice to early modern England the historical evidence presented in this chapter should make clear the continuous presence of these articulated aspirations. Yet at the same time we also see meaningful changes in the tenor and content of these claims. From the seventeenth century, these vague, sweeping statements of sovereignty became increasingly precise. Fixed boundaries replaced general claims and bilateral treaties negotiated to achieve specific ends replaced papal bulls delegating authority to secular powers. In addition to the increase in specificity of maritime law from the ancient to the modern world, there were other trends that characterized the evolution of maritime law from the ancient to the early modern world.

First, the source and content of maritime law underwent a dramatic transformation in the period discussed in this chapter. In the ancient world individual communities regulated the behavior on board the ships belonging to members of that particular community. Maritime law, understood as a vehicle for expressing and regulating competing claims to jurisdiction over the sea, did not exist as such. As the sea was not considered an object of contestation, debates between polities consisted largely of those among individual merchants seeking redress for incidents or losses at sea or in foreign ports. Special courts and adjudicating bodies existed, but only to the extent that they arbitrated conflict among individuals and not between corporate actors. The compilation of various Greek and Roman laws into Justinian's *Digest* in

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<sup>120</sup>For the relevant passages within these treaties, see Crocker (1919)



the sixth century and the subsequent development of canon law shifted the locus of maritime law from local courts and customs to Rome and its theologians and assembly of canon lawyers. The seas became an orienting device for the burgeoning wave of explorers from Spain, Portugal, and Italy and the possession of oceans served as shorthand for possession of the yet-undiscovered territories adjacent to those waters. Still, it was not the seas that were possessed but the land they circumscribed. The Vatican provided titles of ownership and the Roman Curia served as the adjudicator of competing claims that arose from the granting of these rights. Yet while the Catholic Church dominated medieval discourse on maritime law, it became completely absent from that conversation after the Protestant Reformation. Where states once turned to the Vatican for a legitimation of their claims, after the mid-sixteenth century the only authority that states appeared to recognize was the law that they themselves created.

Second, the evolution of maritime law reflects a change in international understandings of legal rights and duties and the expression of these elements in claims to the sea. As seen in the discussion of the ancient court system, the Greeks and Romans only saw rights as arising from a contract. For an individual or polity to claim an inalienable right to a thing would have been anathema to the jurists of that period. The relationship between the medieval Church and secular leaders incorporated that age's understanding of rights, in that case in reciprocal rights and obligations that arose from agreements between master and servant. Just as a feudal lord expecting tribute and rent in return for granting a fief to his vassal, the Church viewed its donations of jurisdiction over the newly discovered lands in the Americas, Indies, and Africa as being based upon the secular powers' ability to fulfill its proselytizing duties. Whereas the vassal provided his lord revenues or a promise to fulfill a military obligation, secular powers possessing lands donated by papal authority provided the Holy See with converted souls and growth of the faith. The Dutch and English

unequivocally rejected this understanding of right and instead claimed that states possessed the same rights as individuals and that these rights existed independently of any political relationship. Both the individual and the state possessed an inherent right to self preservation, both the individual and the state possessed a right to the accumulation of property in order to protect oneself, and both the individual and the state could only be bound by laws that they themselves agreed to.

Third, maritime law increasingly came to reflect actual state practice rather than deduced principles. In the period of Spanish and Portuguese global exploration, maritime law was the purview of scholars and theologians often distanced from the reality of occupation and conquest. The jurists of the age sought to establish a set of principles upon which their explorations could be justified in the language of a Christian European order. Exploration did not necessarily require the creation of new laws and new legal frameworks because it could be intellectually subsumed within the existing legal order. In contrast, the English declarations of sovereignty over the Narrow Seas simply codified existing state practice. The limits of hostile action created by the cannon shot rule reflect a certain common sense assumption on the part of sailors that one does not unnecessarily sail directly into an enemy's line of fire. As maritime law grew increasingly specific in the seventeenth century, the laws themselves grew more concerned with the regulation of war rather than the creation of spheres of influence - determining permissible state practice and codifying existing behavior rather than articulating more abstract principles on the legitimacy of conquest and occupation.

Fourth, the nature of dispute adjudication underwent a series of shifts that mirrored the developments in the sources of maritime law and the claims made by political actors. In the ancient and early medieval world, traders brought their disputes to regional commercial courts. As states began to replace merchants as the objects of maritime law, the Vatican gained increasing prominence as a forum for mediation and

adjudication. Reflecting the view of territorial conquest and expansion as a process of proselytization, the Iberian powers brought their conflicts to the Papacy and other ecclesiastical bodies for resolution and abided by the decisions made by these bodies. In the wake of the Protestant Reformation, England and the United Provinces rejected the legitimacy of the Papacy as judge and jury of interstate disputes and instead adopted a process of conflict resolution that relied largely on military power or the threat thereof.

Changes in these four principles reflect a larger change in maritime law as an institution during the period discussed. Over the centuries included in this chapter, we see not only a change in maritime law, but a complete transformation in the source of law and the means by which disputes are adjudicated. The scale and scope of this evolution can be clearly segmented into these three specific sets of institutional arrangements.

The particular forms that maritime institutions have taken over the centuries raises two questions that reference to the overarching theme of the dissertation as an elucidation of the normative principles that serve as the foundation for international institutions: What normative principles gave rise to these specific institutional arrangements? What are the sources of these principles? The first of these questions will be addressed in the following chapter. Borrowing from theories of justification in international relations, chapter three examines the justifications provided for the claims discussed in this chapter in an effort to elucidate the normative principles underlying these claims.

## Chapter 3

### The Justification of Maritime Claims

Inmates entering Amsterdam's first house of correction in 1607 were greeted with the following inscription: *Virtutis est domare quae cuncti pavent* (It is a virtue to subdue those before whom all go in dread).<sup>1</sup> The quote, borrowed from Seneca, reflects the humanist philosophy that permeated civic life in the United Provinces. It also embodies the central argument behind the Dutch justification for the seizure of the *Santa Catarina*. From the Dutch perspective, an argument based on the portrayal of the Portuguese as monstrous tyrants would make perfect sense. The Spanish Black Legend, encouraged by the Dutch revolt's propagandists, had demonized the Iberian powers among the Dutch. Van Heemskerck's seizure served only to strengthen growing nationalism and local pride.

If the Dutch were so convinced of the righteousness of their struggle against the Spanish, what made the further elaboration of a justification to an international audience necessary? If the appropriateness of the action was self-evident, would an explanation of the Dutch position be required? Shortly after his successful seizure of the *Santa Catarina*, Captain Van Heemskerck received the following letter from Fernão d'Albuquerque, the Portuguese Governor of Malacca:

Wars have divers and doubtful outcomes, which, whether good or bad, arise from God's will alone - people are mere instruments in this respect.

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<sup>1</sup>Schama (1987), 16

Your Honor was so lucky as to encounter a richly laden ship full of merchants, who have no stomach for fighting, along with women and other useless peoples, who are an impediment in cases of emergency. Your Honor may justly enjoy your prize, for you captured her in a public war. I am sorry for one thing, however: that Your Honor did not encounter my ship, so that you could have seen the difference in armaments and defensive capacity.<sup>2</sup>

If the local authorities recognized the legitimacy of the *Santa Catarina*'s seizure and the Portuguese refrained from issuing a diplomatic protest or otherwise pursuing the matter, one could reasonably conclude that a justification of the seizure had not been required from a legal vantage point. The Dutch understanding of the necessity of justification is a matter of some historical debate. When VOC shareholders approached Grotius in September 1604 to write an *apologia* for the seizure, the Amsterdam Admiralty court had already pronounced their judgment on the legitimacy of the seizure. Some scholars have argued that the justification came in response to unease among Mennonite shareholders with respect to the moral legitimacy of the seizure.<sup>3</sup> Others maintain that VOC sought a legal basis for their aggressive military and naval strategies in the East Indies.<sup>4</sup> There is also a question as to Grotius's access to the case's relevant documents. Did Grotius have access to correspondence between Van Heemskerck and the local magistrates that would have proved that a higher court of appeal did exist for the *White Lion*'s crew before their seizure of the *Santa Catarina*? The historical record suggests that, like any diligent defense attorney, Grotius did indeed selectively draw upon sources to produce a compelling, yet not necessarily factually accurate, argument that would favor the VOC.<sup>5</sup> This would suggest that Grotius tailored the Dutch justification to meet particular goals in a specific international and domestic context. While of certain historical relevance in

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<sup>2</sup>Grotius (2006), 524

<sup>3</sup>For the original statement on this position, see Fruin (1925). Fruin's argument is further developed in Horne (1990), 11-21.

<sup>4</sup>The clearest articulation of this position is presented in van Ittersum (2006b).

<sup>5</sup>van Ittersum (2006b)

gaining a clearer understanding of the domestic political context in which Grotius produced *Mare Liberum*, additional focus on these details would serve to obfuscate rather than clarify the underlying principles that formed the basis of Grotius's justification of the free seas. Those historical details will be incorporated into the following chapter's discussion on the specific details of the negotiations that occurred to resolve the disputes outlined in this chapter.

This chapter examines the justifications provided for claims to jurisdiction over the seas and finds that each is the product of a unique, domestic concept of the legitimate basis for governance and not a response to an international discourse on what constitutes permissible conduct between states. That the justifications were responses to international events, had international ramifications, and occasionally echoed international society's normative status quo does not negate that absence of international norms as the source of these justifications. This separation becomes clearer in light of the different concerns that guided each set of justifications and the understanding of legitimate governance from which they drew. The justification of their claims to the sea presented distinctly different challenges for the powers that lay claim to jurisdiction. For the Spanish and Portuguese, this challenge came in the form of framing their justification in the context of an existing Catholic world order. For the Dutch and the English who had rejected the legitimacy of that existing order, the challenge came in the creation of an entirely new moral framework that would from that point forward provide an alternative lens through which state action could be interpreted and justified.

The Spanish and Portuguese response to the charges leveled against them in *Mare Liberum* and its implications for their possessions in the East Indies came in the context of the broader discussion on their rights of occupation in the New World that began with Columbus's discovery of the Americas in the late fifteenth century. This discussion took the form of an extensive self-reflection on the part of the Spanish and

Portuguese that encompassed the rights of the papacy to grant titles of ownership, the methods of conversion of native populations, the morality and legality of the conquests, and the impact of colonization on native inhabitants. Much of the discourse defining the debate - the explicit dialogue with Grotius's freedom of the seas and the implicit underlying narrative of expansion and colonization - between Grotius and the Spanish/Portuguese empires centers around the exposition of oppositions: either the ephemeral nature of the tides makes the sea impossible to possess or the sea can be demarcated even though there is no physical manifestation of those lines of division; either natural law grants the Portuguese exclusive title to trade in the East Indies or it does not; either Portuguese hegemony over the East Indies constitutes a declaration of war or it is the appropriate application of rights and duties granted by the Papacy. Underlying the tension displayed within these oppositions, however, is an even deeper concern with the nature of political power and the source of authorization for its use internationally. It is this overarching concern with the source and nature of political authority and its applications in the realm of international relations that shapes the justifications deployed to support the radically divergent views that characterize the debate. These justifications transcend the obfuscating minutia of the tautological arguments on whether or not the Papacy possessed the authority to grant titles to unexplored lands. Instead, they speak to the very nature of political authority and how it creates and defines international society, including the range of behavioral expectations that are derived from such norms.

The following chapter will begin with an exposition of the justifications provided by the Spanish and Portuguese in defense of their claims to possession of the New World. The basis for the Treaty of Tordesillas lay in the precedent set by one of the earliest examples of papal donation, the 1344 gift of the Canary Islands to Castilian Prince Luis de la Cerda and the discussion of the just conquest of the newly-discovered areas of the Americas and Indies. The second section details Grotius's challenge to

the partition of the world and Portuguese claims to the East Indies based on papal donation. The third section details two responses from the Iberian peninsula to the Grotian challenge. The chapter concludes with the English discussion of Grotius - one which drew the opposite conclusion with respect to the freedom of the sea, but did so through the adoption of a very 'Grotian' approach and an explicit of the principles upon which the Spanish justification relied.

## **The Legitimacy of Papal Donation**

The Spanish and Portuguese justification of their exploration and conquest of the new world came not in the form of a single statement, but as the product of a constantly-shifting internal dialogue that took place over decades, a debate among theologians, scholars, rulers, and administrators that spanned the thirteenth through seventeenth centuries. Following the intellectual injunctions of scholasticism - the philosophical framework that provided the structure for these discussions - those working to justify Spain's and Portugal's claims before the Vatican and the world did so with an eye towards discerning what constituted appropriate behavior given the particular set of circumstances they faced. This is not to say that Spain and Portugal did not advocate for positions advantageous to them - far from it. The Spanish and Portuguese did consciously craft their justifications to present their cases in the most beneficial light; however, we also see that the enterprise of constructing a set of justifications found its reference point in the dominant philosophical currents of the age. In this decades long discourse, two instances of justifications stand out for their political relevance and the degree to which they encapsulate the more general content of Spanish and Portuguese justifications: 1) the 1437 Portuguese defense of their claims to the Canary Islands; and 2) the debate within the School of Salamanca on the just titles of Castile to the Americas.

As discussed in chapter two, the history of the conquest of the Canary Islands



by the Iberian powers is best characterized by a series of disputes among multiple claimants to control of the islands. The first legally-sanctioned continental incursion into the islands came in 1344 when Pope Clement VI granted Don Luis de la Cera, a prince of Castilian origin, ownership and temporal jurisdiction over the Canary Islands. In exchange for the conversion of the indigenous peoples and an annual tribute paid to the Holy See, de la Cera and his descendants would receive the title Prince of Fortune (*Príncipe de la Fortuna*), title of rulership over the islands. In the text of the donation, Pope Clement reminded de la Cera to “recognize that supreme dominion over the [Islands] belongs to the Roman see.”<sup>6</sup> Although de la Cera received authorization to govern, that rulership existed under the explicit authority of Rome. De la Cera died within a few years of receiving the grant without ever having occupied the islands. While they had initially protested the grant, following de la Cera’s death neither Portugal nor Castile pursued its interest in the islands with any significant investment of time or resources<sup>7</sup> until French explorers Jean de Béthencourt and Gadifer de la Salle arrived in Lanzarote in 1402.<sup>8</sup> Upon encountering difficulties, Béthencourt traveled to Spain where his cousin, the French ambassador to Castile, arranged an introduction to the royal court. There, Béthencourt requested Castilian King Enrique III’s protection and approval in his efforts to conquer the Canary Islands. The king granted Béthencourt the title Lord of the Canary Islands as a Castilian vassal. Antipope Benedict XIII confirmed the fief, established a bishopric on Lanzarote (placed under the jurisdiction of Seville), and granted crusading privileges to any men who accompanied Béthencourt and de la Salle. Béthencourt began his conquest by bringing to Seville indigenous converts from the Canaries and

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<sup>6</sup>O’Callaghan (1993), 294

<sup>7</sup>In 1370, the King of Portugal, Fernando I, granted Lanzarote and Gomera to his admiral, but there is little evidence that he occupied the islands. Twenty years later Enrique III of Castile authorized Gonzalo Pérez Martel of Seville’s occupation of the Canaries. Martel led a military expedition to Lanzarote and seized the indigenous king and queen, bringing them back to Seville. For additional detail, see O’Callaghan (1993), 291.

<sup>8</sup>As discussed in chapter two, the explorers began the undertaking with the support of the French king, Charles VI.

selling them into slavery, something which caused concern and consternation within the Church given its understanding of slavery among the Christian faithful. Shortly thereafter, the Béthencourt family sold their rights to the islands to a Castilian count. Two years later, in 1418, Juan II of Castile granted Alfonso de las Cases the right to conquer the remaining islands not held by a Christian prince. Pope Martin V, the first of the post-schism popes, approved the grant but did so under the condition that all involved recognize the Church's supreme dominion over the islands.<sup>9</sup>

Although the earliest history of rulership over the islands is dominated by transfers of authority among Castilian powers with the sanction of the Catholic Church, the Portuguese also took an active interest in the islands and attempted to assert their own authority. In 1424, Portuguese Prince Henry the Navigator requested permission from Castile's King Juan II to occupy the remaining uninhabited islands in the Canaries. The Castilian ambassador to Portugal, Alfonso de Cartagena, rejected the request on the basis of the implicit assumption that Castile possessed rights to some islands but not to others. From the Castilian perspective, Martin V's approval of Castilian conquest of all islands not held by other Christian princes authorized Castilian authority over the Canary Islands in their entirety. Portuguese exploration of the islands continued, however, and King Duarte<sup>10</sup> of Portugal sent envoys to Rome in 1436 to petition the papal curia for rights to exploration and conquest of both the Canary Islands and Africa.

According to Duarte's ambassadors, the islands "had no political unity. The inhabitants were wild men who lived like animals without a fixed religion, without law, and 'neglectful of civil conversation.'"<sup>11</sup> Prince Henry had begun his conquest of the islands for the salvation of the indigenous peoples' souls, an argument similar to that made by Castile's Alfonso XI in his claims for Africa. Henry went beyond parroting

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<sup>9</sup>O'Callaghan (1993), 296

<sup>10</sup>King Duarte is also commonly referred to by his Anglicized name, Edward.

<sup>11</sup>O'Callaghan (1993), 295

Castile's argument, however, and formulated another defense based on qualification. Henry asserted his better suitability for civilizing, not merely converting, the native population and expressed his willingness to work closely with the Vatican to bring the "benefits of civilization" to the infidels. "As an encouragement to continue the work, he asked the pope to confirm him in possession of the islands that he had already taken from the infidels. Because the pope had the plentitude of power over the entire world, his concession of the Canary Islands would be tantamount to divine authorization."<sup>12</sup>

Henry's defense of his claims based on Portugal's better suitability to the task of conversion and civilization appears to draw upon a more general understanding of legitimate governance that permeated medieval Catholic society. In contrast to the unity between people and state found in contemporary liberal democratic theory, government and society existed as two separate conceptual entities in the medieval world. Each society contained within it a unique nature and purpose, a *telos*. Governance consisted of directing a society towards that *telos*. A ruler's legitimacy derived from their ability to fulfill that aim. "He who is qualified to translate the purpose for which society exists, into concrete terms and measures, acts in the capacity of a ruler: he functions as a ruler, because he is appropriately qualified."<sup>13</sup> Fifteenth century Catholic European society existed with the ultimate goal of salvation. Both Castile and Portugal appealed to the Vatican's spiritual, and arguably material, interests in the conversion of the Canary Islands' indigenous peoples. When Henry broadened his justification to include the argument for Portugal's superior qualifications, he drew upon a shared Catholic understanding of what constituted legitimate governance.

In response, the Vatican's theologians delineated the conditions under which Christian princes could legitimately conquer non-European lands. Rather than provide a specific response to a specific claim, the Church instead first elucidated a more

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<sup>12</sup>O'Callaghan (1993), 296

<sup>13</sup>Ullmann (1962), 2

general set of principles which would then be applied to Portugal's argument for the Canary Islands. Seizure of lands not occupied by Christian princes could only take place under the following circumstances: 1) attempts should be made to convert the infidels through preaching and good example, but, if this failed and the infidels attempted to seize Christian lands or destroy their churches, they could be legitimately attacked; 2) infidels who lived in peace and did not occupy formerly-Christian lands could only be punished for idolatry and then only "with discretion and after adequate preparation so that... Christian people would not be placed in danger;"<sup>14</sup> 3) Christian rulers could levy taxes for a just war, but not one purely for conquest of infidel territory (wars of conquest would have to be financed from the monarch's personal treasury); 4) the pope enjoys universal jurisdiction over all peoples; 5) Christian monarchs would not be responsible for wartime casualties stemming from a war carried out with papal authorization; and 5) "if the greater good were to be served, the pope, in his concern for the care of the souls of all men, could deprive the infidels of their dominion."<sup>15</sup> Church doctrine placing human salvation as the ultimate goal of society permeates this set of conditions delineating what constituted legitimate conquest. Non-Christians, viewed as children of God, could only be punished when violating the divine law conceived of as being accessible to mankind by virtue of its capacity to reason. The Church's criteria explicitly condemned conquest for the sake of material gain or political aggrandizement. Only the promulgation of the faith and the punishment of those engaging in idolatry could be seen as the legitimate basis for colonial expansion. As an answer to Portugal's request to colonize the Canary Islands, Pope Eugene IV declared the Portuguese expedition to Africa a crusade (contained in the 1436 bull *Rex regum*) and granted Prince Henry the right of conquest over those islands in the Canaries not occupied by Christian princes (in the 1436 bull *Romanus*

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<sup>14</sup>O'Callaghan (1993), 297

<sup>15</sup>O'Callaghan (1993), 296-298

*pontifex*).<sup>16</sup>

Given their exploration and control of some islands in the Canaries, Castile viewed the papal grant as a direct challenge to their authority and immediately petitioned the Vatican to reconsider its decision. The Castilian defense of their perceived right to complete ownership of the Canary Islands took place in the context of the Catholic Church's Council of Basel, a conference held in Basel, Ferrara, and Florence from 1431 to 1445. Similar councils had been held periodically throughout the fifteenth century and commonly addressed three sets of issues: 1) political, diplomatic, and institutional issues among secular powers or between secular and ecclesiastical authorities; 2) the development of church doctrine; and 3) cultural concerns.<sup>17</sup> While the Council of Basel occupied itself with a wide range of administrative and diplomatic issues, it also heard petitions from Christian rulers. As the King of Castile's petitions for control over the Canary Islands had fallen on deaf ears in the Papal Curia, Juan II shifted the audience of his appeal to the Council in an effort to find a forum more sympathetic to his argument. In August 1437, the King charged Castilian diplomat Alonso de Cartagena with drafting an elaboration of Castilian rights in the Canaries against those claimed by the Portuguese.

Although Prince Henry drew heavily on his claim that Portugal was better suited for the task of conversion, Portugal's defense of its claims to the Canary Islands also relied heavily on the changes in the world's geographic knowledge brought about by developments in navigation. According to new maps of the region, the islands lay closer to Portugal's dominions in West Africa than they did to Castile. Rather than engage in Portugal's line of argumentation based on functional qualification and geographic proximity, Castile introduced a completely different justification as inheritors of the Visigoth's former empire. In his petition at the Council of Basel, Cartagena derived his argument grounded from the work of St. Isidore of Seville (560-

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<sup>16</sup>O'Callaghan (1993), 299

<sup>17</sup>Black (1998)

636). Isidore's *History of the Gothic Kings* depicts a Visigoth empire stretching from its center in Toledo across Spain and into Mauritania in North Africa, a dominion that included the Canary Islands.<sup>18</sup> When Isidore became Bishop of Seville in 600, the Visigoths had been the dominant power on the Iberian Peninsula for two centuries. With their conversion to Catholicism in 589, Isidore integrated the various Visigoth tribes into a more coherent, unified body that became increasingly subject to the authority of the See of Seville. Cartagena claimed the Castilian rulers to be the rightful heirs of the Visigoths. Cartagena's reliance on Isidore's narrative can be seen as anachronistic at best. Even if viewed as an accurate historical account of the political landscape of the Iberian Peninsula immediately after the fall of Rome, the constellations of power in the region had changed so significantly in the ensuing eight hundred years as to leave little, if any, evidence of the Visigoths' continued political authority. Caratgena included Isidore's work not for its historical value, but because of its relevance for an argument that drew upon the Bishop's holiness as an indicator of his scientific authority.<sup>19</sup>

The ownership of the Canary Islands remained unresolved until the 1479 Treaty of Alcáçovas formally recognized Castile's jurisdiction over the Canary Islands and Portugal's rights to the Azores, Madeira, and other islands off the West African coast. The justifications employed in reaching that point reflect a deep-seated, consistent recognition of the Vatican's authority to determine jurisdiction over any newly-discovered territories. The justifications presented to the Vatican by Spain and Portugal acknowledge this through three shared elements that formed the basis of later justifications. First, Spain and Portugal's discussion of their missionary efforts employed language that underscored their suitability to the task. As seen in King Duarte's appeal to the Holy See in 1436, it is not that Portugal could simply engage in missionary work. Portugal was better suited to conquering because of its superior

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<sup>18</sup>O'Callaghan (2004)

<sup>19</sup>Gallardo (2002)

ability to civilize as well as convert. Portugal should receive title to the Canaries, so the argument went, not because the Portuguese would duplicate or expand Spain's evangelizing efforts, but because Portugal could do a better job of it. Second, scripture and canon law were regarded as being more legitimate support for the differing justifications than custom or existing practice. Actual behavior mattered less than theological consistency when considering the doctrinal ramifications of reversing or contradicting a papal bull, the bull understood to be a formal statement made by the pope in his Apostolic role as servant of Christ. Third, responses by the Vatican to these claims frequently entailed the elucidation of principles that could be applied to multiple cases. When the Holy See responded to Duarte's petition to explore parts of Africa, it did so in language that would make the statements equally applicable to Portuguese exploration of the Canary Islands. Canon law and the variety of documents created by the Vatican's theologians generally did not include precise detail, but rather provided broad parameters that would leave ample room for secular interpretation.

The second example of justification of claims to newly discovered territories largely mirrors that found in the case of the Canary Islands in the sense that both instances saw secular powers attempting to orient themselves according to the broader framework for behavior dictated by the Catholic Church. The practical realities of Spain's discovery, exploration, and conquest of the Americas brought with it a host of theological concerns that reflected this overarching interest in theological consistency and the establishment of a set of principles that could guide Spain and Portugal's discovery of the new worlds. A group of sixteenth century theologians at the University of Salamanca responded to this question by formulating a justification of Spanish conquest in the New World grounded in a Catholic understanding of man and his relationship to the world. What came to be known as the School of Salamanca can be seen as a revival of the scholasticism that dominated medieval philosophy as a

reaction to the Protestant Reformation. Although their work had a clear impact on the development of international law and economic thought, those associated with the School of Salamanca should be understood as moralists rather than economists or political scientists. Their work had pastoral ends and sought to establish moral guidelines for appropriate behavior - rules for action that would bring the individual closer to God. Determining what constituted correct political behavior was part and parcel of this broader concern.

The School of Salamanca's approach becomes clearer when contrasted with that of humanism. Early modern European humanism can be defined as the intellectual and philosophical component of the fifteenth century Renaissance - one element of a multifaceted phenomena that touched a numerous aspects of social and political life. Whereas scholasticism sought to reconcile faith and reason, humanism displaced this project entirely in its emphasis on man as being the center of the universe. Scholastics focused on natural law as the revelation of God's will while humanists turned instead to law constructed by man. As will be seen in the following section, the Dutch justification of their seizure of the *Santa Catarina* revolved entirely around the rights of the individual and the laws created by and within states - a characteristically humanist approach. The scholastics, in developing their defense of Spanish and Portuguese exploration, instead sought to explain God's will for mankind and how colonial conquest could be understood as an appropriate response to that divine injunction. This was done primarily in the context of the development of a doctrine of just war.

Echoing the points raised in the Church's response to the Portuguese request for papal approval of exploration off the African coast, the School of Salamanca's development of their just war doctrine addressed three fundamental issues: the legitimacy of pre-emptive self-defense; the rights derived from victory in war; and the relationship between the Christian and non-Christian worlds. Humanists such as Alberico



Gentili (1552-1608) and Grotius justified war, including pre-emptive strikes, on the basis of the interests of the state, glory, and dominion. The scholastics rejected this view outright. The conditions that might arise from competition between states - self-defense based on fear, the pursuit of glory, the development of empire - could not be regarded as sufficient cause of a just war. Nor would it be possible, according to the scholastics, for both sides of a war to be in the right.<sup>20</sup>

Scholars and theologians drew upon these principles in their formulation of Spain and Portugal's conquests of territories outside of Europe as a just war. By reframing of the issue of colonization as that of a just war, it made the possible pursuit of glory and power on the part of the Iberian powers secondary. As already expressed in the discussion of legitimate conquest in the context of Portugal's aspirations to control over the Canary Islands and Africa's west coast, wealth and territorial expansion could not be the legitimate basis of war; however, violations of natural law could be. In contrast to the humanists' concern with laws being binding only upon those who voluntarily entered into such an agreement, scholastics such as Vitoria emphasized the degree to which the universal applicability and enforceability of natural law is not dependent on its broad acknowledgement. Just as ignorance cannot be considered a legitimate justification for violations of natural law, the limited promulgation of its tenants is likewise invalid. The force of law, in Vitoria's view, rested on a set of first principles that rational beings could universally recognize, hence the inadmissibility of a plea of ignorance. Consensus served as the translator of this rationality into legally binding principles, as seen by Vitoria's recognition that the principles of natural law must not be adopted by all to constitute a binding commitment:

From what has been said we may infer the following corollary: that the law of nations (*ius gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (*lex*). The whole world, which is in a sense a commonwealth, has the

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<sup>20</sup>Panizza (2005)

power to enact laws which are just and convenient to all men; and those make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes. . . . No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.<sup>21</sup>

With this passage, the third element of Vitoria's approach to natural law is raised. The obligation to obey natural law does not rest on the threat of a coercive power. In commenting on the relationship between reason and will, Vitoria concludes that "both divine will and divine reason are law. As far as law's immediate dependence on reason is concerned, the proof is that if the pope promulgates a law saying 'I wish all Christians to fast', the act is not law because his wishes are not binding, only his commands. Law, therefore, is not an act of will. . . . Obligation is only involved when embodied in a prescription."<sup>22</sup> The obligation of legislation rests neither on fear of punishment nor on physical coercion sufficient to ensure obedience. Rather, the legitimacy of law is derived from the source of law and the inherent legitimacy of the individual or body responsible for the translation of the tenants of natural law into dictates for practical action.

While Vitoria and his colleagues worked on elucidating natural law principles that could be used in defense of Spain's claims to the Americas, during approximately the same period humanists such as Gentili were also drawing upon the natural law tradition with very different prescriptions for state behavior that gained their fullest expression in Grotius's argument for the freedom of the seas. At the same time, however, an emphasis on the differences of the two approaches belies the extent to which ideas of colonization and just war existed as an international dialogue between different viewpoints. The more dramatic dichotomy between scholastics and humanists found in the seventeenth century is, in the early to mid-sixteenth century, still only a clear difference of opinion within a common intellectual framework. In discussing the

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<sup>21</sup>de Vitoria (1991), 40

<sup>22</sup>de Vitoria (1991), 156

legitimacy of waging war as recourse to a violation of natural law, Gentili states that, “The sovereign himself will bring war upon himself, if he refuses the sea to others; and those will be justified in making war who are refused a privilege of nature.”<sup>23</sup> Like the “barbarians” refusing Spain and Portugal access to their markets, states that prohibited the fair use of public goods could also be punished according to the principles of natural law.

Gentili also viewed the violation of natural law as an injury to international society as a whole and, as such, an offense requiring the response of each member: “. . . just as the other members would aid the one that was injured, if one member should desire to harm another, since it is for the interest of the whole body, even of the offending member, that each of the members be preserved: exactly so men will aid one another, since society cannot be maintained except by the love and protection of those who compose it.”<sup>24</sup> The awareness of an international community is stated more explicitly and the mutual obligation of the members of this community to defend against all breeches of natural law may be more insistent than that found in the scholastics, but in this respect Gentili may be considered to have developed and expounded upon the work of the School of Salamanca. Gentili did, however, diverge from the scholastics in his understanding of what could constitute just military action. While the Spanish theologians viewed war as a juridical process, Gentili viewed war as a method of establishing political legitimacy. While Vitoria’s conception of a just war centered on a universal natural law which allowed for only one party to have right on their side, Gentili advocated the possibility that both parties involved in a dispute could make equally legitimate claims. Man’s reason is fallible and, therefore, cannot always reliably access the dictates of natural law: “the weakness of our human nature, because of which we see everything dimly, and are not cognizant of that purest and truest form of justice, which cannot conceive of both parties to a dispute being in

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<sup>23</sup>Gentili et al. (1964), 92

<sup>24</sup>Tuck (1999), 34

the right.”<sup>25</sup> Because we may often not be able to judge which of the parties has justice on their side, Gentili’s view is that it may be more prudent to assume that both have credible claims and that war – seen here as a “duel” rather than the cause of the righteous – is the ultimate test of legitimacy. These themes - weakness of human nature, the possible absence of one righteous party in a dispute, war as a means of establishing legitimacy - are taken up for further, clearer development in Hugo Grotius’s defense of the freedom of the seas.

## The Rights of Self-Preservation

While Van Heemskerck interpreted his victory over the Portuguese as an indication of divine favor that required an evangelical response,<sup>26</sup> Grotius provided a strictly secular justification for the seizure of the *Santa Catarina*. The defense contained in *Mare Clausum* and *De Iure Praedae*,<sup>27</sup> considered nothing short of revolutionary for its time, centered on Grotius’s “thinking about what moral rules could underpin the confrontation of two societies anywhere in the world.”<sup>28</sup>

Rather than turn to scripture or historical comparison, Grotius based his doctrine of the free seas on an understanding of natural law that would provide a moral basis for justifying state behavior. This discussion is centered on a series of laws:<sup>29</sup>

1. What God has shown to be His Will, that is law.
2. What the common consent of mankind has shown to be the will of all, that is law.

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<sup>25</sup>Gentili et al. (1964), 31

<sup>26</sup>“since the Almighty has blessed our East Indies trade immeasurably, and let us become friends with so many different nations and kings in so short a time span, we should not pass up the present opportunity. Instead, we must do our utmost to settle our nation in the East Indies and establish both a spiritual commonwealth, placing our hope in God, who will let it blossom and bloom.” quoted in van Ittersum (2003), 42

<sup>27</sup>While the first publishers titled the work *De Iure Praedae*, Grotius himself referred to the work as *De Indus*. For consistency, reference to the work will be made in this context as *De Iure Praedae*.

<sup>28</sup>Tuck (1991), 504

<sup>29</sup>Grotius (2006), 369

3. What each individual has indicated to be his will, that is law with respect to him.
4. What the commonwealth has indicated to be its will, that is law for the whole body of citizens.
5. What the commonwealth has indicated to be its will, that is law for the individual citizens in their mutual relations.
6. What the magistrate has indicated to be his will, that is law in regard to the whole body of citizens.
7. What the magistrate has indicated to be his will, that is law in regard to the citizens as individuals.
8. Whatever all states have indicated to be their will, that is law in regard to all of them.
9. In regard to judicial procedure, precedence shall be given to the state which is the defendant, or whose citizen is the defendant; but if the said state proves remiss in the discharge of its judicial duty, then that state shall be the judge, which is itself the plaintiff, or whose citizen is the plaintiff.

Although the Spanish scholastics also sought to couch their defense of exploration and colonization in the context of natural law, they conceived of natural law as a subjective interpretation of God's will. God's will stood as something removed and absolute, something to be discovered rather than created. In contrast, Grotius sought to create a set of propositions which functioned along the lines of mathematical axioms. To provide the foundation for this objective theory of law, Grotius returned to the ancients and the Stoics' argument that man's behavior was determined by his desire for self-preservation. His innovation was to transform this statement into a moral, universal right.

With Grotius's series of laws, we witness a moment of transformation in international law. No longer was action to be determined by, in Weberian terminology, an ethic of conviction in which actions had to be justified along a moral dimension. Rather, an ethic of responsibility - which placed the preservation of the individual as the highest moral end - emerged as the sole determinant for right and wrong action. The implications of this unprecedented justification for state behavior res-

onated throughout Grotius's defense of the *Santa Catarina's* seizure and his argument in favor of the freedom of the sea. In this approach, Grotius broke away from the Renaissance's Aristotelian methodology that divided human knowledge into practical (including ethics and politics) and theoretical (such as mathematics) realms. Instead, Grotius posited a series of axioms from which more general rules and laws could then be derived. In doing so, he "instate[d] mathematics as the methodological model for the human sciences - a development which was to determine more than anything else the character of seventeenth-century European thought."<sup>30</sup>

According to Grotius, these rules were derived from the agents themselves seen through the pronouncements of their will. At the same time, Grotius recognized that the contents of these pronouncements of will had to be universally accepted in order for the derived rules for behavior to be valid. To provide this basis Grotius returned to the Stoic view of man's drive for self-preservation and from it created a universal right: "no one could ever be blamed for protecting themselves, but they could never be justified in doing anything harmful which did not have the end in view. This was the content of God's will for mankind, which could be deduced simply by looking at the natural world."<sup>31</sup>

As discussed in chapter two, the immediate impetus for *Mare Liberum* came in the wake of the Dutch seizure of the Portuguese carrack, the *Santa Catarina*, in the Straits of Singapore in February 1603. Following the Dutch expedition's return to Europe in the early summer of 1604, the Amsterdam Admiralty Court declared the *Santa Catarina* good prize (naval cargo seized from an enemy vessel during a time of war). The Amsterdam Admiralty Court issued their verdict on September 4, 1604. That same month, the directors of the Amsterdam East Indian Company (VOC) commissioned Grotius to write an *apologia* for the *Santa Catarina's* capture. The timing of the request reflects the lack of interest on the part of the VOC in launching

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<sup>30</sup>Tuck (1991), 505

<sup>31</sup>Tuck (1991), 505

a legal defense of the seizure. Any questions as to the validity of Dutch claims to the *Santa Catarina* had, in their view, had been settled by means of the Amsterdam Admiralty Court's verdict. Rather, they approached Grotius in order to "advertise Portuguese inequity to a readership that was not privy to the Amsterdam courtrooms or the assembly hall of the Estates of Holland."<sup>32</sup>

While *Mare Liberum* took years to complete and eventually emerged as part of a wide-ranging philosophical treatise on international law,<sup>33</sup> it was initially conceptualized as a "short, pithy pamphlet, publishable at short notice, which detailed the horrors of the Portuguese tyranny in the East Indies and justified the carrack's seizure as condign punishment for Portuguese mistreatment of Dutch merchants and their indigenous allies."<sup>34</sup> The launch of the Amsterdam VOC's privateering campaign against the Spanish and Portuguese in November 1603 brought with it a host of legal, economic, and political concerns, in particular the potential for protests from third parties and worries from VOC shareholders about the costs associated with a privately funded war. By requesting a justification for the *Santa Catarina*'s seizure, the VOC's directors were requesting a justification that would preempt criticism and assuage apprehension towards an aggressive East Indies trade policy. Grotius responded to this request by drawing upon an understanding of individual rights, the character of the state, and the nature of property deeply at odds with the dominant Catholic-scholastic understanding.

First, Grotius defended the individual's right and capacity to understand the law of nature independently of any mediating body. The Spanish scholastics did

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<sup>32</sup>van Ittersum (2006b), 25

<sup>33</sup>Reflecting the lack of consensus on the immediate reason for Grotius's commission to write *Mare Liberum*, there is historical debate on when Grotius completed his manuscript. Some scholars have argued that he completed his work in the summer of 1605 while others point to November 1606 as being more likely. In either case, Grotius finished *Mare Liberum* well before the Spanish-Dutch peace negotiations of 1607-1608. Dutch publishing house Elzevier issued *Mare Liberum* in late April 1609, weeks after the signing of the Treaty of Antwerp ushering in the Twelve Years' Truce on April 9, 1609. The larger manuscript of which *Mare Liberum* was only one part - *Commentary on the Law of Prize and Booty* - only came to light at an auction of the Grotius family papers in 1864.

<sup>34</sup>van Ittersum (2006b), 108

not perceive the individual as an independent bearer of rights. Rights existed as a product of man's relationship with the divine and not because of any inherent, natural characteristic of the individual. Grotius, in contrast, argued that the individual may indeed be the bearer of rights, in particular in reference to the possession of his own person. Van Heemskerck's view of the Portuguese as enemies did not require a formal declaration of war by the Dutch Republic. Given the absence of an adjudicating body on the high seas, the Dutch captain could respond as an individual to the perceived Portuguese threat.<sup>35</sup>

Grotius's argument rejecting recourse through existing legal and institutional mechanisms in favor of a more mercenary, ad hoc form of justice can be regarded as an instance in which historical accuracy succumbed to the expediencies of legal argumentation. Did van Heemskerck have timely access to legal remedies in his confrontations with the Portuguese traders? In Grotius's account, van Heemskerck was presented with only one option given the distance and uselessness of the Dutch courts and the absence of involvement of local rulers. The historical record indicates that the latter point may not have been entirely accurate. According to van Heemskerck's testimony before the Admiralty Court in October 1604, the 1601 execution of 17 Dutch sailors by Portuguese magistrates in Malacca and van Heemskerck's desire for vengeance played a significant role in his decision to attack the *Santa Catarina*. The King of Johore, having been attacked by the Portuguese after refusing to deny the Dutch access to his ports, requested van Heemskerck's assistance in "dealing with the Portuguese menace." Van Heemskerck agreed to aid the monarch and kept an envoy from the King on board his ship to ensure that the information on the whereabouts of the Portuguese fleet was genuine and not a Portuguese trap.<sup>36</sup> In a letter to van Heemskerck after the *Santa Catarina's* capture (dated March 9, 1603), Portugal's

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<sup>35</sup>van Ittersum (2003), 54

<sup>36</sup>Borschberg (2002), 45



*capitão-mór*<sup>37</sup> of Malacca, Fernão de Albuquerque, discussed the pardon and release by the Viceroy at Goa of three of van Heck's crew captured in Malacca.<sup>38</sup> Legitimate magistrates and impartial administrators of justice did exist in the region and both the Dutch and the Portuguese had extensive contact with native rulers. The Dutch also had (apparently amiable) contact with Portuguese magistrates established in land-based trading posts. Overlooking Grotius's claims of necessary defense, the situation encountered by van Heemskerck and his crew was not one of immediate necessity.

Although Grotius details the train of the abuses suffered by the Dutch under the Portuguese and points to specific instances to be viewed as hostile acts, by allowing for the right of the individual to punish transgressors of natural law Grotius appears to be opening the door for a very broad interpretation of what constitutes such a violation. He writes, "For we have shown that no formal demand for 'redress as an alternative to hostilities', nor any decree of war, is required of him who is first attacked in war."<sup>39</sup> In the instance of the Santa Catarina, the hostility in question was the Portuguese infringement on what Grotius took to be the Dutch Republic's natural right to engage in trade without interference. More specifically, "From the doctrine above set forth, it follows that the Portuguese, even if they were the owners of the regions sought by the Dutch, would nevertheless be inflicting an injury if they prevented the Dutch from entering those regions and engaging in commerce therein."<sup>40</sup> Here, Grotius echoes the arguments made by Vittoria in his defense of Spanish exploration. According to Vittoria, the Spanish could not be justified in outright seizures of territory. They could, however, legitimately declare war on communities in the Americas if native rulers forbade or otherwise impeded trade with the Spanish. The distinction to be made between Grotius and Vittoria is one of degree and specificity. Whereas Vittoria

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<sup>37</sup> *Capitão-mór* is a Portuguese administrative title indicating a person in charge of a captaincy.

<sup>38</sup> van Ittersum (2003), 44

<sup>39</sup> Grotius (2006), 292

<sup>40</sup> Grotius (2006), 219-220

speaks directly of trade, Grotius discusses the more abstract notion of “hostilities” and attack. This notion is more fully developed in Hobbes’s discussion of the state of nature, but the germ of the idea of international society as a war of all against all appears to lie within Grotius.

Once the intellectual leap has been made from a law of nations governed by the will of God to a law of nations governed by the right of self preservation, the perceived danger to a nation’s fundamental rights seems to grow exponentially. In this context, any threat, any challenge, can be perceived as a hostile act analogous to an attack in war. We see this potential most clearly with Grotius’s statement on the right of trade: “Now, in the first place, we hold that, by the authority of that primary law of nations whose essential principles are universal and immutable, it is permissible for the Dutch to carry on trade with any nation whatsoever... Consequently, anyone who abolishes this system of exchange, abolishes also the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does violence to nature herself.”<sup>41</sup> Although Grotius is speaking specifically in the Portuguese case of military blockades and the prohibition of physical access to foreign markets, this idea could very well be extended to free market competition. In the Grotian view, would a monopoly on goods or services constitute the same violation of free trade that a blockade of a harbor would? Would it be justifiable to break that monopoly via military means? Grotius does not speak directly to these possibilities, but does leave the door open for the subject’s continuation by later authors and theorists of international law.

Second, Grotius granted the state a corporate identity with the same rights as the individual. Like the Admiralty Court in their defense, Grotius viewed the East India Company as an agent of the Dutch Republic. As such, the VOC is beholden to the laws of nature, not those of any earthly body. It may be of benefit to take

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<sup>41</sup>Grotius (2006), 218

a closer look at Grotius's language in this instance. He writes, "Now, in regard to the first phase of this examination, and in so far as it relates to the persons concerned, we find that Nature - the mistress and sovereign authority in this matter - withholds from no human being the right to carry on private wars; and therefore, no one will maintain that the East India Company is excluded from the exercise of that privilege, since whatever is right for single individuals is likewise right for a number of individuals acting as a group."<sup>42</sup> In this passage, "Nature" assumes the justificatory role previously held by "God" in earlier legal pronouncements. No longer is the sacred the primary reference point and "sovereign authority," but rather the profane.

Third, Grotius approached the issue of the freedom of the sea as one of property. In *Mare Liberum*, four key points are made: 1) ownership over a thing is not created by declaring it property; 2) papal donation is not a legitimate title to property; 3) a declaration of war does not create a right to property; and 4) sailing over the sea, in and of itself, does not create ownership of the sea. The only means by which property may be acquired is through an act of taking physical possession.<sup>43</sup> Because the sea cannot be "possessed" - in the sense that a physical boundary cannot be erected on it and no state had the capacity to maintain a constant physical presence on the sea - no nation could claim ownership to the sea. Here, Grotius is not concerned with particular bays and inlets, which he viewed as being legitimate objects of ownership due to their size and geographic location surrounded by land claimed by a sovereign power. He is likewise not concerned with Venetian claims to ownership of the Adriatic - regarding the Adriatic as a particularly large bay or closed sea - as the Venetians were capable of patrolling that body of water. Grotius is speaking exclusively about the open sea.<sup>44</sup>

Through this focus on physical possession through the military strength necessary

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<sup>42</sup>Grotius (2006),

<sup>43</sup>Grotius (2006), 220

<sup>44</sup>Borschberg (2006), 41

to defend the oceans and physically exercise control over them, Grotius allows for yet another possibility that would be explored further by later authors. Grotius does not deny the possibility of ownership of the sea. He simply says that it is not physically possible: “The sea therefore cannot be altogether proper unto any because nature doth not permit but commandeth it should be common, no nor so much as the shore, but that this interpretation is to be added: that if any of those things by nature may be occupied, that may so far forth become the occupant’s as by such occupation the common use be not hindered.”<sup>45</sup> The claim to ownership of the sea requires the claimant to be able to prove constant occupation and use. Nations may be granted that portion of the sea which they could occupy and use, as Grotius makes clear in the following: “But the nature of the sea differeth in this from the shore in that the sea, unless it be in some small part thereof, cannot easily be built upon nor can be included, and though it could, yet this notwithstanding should scarce happen without the impediment of the common use, yet if any little part may so be occupied it is granted to the occupant.”<sup>46</sup>

## Returning to the Catholic World Order

The historical record is unclear with respect to the Spanish authors who responded to *Mare Liberum* and the publication of those works. In a 1640 letter to his brother, Grotius noted that “a treatise was written some time ago, at Salamanca, against . . . *Of the Freedom of the Ocean*, but it was suppressed by the King of Spain.”<sup>47</sup> This may be referring to a 1617 work by an unknown author withheld under the orders of Philip III, perhaps as part of his efforts to maintain peace and good relations between Spain and the United Provinces.<sup>48</sup> Because of this ambiguity, the first Spanish re-

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<sup>45</sup>Grotius (2004), 26-27

<sup>46</sup>Grotius (2004), 27-28

<sup>47</sup>DeBurigny (2006), 15

<sup>48</sup>Knight (1925), 2 and Vieira (2003), 362

sponse to Grotius's challenge is regarded as the 1625 publication of *De justo imperio Lusitanorum asiatico* by Seraphin de Freitas, a Portuguese monk and professor of canon law at the University of Valladolid.

Biographical information on Freitas is not widely available. The exact dates of his birth and death are not known, but he is believed to have been roughly a decade older than Grotius and have lived from approximately 1570 to 1640. He received his doctorate degree from the University of Coimbra (Portugal) in 1595. After failing to receive a professorship there, he moved to Valladolid and joined the Military Order of Our Lady of Mercy. He was appointed to a minor professorship of canon law at the University of Valladolid and served as the official representative of the Kingdom of Castile of all the Portuguese Military Orders. In the capacity of this latter office, he was responsible for the maintenance of the rights and privileges of these Orders in Spain. *De justo imperio Lusitanorum asiatico* is the only published work attributed to him.<sup>49</sup>

If Grotius, as some have argued, can be regarded as an advocate playing quick and loose with the facts to defend his fatherland,<sup>50</sup> the tone and historical detail contained in Freitas is that of a monk and scholar, "a man whose passions have long been subordinate to rule and routine."<sup>51</sup> It lacked public appeal and its tone and length made it inappropriate for use as popular propaganda; however, the content of its argument is very much consistent with Spanish thought at the time. Freitas appears to have viewed himself as the citizen of two empires: that of the spiritual Church and the secular Spanish state. What could easily be understood as an irreconcilable tension between two competing authorities is reconciled by Freitas in his support of

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<sup>49</sup>Knight (1925), 3

<sup>50</sup>"It is the plea of an advocate from first to last - of an advocate, too, whose client is his own fatherland fighting desperately to avoid sentence of political death. Its conclusions are based on facts and arguments generally most partially selected and marshalled [sic], and these are frequently presented with a much too unrestrained rhetoric. It is, moreover, often so abstract and academic as to have but little relation to the actual facts and conditions of real life. Only its own age and conditions made it possible."Knight (1925), 4

<sup>51</sup>Knight (1925), 4

Spain's efforts to succeed the Holy Roman Empire. "The papal donations were not, in fact, as a matter of practical politics then regarded by either Spain or Portugal as giving a legal title to their overseas possessions, but rather as something in support of a title already or otherwise acquired - something incidental to the spiritual element in the circumstances - the moral sanction of the spiritual power. Civilisation [sic.] had not as yet so far progressed as to leave everything in the hands of the civil power."<sup>52</sup>

In his defense of the papacy's right of donation, Freitas recognizes the lack of consensus among Catholic jurists and theologians with respect to Christ's temporal power and the pope's capacity to exercise it as vicar of Christ. Each group, however, shared the opinion that the pope could use his power in secular affairs to the extent that the matter involved spiritual ends. These spiritual ends were not merely a matter of expanding authority, but rather the establishment of a common language of morality through which disputes could be resolved. In this light, the secular and the spiritual were not separate spheres of authority. Political power was derived from God's mandate and carried with it certain duties and responsibilities, namely the achievement of spiritual ends. Freitas's argument for the legitimacy of papal donation also drew upon concepts of utility. Not only did the role of the papacy as the ruler of the body of the faithful serve a spiritual end, it decreased conflict between members of that body. The Vatican served as a guide for the faithful much as a ship required a master and sheep a shepherd.<sup>53</sup> Both Grotius and Freitas expressed concern with humanity's innate sociability and the freedom of discourse between nations. Where Grotius concludes that these relations are best served through complete independence of interaction, Freitas argues that the spiritual framework provided by the Church enhances the interaction by offering a language and frame of reference that could be shared by all members of the community.

The second Iberian author justifying Portuguese hegemony in the East Indies,

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<sup>52</sup>Knight (1925), 6-7

<sup>53</sup>de Freitas (1882), 70-71

Juan de Solórzano Pereira (1575 - 1655), drew upon the same line of argumentation found in Freitas. Like his Portuguese predecessor, Solórzano emphasized the legitimacy of papal donation, supported the need for private property based on its efficiency, and regarded secular rulers as fulfilling a spiritual function delegated to them by the Holy See.

After completing his degree in law at the University of Salamanca, Solórzano entered the Castilian royal service. He spent twenty years as a judge in Lima, Peru and, upon his return to Spain, sat on the Council of Castile and on the Council of the Indies. Even though his academic training took place at the world's center for scholastic thought, his career followed that of the humanist scholar-bureaucrat rather than scholar or theologian. Over the course of his career, he wrote widely on legal and administrative issues and his work was widely known in scholarly and political circles both within Spain and abroad.<sup>54</sup> His most important work, *De Indiarum Jure*, came in a period of great interest in the legal and moral underpinnings of the Spanish conquests in the Americas. Like his contemporaries, Solórzano placed his nation's explorations and conquests in a broader justification. The first volume of *De Indiarum Jure* was published in 1629 with the second following in 1639. Together, the volumes constitute a broad discussion on the legitimate basis for the Spanish exploration and conquest of the Americas. Solórzano, again like his contemporaries, couched the justification in theories of just war and brought forth many of the same arguments made by the period's other writers on the topic. The immediate impetus for his work, however, was the anonymous publication of Grotius's *Mare Liberum* in 1609. Although the book had been banned in Spain by the Inquisition in 1612,<sup>55</sup> Solórzano claimed familiarity with its arguments from Freitas's work and believed that "the book reeks of the hand and talent of an heretical author who raves against

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<sup>54</sup>Muldoon (1994), 8-9

<sup>55</sup>Solórzano's claim to not have read *Mare Liberum* may have been genuine. It is also possible that he sought to avoid conflict with the authorities that had banned by book by claiming not to have read it.

our kings and, more gravely, against the Roman Church.”<sup>56</sup> What makes Solórzano’s work of particular interest and relevance in the present discussion of justification is apparent absence of originality in his scholarship. “. . . [H]e did not rethink the fundamental problems that arose in the wake of the New World conquest or reorient the ways Europeans viewed the New World and its inhabitants.”<sup>57</sup> His was a perspective inherited from the medieval scholastics and his defense of Spain’s colonial project situated new ethnographic information and contemporary debates within that existing intellectual framework.

Where Solórzano differed from authors like Freitas, however, is in the broader theoretical currents of the period. If Freitas can be seen as writing in the context of discussions on the justification of Spanish colonization of the Americas within an exclusively Catholic framework, Solórzano can be viewed as turning instead towards a nascent discourse on international law that unequivocally rejected papal authority over Christendom. Solórzano turns his attention to both worlds - the one in which Spanish colonialism is understood in a Catholic framework and one in which exploration and conquest is regarded as a matter of international law.<sup>58</sup> Both strands of argumentation came together in Solórzano’s justification of conquest based on papal donation.

Solórzano began his defense of the legitimacy of papal donation by first referring to Alexander VI’s 1493 bull *Inter caetera* that gave Ferdinand and Isabella title to the Americas. The legitimacy of this bull rested on the pope’s capacity to “dispose of the kingdoms and lands of the faithful not only in spiritual matters but in temporal matters as well.”<sup>59</sup> This debate on the pope’s role in secular affairs had endured for centuries, resting on contending interpretations of Luke’s biblical account<sup>60</sup> of Peter’s

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<sup>56</sup>quoted in Muldoon (1994), 29

<sup>57</sup>Muldoon (1994), 11

<sup>58</sup>Muldoon (1994), 29-30

<sup>59</sup>Solórzano quoted in Muldoon (1994), 98

<sup>60</sup>see Luke 22:38, “And they said, Lord, behold, here are two swords. And he said unto them, It is enough.”



two swords. Supporters of broad papal authority interpreted the swords as representing spiritual and secular authority with Peter and his successors possessing both. Protestant writers, however, understood one sword to represent spiritual power while the other signified knowledge, with neither providing the basis for secular authority.

In defense of the Pope's legitimate role in secular matters, Solórzano dismissed the Protestant interpretation of the passage in Luke as heretical and referred to a series of canonical sources in support of the position. The papacy's duties included the delegation of secular authority to achieve spiritual ends. According to Solórzano, God is the source of all secular power, yet that power is mediated through the papacy. "The good Christian ruler was obedient to the pope and recognized that his kingdom, though ultimately derived from God, came through the Church."<sup>61</sup> Any alternative understanding of the relationship between ecclesiastical and secular rule was heretical.

## International Law as Secular Creation

In September 1580, Francis Drake returned to England carrying with him plunder from Spanish settlements in South America. The ambassador of Spain to England, Bernardino de Mendoza, appealed to Elizabeth for the return of the stolen property. In response, the English offered the following argument:

The Spaniards have brought these evils on themselves by their injustice towards the English, whom, *contra ius gentium*, they have excluded from commerce in the West Indies. The queen does not acknowledge that her subjects and those of other nations may be excluded from the Indies on the claim that these have been donated to the king of Spain by the pope, whose authority to invest the Spanish king with the New World as a fief she does not recognize... This donation of what does not belong to the donor and this imaginary right of property ought not to prevent other princes from carrying on commerce in those regions or establishing colonies there in places not inhabited by the Spaniards. Moreover all are at liberty to navigate that vast ocean, since the use of the sea and the air are common to all. No nation or private person can have a right to

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<sup>61</sup>Muldoon (1994), 104

the ocean, for neither the course of nature nor public usage permits any occupation of it.<sup>62</sup>

Elizabeth's response is noteworthy for a number of reasons. First, she appeals to the same principles of natural law that the Spanish used to justify their war against the indigenous peoples in the Americas. The blocking of trade constituted a violation of natural law and, as such, deserved punishment. Second, Elizabeth also drew upon the same arguments to be deployed by Grotius 25 years later. Property rights could only be established by occupation and, as the ephemeral nature of the sea meant it could not be possessed, the sea could not be the object of property.

During this same period marked by increasing conflict between Spain and England, Elizabeth also claimed England's right to stop neutral ships and confiscate their property when trading with enemy nations - a principle at odds with the free navigation and commerce principles expressed to Spain.<sup>63</sup> Elizabeth defended the act through an appeal to national security. Spain's immense wealth allowed it to purchase the vast majority of its required shipbuilding materials, seafaring equipment, ammunitions, and foodstuffs from foreign merchants, in particular those from the Hanse towns of Hamburg, Lübeck, and Danzig. Elizabeth commanded the merchants to cease trade with Spain. The Hanse merchants ignored the command and continued to send ships to Spain by traveling north around Scotland and Ireland. In 1589 the English captured sixty German ships. In reply to the merchants' protests, Elizabeth's advisor Lord Burleigh replied that based on "the rules of the law as well of nature as of men, and specially by the law civil, that whenever any doth directly help her enemy with succours of eny victell, armor, or any kynd of munition to enable his shippes to maintain themselves, she may lawfully interrupt the same. . ." <sup>64</sup>

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<sup>62</sup>Cheyney (1905), 660

<sup>63</sup>In light of these variations, Elizabeth had been charged with inconsistency. See Fulton (1911).

<sup>64</sup>Cheyney (1905), 664

Despite Elizabeth's protestations to the contrary, this claim to a right of confiscation did represent a departure from the policies that had characterized maritime transport in the seas surrounding England throughout most of the sixteenth century. Since the 1303 Carta Mercatoria, foreign merchants in England had enjoyed the ability to "come safely and securely under our defense and protection into our said realm of England and everywhere else within our power free and quit of murage, pontage and pavage,<sup>65</sup> and that within our same realm and power they may trade..."<sup>66</sup> Parallel to the freedom of maritime travel granted to foreign merchants, prize law and the adjudication of claims in England's admiralty courts also began to take shape. A 1498 treaty between Henry VII and Louis XII stated that all goods seized at sea would be held until the Admiralty judged it to be a legitimate prize; however, prize cases were rare if not entirely non-existent. In instances where claims were made, it was usually dealt with by the chancellor or *ad hoc* appointees. The Admiralty Court handed down its first formal sentence condemning a prize seizure in 1589, part and parcel with Elizabeth's change in policy towards the confiscation of ship property.<sup>67</sup>

In the last two decades of the Tudor reign in England, Elizabeth consistently asserted two principles: 1) the right to seize the cargo of enemy ships or those neutral ships carrying provisions to the enemy based on the state's national security interests; and 2) no nation may exclude any other from free navigation on the sea based on the freedom of trade fundamental to principles of natural law. Individually, each principle speaks to a very different understanding of the basis of international law. The first suggests the primacy of security in relations between states. Custom, fairness, and precedent are secondary to the dictates that arise when a state is faced with a military threat. The second suggests the existence of an overarching set of principles that govern relations between nations independent of treaty claims or military might. In

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<sup>65</sup>These are all types of municipal tolls.

<sup>66</sup>Rothwell (1996), 515

<sup>67</sup>Holdsworth and Pottton (1922), 563

the same way that the claims made by Grotius and the Spanish and Portuguese could not be reconciled, neither could Elizabeth's. The ensuing century would see a systematic development of arguments based on national security and a complete rejection of notions of the freedom of the seas.

The publication of Grotius's *Mare Liberum* in April 1609 coincided with James I's May 1609 proclamation forbidding foreigners to fish without a license in the waters off the British coast. In the context of the ensuing Dutch-English negotiations in 1613, 1615, and 1619 came the two most prominent British responses to the Dutch claims for the freedom of the seas: *De Domino Maris*, published in 1616 by William Welwood, an obscure former law professor; and *Mare Clausum*, published in December 1635 (written in 1616-1617) by John Selden, an English legal scholar and member of parliament.

The first of these, *De Domino Maris*, is said to have come at the commission of Anne of Denmark, wife of James I. Anne had formally petitioned her husband for a monopoly on the granting of fishing licenses required by the May 1609 ordinance. Scholars regard this as a purely self-interested effort on Anne's part to increase her personal wealth as "the payments for the licenses would have allowed her to maintain her elegant life style without the necessity of a further increase in her allowances from the state."<sup>68</sup> James I denied Anne that monopoly and in response Anne commissioned William Welwood to write a treatise defending the concept of the closed sea. Welwood had published work on Scottish maritime law and, having been forced to resign his position at the University of St. Andrews, found himself out of work and eager to curry royal favor.<sup>69</sup> His critique of Grotius is widely considered secondary in significance to that of Selden. It is, however, the only work directly responded to by Grotius and reflects ideas that would be later elucidated in greater detail in *Mare Clausum*.

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<sup>68</sup>Alsop (1980), 172

<sup>69</sup>van Ittersum (2006a), 245

In addition to his argument against the illegitimacy of ownership based on papal donation, Grotius had justified the freedom of the seas on two grounds: the sea was common to mankind; and the sea could not be physically possessed. Grotius understood man's relationship with the natural world as being one of a community where all had equal rights to the world's resources. He included the sea in this as "God gave all things not to this man or that but to mankind and after that manner many may be wholly lords of the same thing; but if we take dominion in that signification which it hath at this day it is against all reason, for this includeth a propriety which then no man had."<sup>70</sup> Private property came about as an agreement to the division of this original state, yet the sea was incapable of division. It could not be divided because the ephemeral nature of the tides and the inability to construct permanent signs of occupation meant that it could not be possessed and, therefore, could not be divided. The sea could, however, be used. According to Grotius, things that belonged to the community of mankind and were not privately owned could be used without being the object of ownership. For example, an individual attending a performance at a public theatre has the right to occupy a vacant seat, but occupying that seat does not create ownership of that seat. At the same time, once an individual is sitting, no one else can legitimately command that individual to move.<sup>71</sup> The seat is being used for the duration of the play and must be vacated at the end of the final act.<sup>72</sup> Likewise, the sea can be used, but the impossibility of permanent settlement on the ocean means that it cannot be owned.

Welwood agreed with Grotius's understanding of private property as a human invention, but disagreed with Grotius's evaluation of the value of private property. Instead, Welwood argued for the benefits of private ownership. Drawing upon pas-

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<sup>70</sup>Grotius (2004), 22

<sup>71</sup>Pufendorf would later argue that the act of sitting down only created a right to a seat if others (who may not have gotten a seat in the full theatre) recognize the existence and legitimacy of that right. If that right is not recognized there is nothing preventing others from forcibly removing the seat's occupant if they are physically able to. see Salter (2001), 541

<sup>72</sup>Salter (2001), 540-542

sages from the Digest, Welwood observes that “community of property breeds disagreement. Whatever is owned communally is neglected due to natural viciousness. Community of goods carries with it difficulty of administration.”<sup>73</sup> Like the scholastics and their use of Aristotle’s argument on human wickedness in support of private property, Welwood believed that private ownership resulted in the better care of the objects possessed. There is a clear continuity of thought between Welwood’s utility-based argument for private property and that found in scholastic authors.

More important to his critique of Grotius, Welwood puts forth the argument that the sea can in fact be possessed for two reasons. First, permanent occupation is not required to establish possession: “. . . [I]t is not needful for him who would possess himself in any part of the land to go about and tread over the same but it is sufficient to enter in upon any part thereof with a mind to possess all of the rest thereof, even to the due marches. And what can stay this to be done on sea as well as on land?”<sup>74</sup> Second, physical markers are no more necessary on sea as they are on land to establish property boundaries. Sailors and cartographers use compasses and lines of latitude and longitude to establish their precise location. If location can be established, so too can the limits of ownership.<sup>75</sup>

Finally, Welwood argued that Grotius’s view of common property allowing use without ownership was predicated on the abundance of natural resources. Welwood’s experience with the Scottish fisheries had taught him that this was not necessarily the case as “by the near and daily approaching of the buss-fishers the shoals of fishes are broken and so far scattered away from our shores and coasts that no fish now can be found worthy of any pains and travails, to the impoverishing of all the sort of our home fishers and to the great damage of all the nation.”<sup>76</sup>

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<sup>73</sup>Grotius (2004), 66

<sup>74</sup>Grotius (2004), 70

<sup>75</sup>Grotius (2004), 70-71

<sup>76</sup>Grotius (2004), 74

Grotius's reply to Welwood criticized the Scotsman for misunderstanding the argument behind *Mare Liberum*, calling him "a man rather suspicious and who can see what does not exist."<sup>77</sup> Of the numerous refutations of Welwood Grotius presents in defense of the freedom of the seas, the most relevant for illustrating the depths of the intellectual division between Grotius and the scholastics is his discussion of the distinction between civil law and the law of nations. Freedom of navigation is not something that "certain nations, one following the example of another, have determined upon as law for themselves, that is, for the civil law of the different peoples."<sup>78</sup> Civil law is only applicable to a specific association of people. The law of nations - that law applicable to states - can only be derived from custom or explicit agreements between states. It is not the product of the declaration or claims by individual states.<sup>79</sup>

Selden's rebuttal of Grotius's argument came as the result of a 1618 commission from James I as part of the king's continued efforts to defend England's claims of exclusive fishing rights in the North Sea against the Dutch. Publication of the work was suspended due to continuing negotiations with the Dutch. *Mare Clausum* eventually appeared in print in 1635 under the orders of Charles I in the context of another fishing dispute between the English and the Dutch. Selden followed this five years later with the publication of *De Iure Naturali et Gentium*, a work which further elucidated some of the theoretical principles upon which *Mare Clausum* was based.

As Grotius did in *De Jure Belli ac Pacis*, Selden recognized the need for a set of uncontested, fundamental principles upon which relations between societies could be based. Whereas Grotius focused on the individual's right to self-preservation as that incontrovertible moral truth, Selden expressed doubt with respect to individuals' ability to establish accurately the existence of moral boundaries. Moral boundaries

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<sup>77</sup>Grotius (2004), 78-79

<sup>78</sup>Grotius (2004), 106

<sup>79</sup>van Ittersum (2006a), 254

only came into existence with the presence of a superior force that could lay claim to the fulfillment of a moral obligation under the threat of force. “Without such a superior to lay an obligation upon them, he several times emphasized, men would be in a state of total moral freedom; there was nothing in man’s *nature* which implied the existence of any *laws* of nature. But this state of moral freedom was limited and ordered once men recognised that pain and destruction could be avoided only if they obeyed the commands of some being in whose power they lay.”<sup>80</sup>

In anticipation of those who would argue that God stood as that superior force, Selden argued that the ambiguity of God’s commandments for humanity gave few details on the actual constitution of social life. Even in the hypothesized absence of such explicit commandments, however, mankind did possess the capacity to discern God’s requirements for social life. Unlike the scholastics who had interpreted this point as underscoring the requirement for the Church as an intermediary in determining God’s will, Selden instead turned man’s reason into the world. Mankind possessed an active intellect - “an external power, literally identifiable with God. . . which can give human beings a direct revelation of what God requires of them, comparable to the more concrete revelation the sons of Noah received.”<sup>81</sup> Like Grotius, Selden believed that a post-Scholastic moral science was possible and that man’s innate desire for self-preservation was a crucial part of this. Grotius viewed that desire for self-preservation as *the* fundamental natural law whereas Selden integrated it into his understanding of man’s fear of divine retribution. While it would be left to Hobbes, Locke, and others to develop his points more fully, Selden did indicate some elements that a clearer development of these new moral foundations for behavior could take. The first of these was the idea that mankind did not possess an inherent moral obligation by virtue of their humanity. This was the view of man as free before the existence of a law of nature, what would later be discussed among the social contract theorists of

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<sup>80</sup>Tuck (1991), 525

<sup>81</sup>Tuck (1991), 526



the seventeenth and eighteenth centuries. The second strand of thought centered on the argument that man possessed the capacity to understand God's requirements for humanity independently of any mediating institution.<sup>82</sup>

With respect to his specific argument against Grotius on the freedom of the seas, Selden, like Welwood, argues that the sea can be occupied and is therefore subject to ownership. As has been noted, Grotius viewed the sea as incapable of possession because the nature of the tides did not allow for the establishment of permanent boundaries. Grotius also acknowledged that "if any part of the sea is susceptible of occupancy, then that part becomes the property of the person occupying it, so long as it does not impede the common use."<sup>83</sup> For both Grotius and Selden, occupancy and not papal donation granted title to vacant swaths of the globe.

Selden understood the initial state of the world to have been either the "universal dominion of a single person, as in *Adam*; or of som universal and common interest in Things, as betwixt *Noah* and his Sons."<sup>84</sup> Natural law allowed for both common and private possessions. The creation of private property required common consent. There exists, however, a third class of property - vacant property neither held in common nor possessed by an individual. Vacant property becomes the property of whoever first occupies it. According to Selden, as vacant property the sea becomes the possession of the first occupant. Occupancy could be based on possession of land bordering the coasts or islands within the sea. Just as the owner of a piece of land could construct a building as high as technology would allow, claims to the sea could be based on the capacity to exploit its riches and claim the possession.<sup>85</sup>

Like Selden's discussion of self-preservation, the implications for international relations theory of vacant property being the legitimate property of the first occupier would be further developed by later authors. The argument for the seas as being

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<sup>82</sup>Tuck (1991), 526-527

<sup>83</sup>Vieira (2003), 372

<sup>84</sup>Selden (1635)

<sup>85</sup>Klee (1949), 41-42

capable of possession was also gaining increasing traction among the age's scholars and lawyers. By the end of the seventeenth century, a new principle had evolved that recognized "the maritime dominion of a state ended where its power of asserting continuous possession ended."<sup>86</sup> In addition to England's explicit claims to maritime sovereignty, the 1610 Dutch delegation to London had expressed the possibility of ownership of the seas yet could not agree on the extent of that dominion. Grotius alluded to the possibility in his later work when he wrote that "in regard to territory, as when those who sail on the coasts of a country may be compelled from the land, just as if they were on the land."<sup>87</sup> The legal debate on the status of the seas had firmly entered the post-Westphalian world, relinquishing the idea of whether or not the sea could be possessed and instead focusing on the extent of that possession.

The first steps in the resolution of this debate came with the 1702 publication of Cornelis van Bynkershoek's *De Dominio Maris Dissertatio*. Bynkershoek, a Dutch judge and legal scholar, recognized the difficulty in determining the outer limits of the sea that could be defended from the land and argued that defining that outer limit stood as the primary obstacle in establishing clear boundaries to maritime jurisdiction. According to Bynkershoek, defining the limits required defining "a power which can be perceived by the intellect rather than unfolded in words."<sup>88</sup> Where international actors failed to reach agreement on the reasoning underlying limits based on a certain number of miles or days' voyage, Bynkershoek argued that extending the limits of state authority to the reach of a cannon shot is both understandable and meets the requirements of possession as being based on physical control "for there can be no question that he possesses a thing continuously who so holds it that another can not hold it against his will. Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it

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<sup>86</sup>Fulton (1911), 549

<sup>87</sup>Fulton (1911), 549

<sup>88</sup>Crocker (1919), 14

that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory.”<sup>89</sup> In proposing what would become known as the cannon shot rule, Bynkershoek makes two significant assumptions that firmly places him in the modern legal tradition: first, he identifies the sea as identical to land in terms of capability of possession; and second, he identifies force as being crucial to establishing authority over both. When he writes “that the control from the land ends where the power of men's weapons ends,”<sup>90</sup> the argument is a very contemporary one. The idea of using state power as a gauge for territorial jurisdiction over undiscovered territories would have been anathema to the fifteenth century Spanish and Portuguese ambassadors petitioning the papal curia; however, jurisdiction over the sea had become based on the same principles of force that legitimized possession on land. The implications for the use of that property were also the same on land as they were on sea. According to Bynkershoek, “the possessor of *dominium* of the sea shall have the power ‘to sell it, to exchange it, to donate it, to give it for payment, or to set it in other conditions according to the decision of will.’”<sup>91</sup>

By the end of the eighteenth century, an international legal consensus had converged around the view that a cannon fired from land could achieve a maximum distance of three miles. From this was born the three-mile limit of a nation's territorial waters.

## Conclusion

The justifications presented in this chapter may be contextualized in a number of different ways. There is a clear division between Catholic and Protestant argumentation. There is an equally significant separation along scholastic and humanist

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<sup>89</sup>Crocker (1919), 14

<sup>90</sup>Crocker (1919), 14

<sup>91</sup>Akashi (1998), 60

lines. Alternatively, one may approach the issue of justification based on the degree to which the justifications presented viewed God as the ultimate source of law. In the Spanish and Portuguese views, common recognition of divine authorship of the laws that governed men and nations, combined with acknowledgement of the Vatican's supreme authority in interpreting and articulating the principles from which these laws derived, determined the content of their justifications. Appeals to an interpretative and adjudicating body in the form of the papacy, in contrast, fell on deaf ears in the Dutch and English contexts.

Among these differences in the substantive content of justification it is also possible to discern radically different theories of justification presented in the claims examined in this chapter. Their efforts to integrate their claims with existing theology suggest that Spain and Portugal adopted what contemporary scholars might characterize as a coherentist theory of justification. According to this theory, the legitimacy of a claim is based on the extent to which it is deemed coherent with existing beliefs. The objective truth of these beliefs are secondary to the holistic framework they construct. The approach is often characterized by the metaphor of a raft. If adrift on an ocean, one's well-being is determined by how well one's raft holds together. If the boards are strongly lashed together and the knots remain secure, the individual at sea is satisfied with that raft. When the knots begin to loosen and the waves pull the boards apart, that same raft looks considerably less appealing. The integrity - or seaworthiness, continuing with the raft metaphor - of the structure as a whole trumps the accuracy or truth of the individual components. This concern with coherence is evident at multiple points in the Spanish and Portuguese justifications. One of the more striking is Alonso de Cartagena's defense of Castilian claims to the Canary Islands. Rather than rely on geographic proximity, precedent, or Castile's occupation of portions of the Canary Islands, Cartagena turned instead to the authority of Isidore - a Catholic saint who, by virtue of his stature as a theologian, could also be seen as

relevant support for contemporary claims. After 1603 this concern with integrating claims in a pre-existing Catholic world order continued. For all of their differences in professional background, both Freitas and Solórzano defended Portugal's right to a monopoly of trade in the East Indies not in the language of power, security, or property, but by appeal to the authority of the papacy in legitimizing their claims. Any rejection of that authority was not merely legally illegitimate, but heretical.

Grotius's attempts to establish a set of axiomatic principles from which we could derive knowledge about state behavior point to the possibility of a second theory of justification present in this account of the law of the sea - foundationalism. Here, a metaphor commonly used to describe the theory is that of a building. Each floor of the building is linked by a non-symmetrical relationship. The floor below supports the one above it. All of the floors are supported by the foundation while the foundation rests on nothing. Drawing upon the humanist/Protestant legacy placing the individual at the center of the universe, Grotius began his work with an assumption on the individual's right to ownership of his own body. From that he derived the right to defend that property and the right to act as judge and jury of violations of that property absent a higher judiciary authority. By making the intellectual leap of equating the state with the individual, the state, too, possessed the right to self-defense and the ability to interpret the laws of nature that governed relations between states independently of any mediator such as the papacy. While the English disagreed with Grotius on the ability of the sea to be the object of property, their debate did not center on contesting the principles set forth by Grotius. There existed explicit agreement on the right of the individual/state to interpret and defend rights derived from nature. Instead, the English proposed an alternative understanding of occupation that would allow for ownership based on the limits of state power rather than the constant physical presence of the state.

These differences between the Iberian powers and the Dutch and English indicate

very different understandings of what would constitute a convincing justification for a claim. Spain and Portugal each advocated competing claims to newly-discovered territories, but did so with common reference to the supremacy of papal authority, the legitimacy of God's law as a blueprint for secular rulership, and the recognition of the common good (understood as spiritual salvation) as the only legitimate end of government. Grotius's defense of the seizure of the *Santa Catarina* and his legal plea for the freedom of the seas drew upon an entirely different understanding of political life. Through the Grotian lens law was not the product of divine revelation, but of conscious consent among those subject to the law. Observation of the world - not the detached reason and moral ideals promulgated by Catholic scholars - provided the axioms for state behavior. The individual possessed an innate, inalienable set of rights, foremost among them the right of self-preservation. The state is regarded as equal to the individual in this endowment of fundamental rights.

When we consider the radical differences in the justifications presented by the Spanish, Portuguese, Dutch, and English in the context of the international maritime institutions presented in chapter two, we find that existing institutions cannot explain the transformation in normative principles first expressed by Grotius in *Mare Liberum*. Constructivist theories of justification in international relations posit the presence of a willingness among actors to change their beliefs through a process of debate and learning, yet the historical record presents little evidence of Spain and the United Provinces exhibiting such openness. The negotiations of the Treaty of Antwerp presented in chapter two illustrate the articulation of clear preferences and negotiating positions, but the justifications presented in the wake of the treaty's signing show no change. The justifications presented by Spain and Portugal in defense of their claims to maritime hegemony after 1609 remained identical to those presented in the fifteenth century. The conditions for learning required by a theory of communicative action - repeated interaction with the Dutch over the course of years, the

cessation of hostilities in the United Provinces, the acceptance of an opening to trade in the East Indies - did not correspond with a change in the normative framework deployed by the Iberian powers to make sense of their place in the world. At the same time, Dutch interaction with the Spanish - first as the subject of Hapsburg rule and later as an independent state - had no apparent change in the normative principles deployed in defense of their maritime claims.

This radical division between these two approaches to justification underscores the question of the source of these divisions. There exists a clear congruence between the international maritime institutions presented in chapter two and the justifications presented in this chapter, but the presence of international institutions do not explain the source of change in the normative principles contained within the justifications. To more deeply examine the normative basis of the justifications provided by Spain, Portugal, the United Provinces, and England in defense of their claims, the following chapter presents a discussion of the philosophical basis for the different conceptions of the relationship between the individual and political community seen in the justifications and the institutional frameworks derived from those normative principles.

## Chapter 4

### The Two Societies

In the sixteenth century a fundamental shift occurred in the political imagination of early modern Europe and the understanding of government that formed the intellectual foundations of the age's domestic political structures. Just as maritime law underwent a dramatic transformation from the medieval to early modern world in terms of the law's sources and content, a similar evolution can be seen during that period's understanding of government. Chapter two presented a broad history of maritime law in an effort to highlight the international institutional context in which the justifications for claims to the sea took place. This chapter approaches the same period of history from a different perspective, one that focuses on the intellectual and philosophical undercurrent that developed in tandem with elements that defined international institutional structures. If the approach in the previous chapters may be characterized as top-down to the extent that it examined the context for justifications in relationship to international institutions, this chapter offers a bottom-up account. It is an exposition of the normative principles underlying the political environment of the age, but not in the sense that it presents a narrative of individual actors or a account of selected negotiations. It is a domestic approach by virtue of its focus on the interconnected ideas fundamental to the structure of domestic political life: the nature of political rights and the relationship of the individual to the political



community; the philosophical basis for legitimate rule; the legal basis of government institutions; and the permissible means by which political ends may be achieved. I argue that concepts of the individual's relationship to the political community and government legitimacy are directly tied to the institutional structures that are based on those normative principles. As discussed in the first chapter, to explain the institution of sovereignty requires an explanation of the *idea* of sovereignty. Over the course of this chapter we will find that the contemporary conception of sovereignty as the basis of international interaction emerges as the product of particular understandings of individual rights and political legitimacy. Furthermore, sovereignty as an international institution is also accompanied by a means of dispute adjudication based on force that is rooted in the individual's right to self-defense.

The chapter will be divided into two sections based on two broad categories of normative principles discussed above: Catholic scholasticism and Protestant humanism. Each section will begin with a discussion of the role of the individual in the political community and the legitimate foundation of political rule contained within each school of thought. This description will then be followed by an account of how actors translated these normative principles into specific institutional arrangements and dispute adjudication mechanisms. In this narrative I emphasize the development of a subjective theory of rights in which the individual came to exist apart from and prior to the political collective and the sources of political legitimacy with reference to the papacy's claims to universal jurisdiction and the challenge to this authority presented by Martin Luther and other Reformation philosophers. The emergent philosophical focus on the individual within the political body shows a new conception of the political community as a coherent unit defined by its association with a particular polity rather than through religious, cultural, or linguistic affiliations. The chapter will conclude with a restatement of these arguments and discuss their relevance for understanding the justifications for maritime jurisdiction and institutions of maritime

law presented in earlier chapters.

## **The Community of the Faithful**

Emperor Justinian closed Plato's Academy in 529. With the closure, scholars took their study of the ancients elsewhere and founded new centers of learning in Syria and Persia. That same year the first Benedictine abbey was founded in Monte Cassino. Although coincidental, the two events symbolically represent the philosophical shift that occurred at the dawn of the medieval period in the West and the era's intellectual re-orientation. Over the course of the following centuries, monasteries became the center of academic discourse, a discourse characterized by its overriding interest in reconciling the dictates of Christian faith and theology with the legacy left by the ancient scholars. This immense undertaking - the organization, classification, translation, and assimilation of the entire inherited corpus of Greek and Roman philosophy into Christian thought - defined the school of thought that would later be known as scholasticism.

Scholars worked with a very clear injunction: "As far as you are able, join faith to reason."<sup>1</sup> While post-enlightenment philosophy has frequently regarded the scholastic enterprise with contempt for its stifling of individual development, that directive did embody a remarkably clear and strong faith in humanity's capacity for reason and knowledge. The individual was deemed able to discover and understand, following Aristotle, the "universal essence" - the basis of all things to be found in the discovery of the underlying nature of particular things. By understanding the nature of these particular things, scholars believed they would gain insight into the mind of the Creator. Man's reason allowed him to participate in God's eternal law. Where that knowledge of the world differed from the Cartesian logic that would emerge centuries later is in the vehicle of comprehension. For the scholastics, human understanding

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<sup>1</sup>Boethius cited in VanDoren (1992), 113

was not the product of deduction but of revelation - God's world being shown in the pulling back of consecutive layers through the application of reason. Augustine captured this relationship between reason and faith when he said, "I believe in order to understand; and I understand the better to believe."<sup>2</sup>

Augustine's understanding of political life is largely a product of his engagement with the ancients. Following Aristotle's conception of man's nature as a political animal, participation in political life and service to one's polis constituted the highest form of social activity in the ancient world. Engagement in politics afforded individuals the means through which their humanity could be fully developed. Participation in civic affairs was not an onerous obligation, but a vehicle for self-realization in which the benefit of the collective served also to foster individual glory. Illustrating this point, in his funeral oration Pericles implores Athens' citizens to become "her lovers, reflecting whenever her fame appears great to you that men who were daring, who realized their duty, and who honored it in their actions acquired this [honor], men who even when they failed in some attempt did not on that account think it right to deprive the city of their virtue, but to offer it to her as their finest contribution."<sup>3</sup> The intimacy contained within Pericles's sexual metaphor underscores the perceived reliance of the individual on the community, reinforcing the ancient concept that the individual citizen achieved individual benefit only through the pursuit of the collective good.

This interest in the individual's relationship to and role within the political community originated in the ancients' preoccupation with what constituted a worthwhile, fulfilling life. Aristotle's *eudaimonia* and the medieval concept of *beatitudo*, both conventionally translated as "happiness," tasked philosophers with defining the content of this life. What did it mean to lead a good life? What did happiness entail? The Roman moralists answered this question by equating the good life with the virtuous

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<sup>2</sup>quoted in Armstrong (2007), 19

<sup>3</sup>Thucydides (1998) 2.43

life - to pursue *eudaimonia* meant to lead a moral existence. What remained for philosophers was to determine the content of this morality. In their efforts to define virtue, the ancient Romans began with the Stoic's view of man as being driven by the need for self-preservation. Implicit here is a distinction between that which serves individual self-interest (*utile*) and that which is moral (*honestum*). Self-interest is distinct from morality and the relationship between the two concepts presents a problem for determining any guide to conduct. If man is to be understood as motivated primarily by that which benefits him, how is it possible for him to simultaneously be good?<sup>4</sup> Cicero addressed the tension between the moral and the expedient by reconciling the two. There is no conflict between the two because what is *utile* is also *honestum*. There is no distinction to be made between what is right and what is in one's self-interest because the individual's rationality presumes that others are likewise acting in their own interest. Rather than determining *honestum* to be a single universal good and classifying *utile* as something external or subjugated to moral law, Cicero unites the two and determines both to be ethical criteria. Cicero also links the self-interest of the individual to that of the community. When comparing the benefits to be derived from the pursuit of selfish ends or the common good, it is the latter which carries with it the greatest *utile* for the individual.

Augustine drew upon these ancient foundations,<sup>5</sup> infusing them with a distinctly Christian ethos, in his understanding of the relationship between the individual and the political community. Both Augustine and the ancients grappled with the question of what constituted a full and meaningful life and both recognized the dilemma of reconciling individual self-interest with the necessities that arise from life in political communities. While their thematic concerns may have been similar, however, Augustine's understanding of how an individual's life was to be oriented to achieve meaning

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<sup>4</sup>Tuck (1993), 7

<sup>5</sup>It is believed that Augustine would have been familiar with Cicero's work and the ancient debates that engaged with this tension between the good and the expedient. See Kempshall (1999), 22

and its implications for social life differed greatly from his philosophical predecessors.

For Augustine all questions of life's meaning and the goals and structures of communities have as their basis his understanding of original sin and the expulsion from the Garden of Eden. Man in his prelapsarian state possessed both goodness and reason, the two qualities that enabled theologians to see man as having been created in God's image. This same quality of reason and the capacity for free will that derived from it also led man to eat from the tree of knowledge, thereby separating him from God. This understanding of original sin as a rejection of God provides Augustine and the early Christians with an answer to the question of life's ultimate goal: a return to the state of oneness with the Creator found in the Garden of Eden, otherwise known as salvation or *beatitudo*. The question that followed is how is this goal of salvation was to be achieved.

Man's pursuit of his selfish desires is the defining characteristic of original sin and man's existence after the fall. The expulsion from the Garden of Eden revealed man's craven appetites and underscored his incessant demand for the satisfaction of these desires. Given the pervasive, unavoidable reality of original sin for Adam and Eve's descendants, unselfishness could not exist naturally to man. Man was not, in contrast to Aristotle's claims, a political animal as nothing existed in man's fallen nature that would allow him to abide by laws and exercise moral responsibility. Escape from this metaphysical reality and the ability to love anything beyond one's self was, for Augustine and the scholastics, solely the product of God's grace. Where the ancients viewed political participation and the pursuit of the common good as essential for achieving *eudaimonia*, Augustine and the early Church theologians rejected any possibility of *beatitudo* outside the community of Christian faithful. For man to overcome his love for himself and pursuit of self-interest required an internal reorientation that could only be achieved through God's grace and not nature, society, or political life. Participation in Church life alone ensured such grace - grace manifested in baptism

and membership in the Church.<sup>6</sup>

Membership of a community based on faith could not, in and of itself, ensure salvation. Rather that “community had to be dedicated to a very specific collective good: disciplined obedience to God.”<sup>7</sup> In this context any discussion of individual rights was entirely non-existent; however, that absence of an individual rights discourse made sense both legally and theologically. The Roman legal vocabulary inherited by the canonists was silent on the subject of individual rights. Ulpian famously defined justice as rendering to each their right (*suum ius cuique tribuere*), but in the Roman world, *ius* referred to “the just share, the just due of some one within an established structure of social relationships, varying with each person’s status and role.”<sup>8</sup> Receiving one’s *ius* could have a positive as well as a negative connotation: the *ius* for a person who murdered one of their parents was to be sewn in a sack full of vipers and thrown into the Tiber.<sup>9</sup> *Ius* in the Roman world stemmed from agreements between independent contracting parties as the ancient world viewed rights as a set of obligations and duties that emerged as the product of contract. “For them *ius* was not a power over something; it was a thing itself, specifically an incorporeal thing.”<sup>10</sup> Man possessed no rights as an individual independent of any political or social connection. The concept of a universal, subjective set of rights such as found in contemporary discourse on natural rights did not exist as part of the Roman lexicon. Traces of it may be discerned in ideas such as natural law (*ius naturale*) - defined both as a set of first principles discerned through reasons *and* the set of principles or forces governing animal behavior - yet it would be misleading to equate the concept of rights as understood by the ancients with those found in the liberal theories of the eighteenth and nineteenth centuries. Without a theory of individuality, a conception

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<sup>6</sup>Coleman (2006), 9-10

<sup>7</sup>Coleman (2006), 10

<sup>8</sup>Tierney (1997), 16

<sup>9</sup>Tierney (1997), 16

<sup>10</sup>Tierney (1997), 16

of the part in relationship to the whole, a discussion of the rights of that individual could not be had.<sup>11</sup>

If we understand individual rights in the classical liberal sense of “a ‘space’ over which [individuals have] sole jurisdiction or *liberty* to act and within which no one else may rightfully interfere,”<sup>12</sup> it is also clear why, from a theological perspective, the early and medieval Church was silent on the subject. Rights as a personal sphere exempt from the influence of authority would suggest that there existed theoretical boundaries to God’s authority. In the scholastic understanding of the universe, to have individual rights would allow the individual to effectively cordon off a segment of his or her life and declare “this is mine and mine alone” - a mindset which Augustine and the scholastics would consider to be synonymous with the separation from God represented by original sin.

In *The City of God* (426), Augustine presented two unique worlds - the city of God and the city of man. The basis for the distinction between the two comes from Augustine’s narrative of the Fall. After their creation, Adam and Eve lived in a sinless “partnership of unalloyed felicity”<sup>13</sup> restricted only by the prohibition against eating from the tree of knowledge of good and evil. By rejecting God’s will and following their own in eating the fruit, Adam and Eve placed their own wishes above God’s and were expelled from Paradise. The existence of that pride (understood as the defining characteristics of sin) is, according to Augustine, the defining feature of social life and the basis for the contrast between the communities that are blessed by God’s grace and those bound by self-love, the cities of God and man:

We see then that the cities were created by two kinds of love: the earthly city was created by self-love reaching the point of contempt for God, the Heavenly City by the love of God carried as far as contempt of self. In fact, the earthly city glories in itself, the Heavenly City glories in the Lord.

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<sup>11</sup>Herbert (2002), 49

<sup>12</sup>Barnett (1997), 668

<sup>13</sup>Augustine (1998), 567

The former looks for glory from men, the latter finds its highest glory in God, the witness of a good conscience.<sup>14</sup>

Where the ancients saw participation in political life as a vehicle for virtue, Augustine rejected all possibility of achieving any good through political engagement. Only through God's grace could one achieve salvation and God alone determined whether one belonged to the communities of the elect or the reprobate. Citizenship to a *polis* did not exist in Augustine's world as it did in Plato's or Aristotle's. Love, either of God or of the self, defined the individual composition of Augustine's two cities.

Men who did not worship God could not be just and a collection of these men could not form a just state.<sup>15</sup> At their best, political institutions could create a degree of order based on an incomplete understanding of justice - incomplete as "true justice is found only in that commonwealth whose founder and ruler is Christ."<sup>16</sup> At their worst, political institutions rivaled street thugs and codified man's sin: "Remove justice and what are kingdoms but gangs of criminals on a large scale? What are criminal gangs but petty kingdoms? A gang is a group of men under the command of a leader, bound by a compact of association, in which the plunder is divided according to an agreed convention."<sup>17</sup> The conception of secular rule as institutionalized thuggery is not to suggest that Augustine rejected the importance of government. Man's sinful inherently conflictual nature required a coercive authority able to maintain social order and Augustine likened subjugation to that authority to slavery: "morally improving because both foster humility, particularly when the good are subjected to the bad."<sup>18</sup> This conception of secular authority did not remove a role for government, but it did define its parameters.

The relationship between the individual and the community was not one predi-

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<sup>14</sup>Augustine (1998), 593

<sup>15</sup>Augustine (1998), xxiii-xxiv

<sup>16</sup>Augustine (1998), 75

<sup>17</sup>Augustine (1998), 139

<sup>18</sup>Weithman (2002), 240



cated on a fundamental tension between the rights of the one versus an obligation to the many, but instead on an understanding of society and participation in a life of faith as central to achieving individual salvation. The community as an organic whole deemed superior in wisdom and authority to the craven appetites of the individual offered both a goal to social life (salvation) and the means to achieve that goal (subjugation to the will of God). The individual's obligation to the community was absolute because of the community's religious, rather than political, orientation. "It does not depend upon, nor does it express, a moral relationship subsisting as between governor and governed. The Christian occupies a moral and spiritual world to which earthly institutions are irrelevant."<sup>19</sup> This did not mean that the individual was absolved of responsibility to secular authorities. Instead, external submission to political power was regarded as an expression of God's will: "it is God's will that [man] should be subject to the higher powers even if those powers are cruel and wicked."<sup>20</sup> Freedom from coercive authority was regarded as as an inward state of acceptance of the will of God and not the product of fear from retribution from secular authorities. Expressed simply: "The emperor can kill us; so can a poisonous mushroom, though: the emperor has no more power over us than a mushroom has. If we are commanded to do something in defiance of the known will of God, we should decline to comply; but we should do so politely and with an explanation, and take the consequences willingly."<sup>21</sup>

Where Augustine's juxtaposition of secular and divine authority offered a theological foundation for the preeminence of the Catholic Church as a vehicle for salvation, the Church also drew upon its role as inheritor of the Roman Empire in its claim to exercise legitimate authority over the body of the faithful. Constantine's 313 Edict of Milan permitted Christians to worship and own property. When Christianity became

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<sup>19</sup>Dyson (2005), 75

<sup>20</sup>Dyson (2005), 75

<sup>21</sup>Dyson (2005), 77

Rome's official religion in 380, the faithful and their clergy received special military and financial support, in return for which they built churches, monasteries, schools, and charities. These legal rights and privileges, however, existed under an unambiguous Roman authority over all religious matters. Rome's emperors appointed and removed bishops and other clergy. Justinian's *Corpus iuris civilis* (529-534) - the compilation of all laws and pronouncements dating back to the first century - contained within it new laws regulating aspects of church life ranging from property, to doctrine, to liturgy.<sup>22</sup> Through Augustine and in the development of the Church under the Roman Empire, we see that political life in the Catholic world served two goals: the moral improvement of its subjects through obedience to authority; and the regulation of social life. The Church, in contrast, occupied itself with spiritual matters.

### **The Two Swords**

The defining characteristics of early medieval political thought on the individual and political legitimacy - the primacy of the community over the individual, the subsumption of self-interest to the common pursuit of salvation, and the irrefutable rightness of ecclesiastical and political authority whether good or bad - are echoed in the institutions of the age. The medieval concept of *ordinato ad unum* reflected the belief that "any multiplicity or diversity could ultimately be reduced to an underlying oneness, and thus harmonized."<sup>23</sup> Institutional arrangements, from economic systems to bureaucratic apparatuses, were predicated on the existence of a single Christian commonwealth. This community of the faithful reflected Church doctrine in its unity, homogeneity, and hierarchy, embodying an understanding of the universe as "the more perfect 'the more, originating from one god as its creator, it is governed under one ruler and receives for itself increasing peace and unity and returns to one god and

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<sup>22</sup>Fahlbusch and Bromiley (2005), 600

<sup>23</sup>Osiander (2001a), 127

lord.”<sup>24</sup>

This characterization of medieval society as one dominated by a homogeneous Christian consciousness is not to obscure the political and economic realities of the period; however, the complexity of the topic and piecemeal medieval economic data available to scholars makes it difficult to speak in anything other than broad generalities. Furthermore, the generalities that can be made are frequently contradictory. It is estimated that, by the eleventh century, Church bodies (e.g., monasteries, bishoprics, etc.) owned 30 to 40 percent of cultivated land in western Europe.<sup>25</sup> During that same period, some secular rulers also possessed the right to dispose of certain bishoprics and abbeys - giving rise to the concept of “royal monasteries” - as gifts to their supporters. Secular rulers also benefitted from the incomes derived from these royal charters for religious orders, complicating a straightforward division of property into Church and non-Church categories.<sup>26</sup> Overlapping jurisdictions and ephemeral divisions between temporal and ecclesiastical spheres of authority problematize efforts to apply contemporary frameworks of analysis to medieval phenomenon; however, the existence of this complexity provides a useful starting point for understanding the institutions of the period.

How could overlapping jurisdiction and multiple sources of authority also be a unified institution? In the medieval world this question was answered by the doctrine of the two swords. Originating in Luke’s gospel,<sup>27</sup> the metaphor illustrates an understanding of the world as governed by two powers - a spiritual and a temporal - that both have their origin in the divine. Christ was understood to have given the pope, as vicar of Christ, two swords with which to govern the world. The Church would thereby carry full responsibility for the creation and promulgation of canon

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<sup>24</sup>Osiander (2007), 289

<sup>25</sup>Ekelund (1996), 19

<sup>26</sup>Wood (2006) and Bernhardt (2002)

<sup>27</sup>” And they said, Lord, behold, here are two swords. And he said unto them, It is enough.” Luke 22:38

law to govern the body of the faithful. The pope's holiness, however, precluded him from wielding the temporal sword and it was therefore delegated to secular powers who would be responsible for the development of civil law consistent with Church teachings and canon law.

Like Augustine's division of the city of God and the city of man, the two swords doctrine rested on a fundamental unity of the Christian faithful. The goals of secular and ecclesiastical authority were identical: the common good, understood as salvation.<sup>28</sup> Both powers also fostered that unity of the faithful by administering and caring for the needs of the multitude in the ways best suited to that particular form of authority. Papal powers were limited by a theological injunction against the use of force. Secular powers were limited by their inability to tend to spiritual welfare. Taken together, they formed a unified whole that rested on the idea that "understanding common life is more than a matter of grasping institutional arrangements or the story of jockeying for power. Every community organizes its life around a set of loves that implicitly becomes a determinate notion of human flourishing and destiny. Every culture incarnates some deep account of the nature and purpose of human life."<sup>29</sup>

In this broader schema of the pursuit of salvation, political communities were regarded as performing three functions: 1) the visible manifestation of sin; 2) the means by which the behavior of the sinful could be contained; and 3) a vehicle for the purification of the soul.<sup>30</sup> According to Augustine, government did not exist prior to sin because, without fear of pain or punishment, prelapsarian man had no interest in exercising power over others. Secular rule existed only through original sin and its creation of "the psychological forces that generate and sustain political activity."<sup>31</sup> Before the fall, humanity was both equal and autonomous. After the fall, relationships

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<sup>28</sup>Coleman (2006), 11

<sup>29</sup>Smith (2005), 202

<sup>30</sup>Dyson (2005), 48

<sup>31</sup>Dyson (2005), 50

of hierarchy and subordination emerged to control man's base motivations. "The State is therefore an enduring witness to the moral disfigurement of the world. In its origin and continuance, it exemplifies the desire that human beings have to dominate and exploit one another."<sup>32</sup> The existence of individual polities within the community of the Christian faithful is a reflection of sin and likewise defined by sin. Political life as an aberration against the natural order reflected the same quest for domination that led to Cain's murder of his brother, Abel, and the founding of the Roman Empire subsequent to Remus's murder by his brother, Romulus.

Political life as an institutional manifestation of man's perverted nature had clear consequences for the understanding of medieval political institutions. Augustine's claim that "true justice is found only in that commonwealth whose founder and ruler is Christ"<sup>33</sup> was interpreted by the canonists in defense of the subjugation of secular power to ecclesiastical authority - justice could only exist in the polity under the spiritual supervision of the Church and through the ruler who had acknowledged the Church's role in his investiture.<sup>34</sup>

Theologians and canon lawyers rejected the possibility of change to human nature through participation in political life. At best government could provide order and stability, creating "only the conditions that make it possible for us to sin in safety."<sup>35</sup> Coercive authority made life bearable and could be seen as a vehicle for the purification of the soul through trial and suffering, but it could neither make man good nor ensure his salvation. In this light we see that political institutions were tasked with two objectives: the preservation of order and the execution of canon law and Church doctrine. The institutions derived from this understanding of political life and structure shared a number of characteristics.

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<sup>32</sup>Dyson (2005), 54

<sup>33</sup>Augustine (1972), 2.21, 75

<sup>34</sup>Dyson (2005), 67-68. Note that Augustine would have disagreed with these later interpretations as he viewed true justice as impossible outside of the City of God.

<sup>35</sup>Dyson (2005), 71

There existed three forms of arrangements in the medieval world: 1) *commendatio*, in which a free individual entrusted himself to the protection of a more powerful individual in exchange for submission and personal aid; 2) *beneficium*, where individuals were granted rights to lands in exchange for the provision of material goods; and 3) *immunitas*, an exemption from fiscal and military obligations.<sup>36</sup>

The concept of *commendatio* originated within Roman trust law as evolved from the practice of assigning goods before one's death. The death-bed *commendatio* reflected the intention that the recipient of the object not merely possess the object in question, but safeguard it and pass it on in turn - a practice that created a moral obligation rather than a legal one.<sup>37</sup> Early Christians inherited the concept and added a theological dimension through Christ's mandate that his followers donate their riches to the poor.<sup>38</sup> Augustine's interpretation of the passage characterized Christ as "keeper of the celestial bank to which all earthly riches should be commended"<sup>39</sup> extended to the Church's role as stewards of God's riches. If Christ were seen as the ultimate beneficiary of all earthly riches, the Church acted as an instrument of divine will through the redistribution of material wealth.

In secular terms, the feudal *commendatio* was an oath of fealty that created a formal, personal, and legal relationship between two parties. The inferior vassal obliged himself to serve his lord and the lord, in turn, agreed to provide his vassal with protection. The role of secular authority as the coercive arm of ecclesiastical power was also echoed in the vassal's obligation to "serve the lord in all manner of tasks which may be required of him."<sup>40</sup> This duty was primarily military in nature, yet also included financial support. Both could unilaterally withdraw their consent from the agreement - the vassal if the lord failed to provide protection or acted arbitrarily

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<sup>36</sup>Poggi (1978), 20

<sup>37</sup>Johnston (1988), 22

<sup>38</sup>Matthew 19:21 Jesus answered, "If you want to be perfect, go, sell your possessions and give to the poor, and you will have treasure in heaven. Then come, follow me."

<sup>39</sup>Herman (1997), 871

<sup>40</sup>Bloch (1989), 219

and the lord should the vassal fail to fulfill his obligations. The legal equality based on mutual obligation that the *commendatio* created meant that the vassal was not considered a subject of his lord and retained a certain autonomy outside the fulfillment of his contractual obligations. It also meant that the vassal could not be accused of treason against his lord.<sup>41</sup> Loyalty in the feudal world was not absolute and only existed to the extent that both parties felt that the other had upheld his part of the vassalage contract. Vassals who believed their lords to be in breach of the contract could legitimately seek redress through defiance (literally defined as a withdrawal of loyalty). War as a means of seeking justice in retribution for a violation of his rights could not be regarded as an act of treason, understood as an *unwarranted* violation of the contract.<sup>42</sup>

The feudal *commendatio* was frequently accompanied by the *beneficium* - a grant to rights over land (the fief) and the population on that land. To better permit the vassal to exploit his fief, the lord also granted the vassal *immunitas* or exemptions from the administrative and military duties or tax burdens frequently associated with territorial control.<sup>43</sup> In early medieval Europe the lord retained permanent ownership of the land, which then reverted back to the control of the lord upon the termination of the *commendatio* or the death of the vassal. Over time that practice evolved to permit the inheritance of fiefs by vassals for multiple generations although, in the absence of an heir, the fief again reverted to control of the lord. This right to dispose of property came to the lord through his function as a guardian and protector of the common good, a responsibility that came as a product of the ruler “*vicar Dei*, sanctioned by God as God’s replacement of governing authority in history, caring for God’s people who were incorporated into the body of the Church and the Christian *regnum*.”<sup>44</sup> Like the authority exercised by the pope, the ruler’s power came to his

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<sup>41</sup>Coleman (1996), 8

<sup>42</sup>Cuttler (2003), 5

<sup>43</sup>Coleman (1996), 9

<sup>44</sup>Coleman (1996), 5

office rather than his person.

This system of feudal relationships based on donation and mutual obligation is also evident in the means by which lords increased their power. While warfare and aggression between lords was not uncommon, despoiling one's neighbors and gaining physical control of a territory did not provide a basis for ownership. Possession and occupation did not grant legitimate title, making it impossible to legally conquer a fief. "They *had* to be bestowed by a feudal superior, or, alternatively, bought or inherited - both means of acquisition that, *because* of feudal law, were extremely popular among the medieval nobility, for whom marriage was a much more important and efficient means of expanding their possessions than warfare."<sup>45</sup> This system of donation also ensured that imbalances in economic or military power would not invariably lead to territorial conquest or consolidation. A vassal could, in theory, possess greater military forces and more wealth than his lord, yet "the crown survived even if powerless because of the strong feeling that there could be no legitimate order without it."<sup>46</sup>

The set of feudal practices that together comprised medieval political institutions is perhaps best regarded as a set of spokes on a wheel. The lord stood at the locus of the wheel with radial spokes representing his relationships with vassals and medieval institutional structures were based on the concept of a series of individual contracts rather than collective consent. Individuals could serve as both lords and vassals - vassal to a superior lord while lord over other vassals. At the heart of this complex set of institutions, uniting the various loci of power and influence, stood an awareness of all authority as having its ultimate source in the divine. The importance of the role of the divine, exercised through the power of the Church, as a coordinator can not be underestimated. Political life given the diversity of the Christian faithful required "a practically wise sense of the overall shape and proper end of the regime as a whole,

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<sup>45</sup>Osiander (2001a), 124

<sup>46</sup>Osiander (2001a), 124-125



the needs and potentials of its constituent parts, and an ability to weave those parts into a harmonious, integrated community. When coordinating the activities within a society, a Christian statesman would consistently ask, ‘What notion of human flourishing and destiny do our practices and institutions imply?’ In other words, the Christian engaging in political action must struggle to develop a realistic assessment of the virtues and vices of his or her regime and a notion of the proper end of that regime.”<sup>47</sup> For Augustine and the medieval scholastics, political life required the wisdom and perspective that faith and the Church provided.<sup>48</sup> The Christian polity provided a sense of order that facilitated spiritual life, but that order existed to serve the more basic aim of salvation. Whether good or bad, all political power derived from God and social institutions returned to that fundamental principle in the adjudication of political disputes. God had not only moral personality, but legal personality as well, and that adjudicating function came to be exercised through the Church.

This concept of the prince as the holder of the secular sword of authority creates an intimate link with the ecclesiastical sphere as the second of the two swords. The secular lord is the executor of justice and not the determinant of what constitutes justice or the principles upon which justice is based. That definition and interpretation of justice existed as a function of the papacy; however, the Church as adjudicator came only through the gradual codification of law and development of centralized administrative units to address legal disputes.

Law in early medieval Europe existed as a diverse collection of tribal rules, local customs, and Roman legislation. Reflecting the diffuse centers of political authority in the feudal world, ecclesiastical law before was similarly decentralized. Canon law before the eleventh century was not enacted by a central body or expressed in a unified body of law, but rather drew upon existing local and regional legal codes.

The ascension of Gregory VII to the throne of St. Peter in 1073 and his declaration

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<sup>47</sup>Smith (2005), 204

<sup>48</sup>Smith (2005), 204

of the ultimate supremacy of the papacy in the 1075 bull *Unam Sanctam* marked the beginning of an administrative reform movement within the Church that led to the systematic codification of customary, canon, and Roman law and the centralization of the Vatican as the key adjudicating body in legal disputes.

Before the Gregorian Reforms, church clergy served under the authority of secular rulers. These lords possessed most church property and also appointed individuals to ecclesiastical office. “Contrary to the modern ideas of the separateness of the church and the state, the church in the year 1000 was not conceived as a visible, corporate, legal structure standing opposite the political authority. Instead, the church, the *ecclesia*, was conceived as the Christian people, *populus christianus*, which was governed by both secular and priestly rulers.”<sup>49</sup> Secular influence over church affairs reached its peak in the mid-eleventh century with the arrival of Henry III in Rome in 1046 to be crowned Holy Roman Emperor by Pope Clement II. On Clement II’s death the following year, Henry III exerted his influence to place Benedict IX (October 1047 - July 1048), Damasus II (July - August 1048), and Leo IX (1049 - 1053) in rapid succession. While related to Henry III, Leo IX also used his papacy to launch what was later regarded as “the first great age of propaganda in world history”<sup>50</sup> to advocate the freedom of the clergy from secular authority. The 1059 election of Pope Nicholas II marked the first election of a Roman pontiff by Church cardinals.

Having established the Church’s autonomy from secular authority and initiated sweeping reform,<sup>51</sup> Gregory VII faced the problem of establishing the church’s primacy in the absence of coercive power. The doctrine of the two swords made clear the doctrinal impossibility of the Church exercising direct force; however, the Church also faced a real threat by those secular rulers who had opposed any growth in papal authority. In response and in the context of the German wars of Investiture, Gregory

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<sup>49</sup>Berman (1983), 91

<sup>50</sup>Berman (1983), 94

<sup>51</sup>These reforms included prohibitions of simony (the selling of church offices) and clerical marriage.

VII and his clergy turned to the edification of law as a source of both authority and control.

Church scholars turned to church history and Roman legal sources to create a science of the law with which they could buttress their claims to authority. The absence of an existing legal forum meant that the assertion of papal supremacy was entirely self-referential, expressed in a series of twenty-seven propositions contained in the 1075 document, the *Dictatus Papae* (*Dictates of the Pope*). These propositions included:

1. That the Roman church is founded by the Lord alone.
2. That the Roman bishop alone is by right called universal.
3. That he alone may depose and reinstate bishops.
4. That his legate, even if of lower grade, takes precedence, in a council, over all bishops and may render a sentence of deposition against them.
5. That to him alone is it permitted to make new laws according to the needs of the times.
6. That the pope alone is the one whose feet are to be kissed by all princes.
7. That his name alone is to be recited in churches.
8. That he may depose emperors.
9. That no synod should be called general without his order.
10. That no chapter or book may be regarded as canonical without his authority.
11. That no judgment of his may be revised by anyone, and that he alone may revise [the judgment] of all.
12. That the more important cases of every church may be referred to the Apostolic See.
13. That he may absolve subjects of unjust men from their [oath of] fealty.<sup>52</sup>

With Gregory VII's declaration of the papal court as "the court of the whole of Christendom,"<sup>53</sup> the Vatican became the determinant justice in questions of faith

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<sup>52</sup>Berman (1983), 96

<sup>53</sup>Berman (1983), 99

and morality, but in civil matters as well. With the widespread recognition of the pope's authority in these legal questions, the political center of gravity in medieval Europe shifted from secular to ecclesiastical authority. By the end of the twelfth century, it had become impossible to conceive of any political community that did not include a prominent role for the Church in its role as an independent public legislative body. This Papal Revolution - expressed first with Gregory VII's papal manifesto and codified by the *Decretum Gratiani*<sup>54</sup> - transformed the diffuse early medieval church unified by common practices and doctrine into a centralized, hierarchical, public authority.

The institutional features of this wholly new means of centralized adjudication of disputes that emerged in the wake of the Gregorian Reform placed full governance of the Church in the office of the papacy. He was "the supreme legislator, the supreme administrator, the supreme judge. He could make laws, impose taxes, punish crimes. He could establish and suppress bishoprics. He could dispose of ecclesiastical beneficed and had final authority with respect to the acquisition, administration, and alienation of all church property."<sup>55</sup> In addition, the papacy functioned as a court of final appeal in church matters and judge of first instance for all Christians in any judicial question.

## **The Primacy of the Individual**

By the beginning of the sixteenth century, calls for reform of the Catholic Church had been building for decades and the critique of the Church touched all aspects of ecclesiastical life. The Vatican's bureaucracy was seen as inefficient and corrupt. Machiavelli attributed the licentiousness of Renaissance Italy to the poor moral example set by the clergy.<sup>56</sup> In his scathing critique of ecclesiastical office holders, Dante

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<sup>54</sup>The *Decretum*, begun in the first half of the twelfth century, was the first collection of legal texts and would become the first of six books that made up the *Corpus Juris Canonici*. This collected body of law remained in force in the Roman Catholic Church through 1917.

<sup>55</sup>Berman (1983), 99

<sup>56</sup>McGrath (1999), 3

reserved a place in his inferno for members of the clergy (the fourth circle for those guilty of avarice) and a number of popes (the eighth circle for crimes of fraud). Only a small portion of priests resided in their parishes and those who did live among their flock frequently scandalized their parishioners through their immoral behavior. Holders of ecclesiastical offices relied more on financial advantage or nepotism than theological or pastoral skill in achieving their posts. Popes enjoyed multiple children from multiple mistresses despite their priestly vows of celibacy and chastity. Martin Luther (1483-1546) witnessed these abuses and, rather than respond through advocating administrative reforms, turned to theology for an answer to the crisis of the Church.

The cornerstone of Luther's challenge to Catholic theology came through his doctrine of justification by faith alone. Luther viewed the central problem of Christianity as lying in a single passage from the Bible, Romans 1:17: "For in the gospel a righteousness from God is revealed, a righteousness that is by faith from first to last, just as it is written: 'The righteous will live by faith'." Based on this passage, Luther argued that salvation could not be achieved through good works, indulgences, or repentance - the traditional teachings of the Catholic Church. Salvation did not exist as a goal to be achieved through man's actions or participation in the Church. Rather, it was a gift of grace from a kind and loving God. From Luther's perspective, it freed believers from fear of divine punishment and allowed them instead to focus on the practice and further growth of their faith.<sup>57</sup> The implications of this comparatively straightforward theological statement were profound:

If faith alone saved, then the various rites and sacraments of the church were not needed for salvation. Moreover, if faith came from an immediate encounter with Scripture, then priestly intercessors were not only not necessary, they were actually obstacles to an encounter with God... In place of such a spiritual elite Luther held up the possibility of a priesthood of all believers. Finally, if God spoke to each man privately through

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<sup>57</sup>Hendrix (2007)

Scripture, then there was no definitive dogma that characterized Christian belief. Individuals might make their own decisions about their religious responsibilities.<sup>58</sup>

In liberating the believer from fear of eternal damnation, Luther also freed him from the strictures of the Catholic Church. In place of the community of the faithful stood the individual and the individual's private relationship with God.

Luther's statement on individual salvation articulated a movement on the development of a theory of subjective rights that began with the thirteenth century Catholic debate on the individual's ability to own property. Prior to this debate a subjective theory of rights could not be discussed as, conceptually, there did not exist a political subject to whom these rights could be assigned. What could be discussed in the age's terminology, however, was the concept of property and the degree to which one could be seen as possessing a right to ownership. By examining the debate surrounding the individual's ability to own property, then, we find a nascent theory on the rights of the individual in the political community.

The early Catholic Church viewed private property as the consequence of the fall of man. In the Garden of Eden, man had everything in common. After he was expelled from this golden age, man began dividing up ownership of things.<sup>59</sup> Private property existed among individuals, but Catholic doctrine rejected the possibility of private property among members of monastic orders. A monk could not, for example, own a cow. It would belong to the order, although that monk could claim exclusive use of that cow. Like many other religious communities, Francis of Assisi and the monks in his order believed that poverty would bring man closer to the state of grace

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<sup>58</sup>Gillespie (2008), 111

<sup>59</sup>The *Institutes* details three ways based on natural law in which particular things are acquired legitimately: 1) physical occupation or the seizure of things that have no owner or certain classes of things taken from an enemy (*occupatio*); 2) things which are naturally derived from other owned objects as in the case of a farm animal giving birth or the natural formation of an island in a river (*accessio*); and 3) transfer by the owner (*traditio*). There are also two ways which property may be acquired through civil law: 1) physical possession for a particular duration of time (*usucapio*); and 5) as a gift (*donatio*).

experienced before the fall. According to the Franciscans, property interfered with humanity's response to God's love. Because property brought with it the possibility of discord it contained within it the possibility of placing the individual against his neighbor. Ownership involves a necessary separation of others and, by removing the temptation for such selfishness and avarice, the monks sought to bring themselves closer to the divine. What distinguished this perspective from others is degree of poverty advocated. Individual poverty alone is insufficient. True poverty would require the *monastic order* as well as the *individual* to relinquish all possessions and the Franciscans rejected ownership in all of its forms. They benefitted from the permanent use of things belonging to others, but possessed nothing themselves. Pope Nicholas III approved the doctrine as a legitimate Biblical interpretation in his bull *Exiit qui seminat* of 1279, allowing the order permission to use the things necessary for living without possessing property in them. Instead, all property granted to them would be transferred to the Holy See or the Roman pontiff.<sup>60</sup>

After Francis of Assisi's death in 1226, the order he founded split into two camps: the Conventionals and the Spirituels. The former recognized the ideal of poverty promulgated by Francis, but were willing to compromise on pragmatic grounds. The realities of administration proved too difficult to reconcile with a complete absence of property ownership. The latter, the Spirituels, sought to preserve Francis's doctrine of austere poverty. The two views had practical consequences far beyond their theological aspects. The Conventionals envisioned a Franciscan order that included libraries and schools. The Spirituels instead envisioned a mendicant order that relied solely upon supplication for their survival. While they were a minority group, the radicalism of the Spirituels did find some support within the Vatican. In 1294 Pope Celestine V permitted a small group of extreme Spirituels to live as hermits outside of the Franciscan order's jurisdiction. The group was later excommunicated after their

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<sup>60</sup>Mäkinen (2001), 96

1302 challenge to the legitimacy of Pope Boniface VIII.

Tensions within the order and challenges to the authority of the Papacy continued until Pope John XXII reopened the issue. Discussions on poverty within the Church began at Avignon, but, before any statement could be made, the Franciscan order at Perugia (a Spiritual group led by Michael of Cesena) preempted any discussion and declared that Christ and the Apostles had no property of their own. This led to John XXII issue of *Ad conditorem* in 1322, the bull that explicitly transformed the issue from a spiritual to a legal one.

In response to the perceived radicalism of the Franciscan doctrine of poverty (and the order's understanding that property originated through social interaction), Pope John XXII declared the conceptual similarity between God's *dominium* over the earth and man's *dominium* over his property.<sup>61</sup> Property did not emerge only after social interaction or through the intervention of civil law. When taken as singular individuals, men "had a control over their lives which could correctly be described as *dominium* or property."<sup>62</sup> Pope John XXII rejected unequivocally the possibility of a right to use (*usufructus*) existing without concurrent ownership (*dominium*) of a thing. To possess a *dominium* means to derive some benefit from one's ownership and an individual cannot own what he cannot benefit from.

According to John, ownership had two crucial conditions: 1) property benefitted its owner in the sense that no individual could make use of a thing without in some part possessing ownership of it; and 2) property was not diminished through another's use of it.<sup>63</sup> Consumption violated both conditions. Consumption removed all benefits that an owner could derive because the object would cease to exist. Consumption of a thing would also benefit the usuary rather than then owner. John concluded that neither *ius intendi* nor *simplex usus facti* could exist without ownership.

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<sup>61</sup>Tuck (1981), 22

<sup>62</sup>Tuck (1981), 24

<sup>63</sup>For example, one person could not justly eat another's piece of fruit and still claim that the original owner (who did not eat the fruit) possessed a right to it.



Foreshadowing the discussion to take place three hundred years later, John XXII's argument for man's natural right to property appears to point to the early modern discourse on the natural right of the individual to self-preservation begun in Grotius's work and fully explicated by Hobbes. If use supplied the justification for a title to property, any action by an individual in the world could be perceived as an effort to gain additional property – an idea subtly echoed in the early modern humanists' emphasis on political expediency as a criterion for justice (and which will be discussed in greater detail with respect to Gentili's views on the law of the sea in the following chapter). The freedom to act in the world could thereby also be included in the category of property. If *dominium* does not require society and that inherent capacity and right to possess cannot be removed, the identification of the moral qualities of states with those of the individual assume ominous undertones.

The Italian jurist Bartolus de Saxoferrato (1313/14-1357) translated John XXII's assertion of man's natural right to property into the language of the state. At this intersection of politics, theology, and law, Bartolus likened the rights of the state to those of a provincial governor (*praeses*). Just as the territorial ruler had the right to drive criminals from his territory, the ruler had the same right to exercise this policing power on the sea. Although Bartolus reaches this conclusion by not differentiating between the use of force on land and sea, in doing so he provides the basis for a territorial sovereign's exclusive jurisdiction over the sea (as it is on land). In a similar argument, Bartolus proposes the state's jurisdiction over nearby islands – viewing the island as an extension of the mainland territory rather than a unique territorial entity in its own right.<sup>64</sup>

William of Ockham (~1280-1349) is said to have entered this debate at the request of Michael of Cesena, the head of the Spiritual order that presented the initial challenge to John XXII. In response to John's claim that an individual could not make

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<sup>64</sup>Fenn (1926), 474-478

use of a thing without possessing ownership in it, Ockham put forth the argument of extreme necessity and introduced a dimension of moral right into the discussion of legal rights. Here, Ockham distinguished between human law and natural or moral law. According to Ockham, use of a thing did not require legal title to it. A moral right would be sufficient. “Once property was actually established by human custom or agreement (‘human law’), the original natural right to use any thing at all was tied, restricted, or impeded, because there is a moral duty to respect the legal rights of others. However, in situations of necessity the original moral right revives and overrides the owner’s legal right to exclude use by others.”<sup>65</sup> In the instance of necessity, one’s moral claims to an object trump an owner’s right to exclusive use to property. This claim could not be enforced in court, but its status as a moral rather than a legal right made the former no less legitimate than the latter. In making this argument, Ockham drew upon the principles of natural law as understood by the canonists and, from it, derived a natural right shared by all mankind. For Ockham there existed two sources of law: natural (or divine law) and human (or civil law). Civil law could only be legitimate if consistent with natural law. If civil law did not challenge the directives of natural law, it could not legitimately be violated. Civil law could, however, be changed. The rights accorded to individuals under civil law would also change. Yet just as there existed a second source of law alongside civil law - natural law - there also existed a second source of rights. The rights derived from natural law could neither be renounced nor changed.

Two corollaries relevant to the relationship between secular rulers and individuals within the political community stemmed from Ockham’s delineation of a set of individual rights independent from and prior to those that existed under civil law. First, John XXII was a heretic and, as such, no longer pope. Second, “because John is a tyrant who threatens the rights of others, including emperors, kings and other

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<sup>65</sup>Kilcullen (1999), 308

lay persons, he is therefore a grave sinner and should be removed from the papacy; the main premise is that grave sin justifies deposition of the pope even if he has not automatically ceased to be pope by becoming a heretic.”<sup>66</sup> At the apex of its power and authority, the Church claimed the supreme right to define and redefine Catholic doctrine. Although it did not generally occupy itself with the details of secular rule, it reserved the right to intervene as a legitimate authority, distanced from and superior to man-made laws. Ockham, drawing explicitly upon the two swords doctrine, attempted to define and circumscribe the limits of papal authority.<sup>67</sup> This discussion raises two significant contributions made by Ockham that would be later developed by Luther: 1) the distinction between moral and legal rights; and 2) impact of these subjective powers, or moral rights, in the individual’s relationship with the state. Both elements, seen in the debate on Franciscan poverty, represented a critical shift in the understanding of the individual and his relationship to the state. Both would also have clear philosophical, political, and legal implications, in particular with the understanding of the legitimate source of political authority.

The debate on Franciscan poverty underscores the relationship between the concept of subjective rights and the concept of ownership. To possess something meant to possess a fundamental right to that thing. In the ancient and early medieval world, the set of rights that permitted ownership were derived either from contract or from an understanding of natural law as a descriptive term meaning a proper or just ordering of the natural universe. With the Franciscans came the embryonic understanding that, under certain circumstances (such as extreme necessity), there existed a superior set of rights independent of an individual’s social context that could be appealed

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<sup>66</sup>Kilcullen (1999), 311

<sup>67</sup>Despite his critique of unlimited papal authority, Ockham cannot be considered an opponent of the papacy. Ockham protested a particular understanding of the “fullness of power” attributed to the papacy, but was equally opposed to arguments, such as those made by Marsilius of Padua, severely restricting the pope’s authority. Ockham’s thought on the limits of papal authority is perhaps best seen as a voice in the conciliar movement, a thirteenth and fourteenth century reform movement that argued ultimate authority in spiritual and doctrinal matters should be held in a Church council rather than in the pope himself.

to to justify both property and action. The same growing individualism that allowed for the emergence of a subjective theory of rights is also reflected in the shift in the source of government legitimacy to be discussed in this section. As illustrated by the radically different theories of government legitimacy that emerged in Reformation Europe, the political center of gravity shifted from one defined by God (via His intermediary, the Catholic Church) to one centered on the individual. This theory of rights also extended to the Protestant conception of legitimate rulership.

According to Luther, the order of creation - manifested in law and the gospel - protected man from chaos and the resultant suffering. These gifts from God can limit sin and, thereby, alleviate the wretchedness of the human condition. Like Augustine, Luther separated the world into two spheres that reflected this order of creation: the spiritual (*das geistliche Reich*) and the temporal (*das weltliche Reich*). The former is characterized by freedom and equality, a world in which Christians serve their fellow man in harmony. The latter, in contrast, is characterized by reason and the absence of faith. Through its use of the sword, “the secular realm limits sin and malfeasance and thus insures that the unjust will not run rampant over the weak and downtrodden.”<sup>68</sup> Unlike the Catholic conception of the Church’s superiority over secular authorities, Luther saw ecclesiastical and lay powers working in tandem, each with its own separate sphere of influence. Political legitimacy in this temporal sphere was derived from God and rulers instruments of God’s will.

It is important to note, however, that the concept of “government” in its modern sense would have been anathema to Luther and his contemporaries. Luther indeed argued that God vested political power in what he termed *Obrigkeit* (ruling authority), but governmental institutions in the sixteenth century were understood not as things but rather as people. Power resided entirely in the individual ruler.<sup>69</sup> Luther and the magisterial reformers viewed these secular rulers as having received

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<sup>68</sup>Whitford (2003), 181

<sup>69</sup>Whitford (2003), 188-189

their authority from God and each governed as the head of the Protestant churches within their territories. The communities of the citizens and the faithful, considered mutually exclusive in Augustine's world, became fused together in the view of the magisterial reformers. "Religious loyalty was identical with political loyalty. A subject who confessed to religious views different from those acknowledged and officially approved was considered disloyal, subversive, and politically dangerous."<sup>70</sup> Whereas a pre-Reformation government legitimacy based on God required the sanction of the papacy, a post-Reformation government legitimacy based on God became entirely self-referential. The Prince ruled because God's grace had placed him in that position and his primary duty was to exercise his use of the sword - the unique power that differentiated the secular from the ecclesiastical worlds - to maintain social order.

The division between spiritual and temporal spheres of influence and the capacity of the ruler to use force to compel obedience did not, however, imply that secular rule could descend into tyranny. Secular rulers, according to Luther, may have achieved their status through God's grace, but that divine injunction merely emphasized the ruler's duty towards his subjects. To act in a way that did not have the interest of his people in mind meant to violate divine law and, therefore, served as justification for revolt.

Unlike the magisterial reformers who sought a union between church and state, the radical reformers advocated a strict separation between the two. There existed no distinction between rulers and their subjects when it came to the capacity to sin, disqualifying the former for any special role in church. Among these radical reformers, John Calvin (1509-1564) provided perhaps the best articulated discussion on the ultimate source and justification for civil government.

Echoing Luther and Augustine, Calvin viewed government as both a symptom and remedy for the problem of human sin. Unrestrained, humanity's capacity for

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<sup>70</sup>Guggisberg (1996), 80

sin would create chaos and government provided necessary order and tranquility. Civil magistrates acted as guardians of law. Law provided the basis for rulership. People lived according to the laws and in obedience to the magistrates.<sup>71</sup> Rulers are ordained by God and accountable to Him alone, yet governance also brings with it a set of duties and responsibilities.

Calvin makes explicit the Christian duty to obey both just and unjust rulers as “the magistrate cannot be resisted without God being resisted at the same time,”<sup>72</sup> however, like Luther, he also distinguishes between a respect for the office and a respect for the holder of that office. “If the point of a civil society was to secure its members in the exercise of their rights, then if the society failed to deliver that security, the members were relieved of their obligations and could return to the state of nature. It followed that the first duty of any government, understood as the agent of its citizens, was to safeguard their natural rights.”<sup>73</sup> In cases where magistrates “dishonestly betray the freedom of the people, of which they know that they have been appointed protectors by God’s ordinance,”<sup>74</sup> Calvin does allow the possibility of “open avengers” revolting against authority if they are motivated by “God’s specific and explicit revelation.”<sup>75</sup>

Just as the growing primacy of the individual in political thought contributed to the emergence of a subjective theory of rights that formed the basis of claims to property, the transformation of the role of the individual in political life is also evident in the sources of political legitimacy. Each of the above accounts of political legitimacy places God as the ultimate source of political power; however, the understanding of the individual in each of these accounts underscores the differences between them. The Catholic concept of political legitimacy as seen in Augustine’s view of a community

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<sup>71</sup>Calvin (1960), IV.3

<sup>72</sup>Calvin (1960), IV.20

<sup>73</sup>Tuck (1997), 686

<sup>74</sup>Calvin (1960), IV.20

<sup>75</sup>Stevenson Jr. (2004), 185

of the faithful allows no room for the individual as a political actor. God, the papacy as God's mediator on Earth, and the ruler as maintainer of order are politically salient in this theory of legitimacy, with the concept of a body of citizenry non-existent. The Magisterial Reformation maintained the same criteria for legitimacy as that seen in Augustine - divine ordination - yet by removing the papacy made that ordination a self-appointment on the part of the ruler. In contrast, Calvinist thought drew upon Luther's concept of the community of the faithful and from it derived an understanding of political legitimacy based on the magistrates' ability to fulfill society's needs for order and stability.

If, then, a conception of the body of the faithful can be seen as a crucial intellectual step towards an understanding of government legitimacy based on meeting the needs of the ruled rather than the interest of the rulers or the mediation of God's will through the Catholic Church, the next step in understanding the sources of justification may then be considering the emergence of a self-conscious body of citizens with an awareness of a unique set of rights vis-à-vis their rulers.

## **The Two Kingdoms**

Following Luther's doctrine of the two kingdoms, the Protestant vision of the world is one in which individuals belong to one of two distinct spheres: the kingdom of God and the kingdom of the world. The former category contains the genuinely faithful who, because of their righteousness, require neither law nor coercion and a world comprised entirely of Christians would, in Luther's view, possess no need for secular authority. The vast majority of the world's population, even those who profess their Christianity, are not part of Luther's kingdom of God and require law "to instruct, constrain, and compel them to do good."<sup>76</sup> Although law can teach men to recognize sin, it is not designed to transform men's souls and bring them closer to Christ. In

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<sup>76</sup>Luther (2005), 435

contrast to Augustine's understanding of temporal suffering being mitigated by the promise of a heavenly reward, the Protestant faithful do not view secular authority as conceivably presenting a series of trials that would prepare the spirit for salvation. Instead, law and secular authority are very much of this world and function as a constraint against non-Christians "so they dare not willfully implement their wickedness in actual deeds."<sup>77</sup> Luther's conception of temporal authority is grounded in that single imperative: compelling outward obedience to secular powers in order to prevent man from devouring one another and the world from descending into chaos. In contrast to the idea of a single, homogeneous community united by a genuine Christian faith that dominated scholastic thought and medieval doctrine, Luther argues that "the masses are and always will be un-Christian."<sup>78</sup> Membership in the church through baptism and participation in the liturgy are, for Luther, frequently acts of hypocrisy. As a consequence, the existence of a Christian government is impossible as:

a man who would venture to govern an entire country or the world with the gospel would be like a shepherd who should put together in one fold wolves, lions, eagles, and sheep, and let them mingle freely with one another, saying, 'Help yourselves, and be good and peaceful toward one another. The fold is open, there is plenty of food. You need have no ear of dogs and clubs.' The sheep would doubtless keep the peace and allow themselves to be fed and governed peacefully, but they would not live long, nor would one beast survive another.<sup>79</sup>

Given man's avarice and the speciousness of the Christian community, Luther unequivocally rejects the viability of the doctrine of the two swords in which secular rulers act as the coercive arm of the Church in the pursuit of individual and collective salvation. Both the spiritual and the temporal kingdoms have a role to play in society - "the one to produce righteousness, the other to bring about external peace

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<sup>77</sup>Luther (2005), 436

<sup>78</sup>Luther (2005), 437

<sup>79</sup>Luther (2005), 437



and prevent evil deeds”<sup>80</sup> - but the two spheres are distinct and cannot overlap.

Luther’s contempt for secular rulers is clear and despite, or perhaps because of, this he provides a series of duties or obligations of the ruler towards his subjects. First, the ruler must “give consideration and attention to his subjects, and really devote himself to it. This he does when he directs his every thought to making himself useful and beneficial to them; when instead of thinking ‘The land and people belong to me, I will do what best pleases me,’ he thinks rather: ‘I belong to the land and the people, I shall do what is useful and good for them. My concern will be not how to lord it over them and dominate them, but how to protect and maintain them in peace and plenty.”<sup>81</sup> Christ is seen as a model of good rulership rather than a divine lawgiver. Rulers should not seek to gain power, glory, and personal enrichment, but benefit their subjects. In addition, rulers should “beware of the high and mighty and of his counselors, and so conduct himself toward them that he despises none, but also trusts non enough to leave everything to him.”<sup>82</sup> Much like Machiavelli’s Prince, Luther’s ruler thinks strategically. Rulers do not maintain their authority by virtue of established feudal hierarchy and the strength of papal donation, but rather through circumspection and careful analysis. Addressing his prince, Luther observes that “You have no right to assume that somebody else will take as deep an interest in you and your land as you do yourself, unless he be a good Christian filled with the Spirit. The natural man will not. And since you cannot know whether he is a Christian or how long he will remain one, you cannot safely depend upon him.”<sup>83</sup>

While Luther’s discussion on temporal authority focused on the duties of the secular ruler and the sharply decried the ability and legitimacy of the Church’s intervention in non-spiritual matters, there also exists in his writing an implicit awareness of the object of political rule. The wise prince acts on behalf of his subjects, sug-

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<sup>80</sup>Luther (2005), 437

<sup>81</sup>O’Donovan and O’Donovan (1999), 594

<sup>82</sup>O’Donovan and O’Donovan (1999), 594

<sup>83</sup>O’Donovan and O’Donovan (1999), 595

gesting Luther's awareness of individuals as political actors possessing an identity beyond that of Catholic or Protestant and the assignment of a personality to that body independent of religious affiliation. Service to man rather than devotion to God as the criterion for good government also incorporates the Protestant doctrine of salvation as being an essential individual matter. God's personal relationship with the individual and that individual's response to God's grace is not dependent on any outward actions or allegiances. It is an intensely private bond that draws man closer to the divine in a way diametrically opposed to the Augustinian understanding of grace as something to be striven for and salvation a state to be gained through hard spiritual labor.

Luther's emphasis on the individual rather than the community as the source of salvation leads to a very different understanding of political institutions than the one presented by Catholic doctrine. In the Catholic world, the community stands as an organic whole - a living, breathing entity whose majesty is evoked by virtue of it being much more than the sum of its parts. The concept of the body of the faithful was coterminous with the body of Christ and the sacerdotal character of that community elevated it in stature beyond the needs, rights, and interests of the individual. Luther's theory of salvation metaphorically imploded this body of the faithful and rendered it down to its fundamental component - the individual and his personal relationship with God. The institutional frameworks derived from these differing understandings of the basic units of society can be explored through the distinction between the concepts of *societas* and *universitas* and their relevance for understanding differences in political structures.

Social structure as *societas* views collectivities as comprised of individuals associated not in "an enterprise to pursue a common substantive purpose or to promote a common interest, but that of loyalty to one another, the conditions of which may achieve the formality denoted by the kindred word 'legality'. Juristically, *societas* was

understood to be the product of a pact or an agreement, not to act in concert but to acknowledge the authority of certain conditions in acting.”<sup>84</sup> In the feudal world, social relationships and the theological foundations upon which they were based entailed formal relationships - the feudal *commendatio* - rather than the shared pursuit of a collective goal. Political and church institutions could help or hinder the achievement of salvation, but the peasant would receive his heavenly reward independent of his lord.

The *universitas*, in contrast, is an association of persons who, together, form a natural person and is based on “a relationship between persons thus said to compose a one [sic] of the same character as each of themselves.”<sup>85</sup> This social structure is not a series of individuals contracting with other individuals, but rather an aggregation that created a separate entity. When considering the institutional structures that emerged from Protestant understandings of the individual and political authority, we see here the basis for the emergence of the state as a corporate actor. This also sheds light on the pervasive use of metaphors attributing human personality to the state. The analysis of the state, following this set of social structures, is predicated on a thorough understanding of human nature and the ability to draw parallels between man and institution. If an association possesses the personality of its members - in this case the state as a corporate actor - the question of establishing an accurate understanding of human nature becomes of central importance.

Similar to the previous section’s discussion on the evolution of a subjective theory of individual rights, Luther and other Protestant theologians imbued new meaning into the idea of an association possessing unique properties and personality; however, the concept of the corporate actor was not foreign to sixteenth century audiences. Roman law viewed the *polis* as a corporate entity, granting the treasury rights to sue and be sued in civil courts. Municipalities and private groups possessed similar rights

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<sup>84</sup>Oakeshott (1991), 201

<sup>85</sup>Oakeshott (1991), 201

although those rights were dependent on the emperor for donation. Guilds, clubs, and other associations did not possess inherent rights but relied on a public authority to determine their duties and scope of action. The concept of a corporation as a legal person or possessing legal personality did not exist.<sup>86</sup>

Eleventh and twelfth century legal scholars equated the corporation with the individuals who composed it: “the corporation is nothing other than the men who are there.”<sup>87</sup> This is not to say that groups did not exist as an element of legal study, but rather that the primary concern of the early canonists was the regulation of these groups rather than the development of a theory of corporations. Corporate bodies existed in the medieval world, but they too lacked a unique personality, a “specific ability to bear the character of persons.”<sup>88</sup> Reflecting the overarching principle of the *societas* as a collection of individuals united by a common legal framework, medieval canonists drew upon the Roman corporate law framework to establish the rules and procedures that would define the multiplicity of communities that existed in the medieval world and the relationships that existed within and among them. Foremost among these groups to merit attention was the *ecclesia* - the bishop and body of clerics associated with individual episcopal sees. Gratian’s *Decretum* and contained extensive material on the extent of bishop’s independence from his chapter including such restrictions as a prohibition on the buying or selling of property without the advise or consent of his chapter.<sup>89</sup>

Even though the concept of a corporate body possessing legal personality had not yet been codified in the ancient and medieval world, the growing awareness on the part of Christians of their unique role as members of the faith did contribute to the development of the concept. By the twelfth century the Catholic Church had come to see itself as a unique institution and borrowed a term once used to refer to the

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<sup>86</sup>Berman (1983), 216

<sup>87</sup>Canning (1988), 474

<sup>88</sup>Runciman (2005), 3

<sup>89</sup>Pennington (1988), 443-444

eucharist - the *corpus mysticum* or mystical body (of Christ) - to refer to its members as a collective.<sup>90</sup> This move from a body of Christ to a corporation of Christ found its clearest expression in the work of the Commentators, the fourteenth century French legal scholars engaged with the study of Justinian's *Digest*. Among them, Baldus, bypassed the Church entirely and instead attributed a corporate identity to the state:

... acts of a Government are binding on its successors because the real Subject of the duty is the State's Personality. The Commonwealth... can do no act by itself, but he who rules the Commonwealth acts in virtue of the Commonwealth and of the office which it has conferred upon him. Therefore in the King we must distinguish the private person and the public person. The person of the King is the organ and instrument of an 'intellectual and public person'; and it is this intellectual and public person that must be regarded as the principal, for the law pays more regard to the power of the principal than to the power of an organ. So the true subject of the duty created by an act of the Government is the represented Commonwealth which never dies, and a subsequent Ruler is liable in its name.<sup>91</sup>

This concept of a corporate body of the faithful had transformed the status of the pope to that of "the chief Prince moving and regulating the whole Christian polity."<sup>92</sup> In similar fashion, secular rulers became seen as heads of unified entities rather than a disparate collection of individuals. While later writers in the Protestant humanist tradition would develop this concept of corporate identity more fully, we see in the above quotation the first sketch of what would become an understanding of political structures as possessing a unique personality and the existence of rulers acting on behalf of the commonwealth and not as recipients of divine direction as mediated by the papacy. No mention is made of a voluntary association or any concept of individual freedom,<sup>93</sup> but we do find a clearly, albeit weakly, expressed concept of representation. The king as a public person acts on behalf of the commonwealth. In this context, the commonwealth:

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<sup>90</sup>Kantorowicz (1997)

<sup>91</sup>von Gierke (1900), 69

<sup>92</sup>Kantorowicz (1997), 203

<sup>93</sup>note that subjects or citizens are also not mentioned

is not... many persons transformed in one Person. It is a many speaking with one voice, not because all the tongues have miraculously become one Tongue, or because all the intelligences concerned have become one Mind, or all the wills one Will, but because (unlike *socii*) they are agreed, not merely to speak the same language, but to say the same thing and are equipped with the means of committing themselves to or acknowledging such common utterances as their own.<sup>94</sup>

This ability to speak with a common voice came first through the understanding of the ruler as representative of his people. This unification or identification of the ruler with the polity rather than his faith brought with it two important developments. First, the political body as a corporate entity, while compared to the human body, was not viewed as sharing the moral attributes of the individual. Without a physical body, it could not be punished in physical terms. Without a soul, it could not be condemned for moral failings. Like the God of the Protestant theologians, this embryonic nation-state transcended the individual and its immaterial form made it accessible through individual experience and adherence to its laws – what may perhaps be considered the secularized version of “grace.” The state did not clearly stand above or outside the individual, yet the topic of discussion increasingly shifted to a growing awareness of the role of individuals within the political community and the attribution of personality to that collection of individuals under a single ruler.

The nature of that personality - the personality of individuals within the political community and of the ruler himself - is of particular interest when joining Luther’s disdain for the religious pretensions of the common man and his outright contempt for secular authorities who claimed to be Christian princes. If man is irretrievably fallen and the genuinely Christian prince is an anomaly, a collection of men as a *universitas* is surely a dangerous thing. This brings us to Luther’s emphasis on the primacy of coercive authority for maintaining order within the political community and for ensuring survival from foreign enemies.

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<sup>94</sup>Oakeshott (1991), 205

Consistent with his ardent separation of church and state into two separate spheres, Luther rejected the legitimacy of religious warfare. Because of the clear division between the spiritual and temporal kingdoms, a secular ruler could not permissibly engage in a crusade or otherwise fight on the pope's behalf. An emperor could initiate war simply because he was emperor. Moreover, given man's inherent greed and self-interest, declarations of war were unavoidable. Writing "On War against the Turk" (1529) after the first Ottoman attack on Vienna:

They undertook to fight against the Turk under the name of Christ, and taught men and stirred them up to do this, as though our people were an army of Christians against the Turks, who were enemies of Christ; and this is straight against Christ's doctrine and name... It is against His name, because in such an army there are scarcely five Christians, and perhaps worse people in the eyes of God than are the Turks; and yet they would all bear the name of Christ.<sup>95</sup>

... it is certain that the Turk has no right or command to begin war and attack lands that are not his. Therefore, his war is nothing else than outrage and robbery... For he does not fight from necessity or to protect his land in peace, as the right kind of ruler does, but like a pirate or highwayman, he seeks to rob and damage other lands, who are doing and have done nothing to him.<sup>96</sup>

Luther exhorts his audience to wage war against the Turks not because they are an enemy of the Christian faith,<sup>97</sup> but because they are enemies of government. "Their government, therefore, is not a regular rulership, like others, for the maintenance of peace, the protection of the good, and the punishment of the wicked, but a rod of anger and a punishment of God upon the unbelieving world..."<sup>98</sup> The Ottoman Empire's attack on Europe is the product of greed and self-aggrandizement - unfortunate but not surprising through the lens of the Protestant view of human nature - and must therefore be stopped.

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<sup>95</sup>Luther (2007), 83-84

<sup>96</sup>Luther (2007), 85

<sup>97</sup>recognizing that "the world acts as though it were snowing pupils of the Turkish faith" Luther (2007), 85

<sup>98</sup>Luther (2007), 96

In “Whether Soldiers, Too, Can Be Saved,” Luther provides a medical analogy for his view of war, comparing the work of the soldier to that of the physician. Some Christians may believe that killing and robbing do not reflect Christ’s message of love and charity. Similarly, a doctor who amputates a diseased limb may be called cruel. In both cases, however, the act is a kind and merciful one because of the purpose it serves. The doctor saves a life through the loss of an arm and the Christian soldier protects the good and keeps and preserves house and home, wife and child, property and honour and peace. . . .”<sup>99</sup> War can therefore be regarded as “a small misfortune that prevents a great misfortune.”<sup>100</sup>

Calvin extends this absolution of soldiers fighting in defense of the state by portraying them as instruments of God’s will. “*To hurt* and *to destroy* are incompatible with the character of the godly; but to avenge the afflictions of the righteous at the command of God, is neither *to hurt* nor *to destroy*. Therefore it is easy to conclude that in this respect magistrates are not subject to the common law; by which, through the Lord, binds the hands of men, he does not bind his own justice, which he exercises by the hands of magistrates.”<sup>101</sup> Calvin goes further to warn magistrates against the dangers of excessive mercy in fear that he not “through a superstitious affectation of clemency, fall into a mistaken humanity, which is the worst kind of cruelty, by indulging a weak and ill-judged lenity, to the detriment of multitudes.”<sup>102</sup>

## Conclusion

In his response to the mid-twentieth century thesis in which scholars viewed historical development as a process of secularization of Christian theological antecedents, German historian Hans Blumenberg proposed an alternative account of the mod-

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<sup>99</sup>Luther (2007), 36

<sup>100</sup>Luther (2007), 36

<sup>101</sup>Calvin (1960), IV.20.10

<sup>102</sup>Calvin (1960), IV.20.10



ern age. Modernity arose not as the product of a continuous development towards a teleological end, but rather through the replacement of a fixed and authoritative Aristotelian approach to science with a more flexible conception of knowledge based on the Cartesian method of scientific inquiry.

Blumenberg's thesis is based on his view of the art, literature, and philosophy of each age embodying a particular creative spirit. These mirrors of social life did not spring into existence spontaneously, but rather existed as part of a broader dialogue within and across time. "The continuity underlying the change of epoch is, he says, a continuity of problems rather than of solutions, of questions rather than answers."<sup>103</sup>

This chapter has presented an illustration of Blumenberg's concept of continuity within change. Between the ancient and early modern world we see that scholars, theologians, statesmen, and philosophers have all grappled with an identical question: given man's fundamental drive for the pursuit of his personal, immediate self-interest (whether that self-interest be called *utile* or original sin) and his remarkable capacity to do harm to others, how are societies to be structured? The ancient world provided two answers to that question.

In Aristotle and Thucydides we find that man's self-interest could be redefined and redirected into the pursuit of the common good. The welfare of the state was seen as the fount from which all individual benefit flowed and civic virtue as the path to both the individual's and the polity's greatness. Aristotle's view of man as a political animal categorized the individual as a being indistinguishable from others of his species and to participate in political life was only right and fitting given this inescapable natural state. Drawing upon his familiarity with Aristotle, Augustine's emphasis on spiritual communion with God found its temporal translation in the scholastic's emphasis on the community of the faithful. Rather than pursue the common good defined as the glory of the polity, Augustine's individual was tasked

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<sup>103</sup>Blumenberg (1985), xviii

with the pursuit of an idea of salvation that transcended temporal concerns. Man's individuality was secondary to his primary role as a believer. He concluded feudal contracts with his lords and vassals. He participated in civic and Church affairs. In both of these activities, however, man acted as a member of the body of Christ and this community cohesion had reverberations through the medieval political world. The laws by which man lived found their legitimacy only to the extent that they reflected God's will for mankind (which, fortunately, was expansive enough to include both political benefits and abuses). Through the doctrine of the two swords, the social world reflected a divine hierarchy in which the papal sword exercised spiritual authority and delegated secular authority and exercise of the temporal sword to local magistrates. The Church retained a distance from the bloodier business of warfare and political administration while retaining its stature as mediator and court of final appeal for members of the faith.

Alongside this ancient view of political life as the noblest human pursuit we also see a much darker, more pessimistic answer to the question of how societies are to be structured in response to man's pursuit of his self-interest. In reply to Cicero's advocacy of republican and democratic government, Tacitus wrote that "Cicero's definition of the state as a group of men associated for the sake of living well indicates the best objective indeed, but it does not indicate the power and nature of the institution."<sup>104</sup> Early modern scholars such as Machiavelli, sympathetic to the Ciceroian ideal, responded by integrating Tacitus's interest in military security and the acquisition of material resources to ensure that military security into their theories of *raison d'état* and its "relentless focus on raw power."<sup>105</sup>

While radical in their expression, the ideas derived from Luther's view of salvation as dependent on a personal relationship with God rather than acts of charity and piety echoed a much older, humanist concern with the status of the individual in the

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<sup>104</sup>quoted in Salmon (1980), 317

<sup>105</sup>Tuck (1993), 120-126

political community that originated with Cicero and found further support through Tacitus's skeptical view of political life. Luther's view of political authority as benefiting primarily the ruled rather than the rulers is strikingly similar to Cicero's injunction that "those who propose to take charge of the affairs of government... keep the good of the people so clearly in view that regardless of their own interests they will make their every action conform to that [and...] care for the welfare of the whole body politic and not in serving the interests of some one party to betray the rest. For the administration of the government, like the office of a trustee must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted."<sup>106</sup> Like the balance struck by Luther between his interest in the individual and recognition of that same individual's remarkable capacity to inflict harm, Cicero's republican ideal of personal freedom and community service found its counterpoint in Tacitus's disenchanted advocacy of absolutist government where "all politics was [seen] as at least potentially civil war, and our fellow citizens were no different from enemies with whom we lived in uneasy peace."<sup>107</sup> Luther's vision of man in the secular world did not embrace a longing for God as an appeal for salvation or as a reflection of mankind's natural and inextricable membership in society. Instead, his relationship with the divine reflected man's individuality. Man's spiritual life depended on his personal relationship with God and in the political sphere this emerged as an emphasis on the rights of the individual vis-à-vis the community. The Protestant Reformation introduced to Europe a clearly articulated set of principles delineating the sovereign, inalienable rights of the individual and presented the foundations of a legal framework grounded in law made by men rather than received from the divine. These ideas formed the basis of political institutions grounded in popular consent, yet, due to the remarkably pessimistic view of human nature contained within them, also armed secular authority with the theoretical right to use coercive

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<sup>106</sup>Cicero (1902), 1.25

<sup>107</sup>Tuck (1999), 10

power to maintain peace and stability within these communities.

## Chapter 5

### The Lens of the Free Seas Debate

The thread that has united the perspectives presented on the seventeenth century free seas debate is an overarching interest in the ways in which ideas - the normative principles valued by political actors - impact political behavior. When the Catholic Church entreated its faithful to embrace the Gregorian Reforms in the late eleventh century, it did so not through recourse to threats but by appeal to the idea that the papacy, as Christ's representative on earth, legitimately possessed authority over secular powers. Luther's *Ninety-Five Theses* launched a long succession of military conflicts that spread throughout Europe, but what brought these armies together - whether through cynical opportunism or sincere belief - was an idea based on the individual's personal relationship with the divine. While any number of historical examples can be used to illustrate the presence of an ideological component to political action, the claim that ideas impact actor behavior is a banal one absent a supplemental argument about how ideas matter and how these normative principles may best be approached as a topic of scholarly inquiry. It has been the task of this dissertation to present that argument.

It has been claimed here that international society is based on shared normative principles and that these principles can be discerned through the analysis of justifications made by international actors in defense of claims. More specifically, the

outline for what would become the post-Westphalian international order is reflected in the differing justifications presented in the fifteenth through seventeenth centuries by Spain, Portugal, the United Provinces, and England for their claims to maritime jurisdiction. The norms that characterized international society prior to the beginning of the seventeenth century - the political community as part of a Christian society, the role of the papacy in dispute adjudication, and the view of international law as something to be revealed rather than created - provide a clear basis for Spain and Portugal's claim to global hegemony. They do not, however, explain the radically different conception of international society presented by the Dutch and English in their efforts to justify their respective rights to the East Indies spice trade and North Sea fisheries. The answer to this clear divergence from existing norms is provided by turning instead to the Protestant humanist philosophies held by domestic actors and articulated in Grotius's *Mare Liberum* and Selden's *Mare Clausum*. When extending these disparate justifications beyond the immediate context of the free seas debate, we find that the moral principles that provide a general outline of the normative content of international society are not necessarily solely products of state interaction, self-interest, or power relationships, but of deeply-held individual values that shape and orient man's experience in the social world.

The dissertation is also based on the premise that normative principles cannot exist outside a set of institutional structures required to give them meaning. Borrowing from Karl Schmitt's reading of Hobbes, *keine Norm gilt im Leeren*<sup>1</sup> - no norm is valid in emptiness. Where Schmitt echoed the Hobbesian notion that the state creates the institutional structures that are the necessary prerequisites for political action, I suggest that we may also find relevance in this approach for the study of international society. If the institutional structures embodied by the state determine "the concrete situation in which moral and legal norms can be valid,"<sup>2</sup> the absence of such author-

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<sup>1</sup>Schmitt (1994), 155

<sup>2</sup>Rasch (2000), 4

itative, universal structures in international society implies that ethical concepts can only be studied through recourse to the ideas and values held by domestic actors. From this perspective, the norms that shape international society are neither derived from eternal concepts nor born from intersubjective meaning. They are the product of domestic processes and normative principles held by domestic actors.

Reviewing the argument made in the body of the dissertation, situating this work in the existing literature on international relations theory, and elucidating some implications of this analysis is the task of this final chapter. Doing so places this work in the context of a larger dialogue in the field about the content and limits of international relations theory and this dissertation's contribution to that conversation. The first section provides a restatement of the thesis and examines the seizure of the *Santa Catarina* through the lens of various theories of international relations. Each of the approaches discussed in the introduction to the dissertation - neorealism, institutionalism, and constructivism - would bring to the analysis a different set of assumptions and interests. This section illustrates the differing perspectives, the conclusions that would hypothetically be drawn, and how the present analysis contributes to a richer account of international society and normative principles than existing theories can provide. The second section makes explicit the connections between the justifications presented by the actors discussed in the historical narrative and the philosophical foundations. In doing so we find that the justifications made to support legal claims cannot be attributed to existing international norms, but rather through ideas shared by domestic actors.

## **Perspectives on the Seizure of the Santa Catarina**

The dissertation began with a statement of a puzzle: how can we account for the Dutch decision to justify their claims to trading rights in the East Indies in a language that differed so dramatically from existing international norms? As seen in

the discussion on justification in the first chapter, existing theories of international relations view justifications as referring to a shared set of principles in order to provide legitimacy for a particular course of action. Justifications, then, are a reflection of common values and prevailing beliefs on appropriate state behavior. As seen in the summary of justifications provided in table 5.1, however, Dutch justifications explicitly rejected prevailing norms of international maritime law.

Prior to 1603, maritime law had been grounded in a common recognition of the papacy as the source of legitimate title to ownership and mediating body in international disputes. Catholic scholastic just war theory only permitted expansion outside European borders under the auspices of the spread of the Christian faith. Non-Christians were seen as possessing the same dignities shared by all humanity and incursions into their territories could not be justified by base motivations such as greed or glory.

These international norms found clear expression in the debate between Castile and Portugal regarding the conquest of the Canary Islands and, later, Spain and Portugal's debate on rights to exploration and jurisdiction over newly discovered territories in the Americas, Asia, and Africa. Attempts to discern the "true" motivations of the Iberian powers aside, these colonial enterprises were not justified based on wealth or power, but rather on Spain and Portugal's ability to expand the body of the Christian faithful through missionary efforts. Both the Spanish and Portuguese drew upon canon law, church tradition, and theological writings to support their claims. The papal grants to secular rulers resembled feudal fiefs and the relevant documents included explicit passages that honored the pope as a medieval lord bestowing territorial rights to a vassal. In the instance of disputes over these feudalistic grants, both Spain and Portugal turned to the source of those rights - the Church - for adjudication.

The 1603 Dutch seizure of the Portuguese *Santa Catarina* served as the starting point for a much more wide-ranging discourse of the rights of the individual to inter-



<b>Medieval Norms of Maritime Law</b>	
expansion of jurisdiction outside Europe viewed as a spiritual enterprise and, therefore, subject to papal authority	
papal donation as legitimate basis of ownership	
ecclesiastical bodies act as mediators in disputes between secular rulers	
<b>Spanish &amp; Portuguese Justification</b>	<b>Dutch Justification</b>
colonization of newly-discovered territories outside of Europe done in the interest of spreading the faith	expansion of trade in the East Indies a legitimate means of accruing wealth for national and individual benefit
claims legitimized by recourse to canon law and precedent established by the Church	claims legitimized by recourse to concepts of natural law that provide for the rights of the individual to self-defense and the unimpeded engagement in trade
secular rulers as representatives of the faith and beholden to the pope in spiritual matters; expansion outside Europe funded by personal treasuries	secular rulers as representatives of the people and beholden to their people and the protection of their interests; expansion outside Europe funded by personal investments and public funds
recourse to Vatican in the instance of disputes	recourse to the possible exercise of military power in the instance of disputes

Table 5.1: Medieval Maritime Norms and Justifications

pret and defend natural law absent a sovereign authority - a discourse, through its association of states' rights with the rights of the individual, that became a statement of the nature of the state and international society in the early modern world.

According to Grotius's defense of the seizure in *Mare Liberum*, the Dutch expansion into the East Indies could only be regarded as a legitimate pursuit of national self-interest and the right to trade - to participate fully in the community of nations - existed as a fundamental right to all. Due to the ephemeral nature of the tides and the impossibility of erecting permanent boundaries on the high seas, the sea could not be an object of property. Even if that were possible, however, jurisdiction based on papal donation could not be a legitimate title of possession as the only laws applicable to both man and states are the ones they themselves create. Because of the definitive separation between the spiritual and temporal worlds, rulers are ultimately responsible to their subjects and not to any code of divine law. Expansion beyond existing boundaries is equally secular in nature. For a state to increase its wealth and security is neither a divine injunction nor a strictly personal concern for individual rulers. It is an act of public authority that draws its legitimacy and its funding from public associations. Given the fundamental illegitimacy of the Catholic Church as an institution, the pope cannot be seen as a fair arbiter of international disputes. Just as he does not possess the authority to distribute lands, he can not serve as the locus of international arbitration. Left to their own devices, states must rely on their own military capabilities to metaphorically navigate the hostile waters of a world bereft of a single, absolute authority - a world, as it were, beyond the line created by a shared moral consensus.

Historians have interpreted the seizure of the *Santa Catarina* within the context provided by the Dutch struggle for independence from their Hapsburg rulers. Students of political theory have examined the war of ideas which stemmed from Grotius's declaration of the sea as incapable of being the object of ownership. Within the

field of international relations, however, the Dutch seizure of the *Santa Catarina* is regarded - if at all - as an ancillary, if not somewhat interesting, anecdote in the more dramatic *sturm und drang* of international affairs.<sup>3</sup> By relegating this case to the periphery of their field of inquiry, however, scholars have overlooked its potential to serve as an illustration for the origin of the international system and change within it. Existing theoretical frameworks would conceivably have drawn different different conclusions and examined different aspects of the incident.

An institutionalist view begins with the assumption that the international system is an arena in which collective action problems between states are articulated and resolved. The condition of anarchy here is peripheral to the analysis. While actors behave strategically and seek to maximize utility, preferences vary among states. Through this lens, the international system is not an environment which dictates certain behaviors. Rather, the international system is interpreted as a set of institutions - the “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area”<sup>4</sup> - consciously created by actors within the system.

Hendrik Spruyt’s work on state building in many ways typifies this approach and highlights both its strengths and weaknesses. In Spruyt’s historical account,<sup>5</sup> the growth of trade in the Middle Ages led to the emergence of new social elites with interests that could not be met within feudal institutions. Great emphasis is placed on the role of individual agency in the development of post-feudal institutions. Spruyt’s actors recognize and capitalize upon changes in societal hierarchies, using their status to develop specific institutional arrangements. These new institutional forms are rooted in individual interests and beliefs which, although not explicitly stated by Spruyt, appear to be functions of these individuals’ position within society

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<sup>3</sup>For example, Keene (2002) incorporates the the seizure of the *Santa Catarina* briefly into his discussion on Grotius’ notion on the divisibility of sovereignty. See Keene (2002), 50-52.

<sup>4</sup>Krasner:1982bv, 185

<sup>5</sup>Spruyt (1994)

as defined by their relationship to modes of production. In the Middle Ages, these new elites – centered around an emergent merchant class – formed coalitions amongst each other in order to create new forms of political organization better suited to their needs: the sovereign state, the city-state, and trading leagues. Once established as alternatives to the feudal order, these three units competed amongst each other for dominance and the sovereign state emerged victorious.

Spruyt's evolutionary principles clearly defines the relationship between institutions and behavior. Actors create institutions to benefit themselves and the type which boasts the highest degree of evolutionary fitness emerges as dominant. The explanatory capacity is also significant. We may see cases of policy and institutional convergence across internationally for the same reasons we see the triumph of the nation-state. Successful strategies and institutions do better because they are more adept at serving actors' interests. Actors are assumed to be both purposive and in full control of institutional development. According to Spruyt, actors create social structures which reflect interests and cognitive frameworks defined by the source of change in the systemic equilibrium. In the Middle Ages, the growth of trade led to the creation of a new merchant class which required efficient organization, the ability to create credible commitments, and well-defined scopes of authority.

This perspective would highlight the instrumentality of the *Santa Catarina's* seizure. At the time of the capture, the United Provinces were at war with Spain and the Dutch merchant fleet would be one tool in that military effort. A policy encouraging privateering on the high seas would be consistent with the institutionalists' emphasis on self-interest, individual agency, and the conscious creation of international norms designed to serve those interests. Van Heemskerck's declaration of lawlessness on the high seas and the subsequent support provided by the United Provinces and VOC effectively created a new form of political institution - the international state of nature understood as anarchy - which governed that which could not be otherwise

claimed through the use of force.

Neorealist scholars have centered their work on the role of power in governing international affairs. Here, the international system is regarded as a set of imperatives. These imperatives are *a priori* deductions of what any rational actor would do given a certain set of conditions. Scholars in this approach have characterized the international environment as defined by a set of properties based on the distribution of power – anarchic space, balanced space, hierarchical space, bipolar space.<sup>6</sup> The characteristics of a particular power constellation provides a set of behavioral imperatives for state leaders. Knowledge of state behavior is derived from the analysis of elements within the boundaries – ordered and determined prior to the analysis and grounded in human nature – of this system. The centrality of power in this approach is clear and its justification is familiar to students of international relations. This is the story of the Hobbesian state of nature, fraught with uncertainty and characterized by a perpetual, existential fear.

Through this lens, the question of why van Heemskerck seized the *Santa Catarina* would be redundant. At the risk of grossly simplifying the neorealist approach, the Dutch attacked the Portuguese ship because they could. To do otherwise would have been to risk their own well-being given the anarchy of the international system and threat to security presented by the Portuguese. Actors far removed from the diplomatic circles of the continent would not have the opportunity to apply for help from their capitals and, as a result, the interests of the stronger carried the day. “Whatever elements of authority emerge internationally are barely once removed from the capability that provides the foundation for the appearance of those elements. Authority quickly reduces to a particular expression of capability.”<sup>7</sup>

Looking at the case from a systemic standpoint, the spheres of influence created by

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<sup>6</sup>For a more detailed account of the variety of possible structures to the international systems, see Kaplan (1957)

<sup>7</sup>Waltz (1979), 88

the Treaty of Tordesillas and which preceded the Dutch expansion into the East Indies spice trade could, potentially, be called a bipolar system<sup>8</sup> and, from this perspective, the challenge presented by the Dutch to Spanish hegemony could be told within a power transition narrative. The domestic economic growth the Dutch enjoyed despite their ongoing conflict with the Spanish monarchy led to a growth in power not reflected in the existing distribution of costs and benefits in the international system. As a dissatisfied rising power with the military and economic capacity to change the status quo, the United Provinces capitalized on their strengths and the seizure of the *Santa Catarina* can be regarded as an early sign of a broader attempt to gain systemic hegemony and redefine the norms and institutions of the international system.

Institutionalists could point to the Treaty of Tordesillas and subsequent bilateral agreements on the apportionment of the globe as a voluntary series of agreements designed to reduce uncertainty and limit the transaction costs associated with the new era of global exploration. The collapse of the Treaty of Tordesillas based on the challenges presented by England and the United Provinces would then be an instance of the failure of cooperation or the limits of institutional design. In contrast, Waltz's account of the stability of bipolar systems would suggest that the treaty reflected the realities of two competing powers - Spain and Portugal - in an anarchical world. Their unification under the Spanish Hapsburgs in the late sixteenth century represented a hegemonic threat to Europe's other powers that demanded a military response.

Constructivist accounts view the international system as the product of interaction. Through interaction, actors develop a set of intersubjective meanings. These meanings serve to develop identities which, in turn, define an actor's interests. Conventionally systemic concepts such as "balance of power" and "anarchy" only have

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<sup>8</sup>Modelski (1978)

meaning in terms of impacting behavior when actors perceive these factors as integral to their identities and interests. The example of the *Santa Catarina* could, however, compliment an analysis on norm dynamics and international change. Following the three-stage process of norm emergence, norm cascade, and norm internalization, the interaction of the Dutch and Portuguese could be viewed as an instance of norm emergence. In this interpretation, van Heemskerck could be conceptualized as a “norm entrepreneur”<sup>9</sup> seeking to convince other actors to adopt a specific understanding of international anarchy. His “persuasion” may have taken a more militaristic form than commonly associated with the spread of norms, but a story may be told through that lens.

The multiplicity of stories which could be told from this one historical instance is daunting in its range, but the lessons to be learned are also substantial. From an institutionalist perspective we gain the insights that come with recognizing that, regardless of what societal forces may be at work, a theoretical understanding of international relations requires the acknowledgement that the world is populated by purposive actors and that, regardless of how it is defined, these actors pursue their self-interest. Neorealist scholarship draws our attention to the role of environment in framing the decisions available to these actors. Constructivists underline the role of ideas which actors rely on determining what that self-interest may be. Although each approach has its limitations, each also brings with it a non-trivial element of truth in its account of what the world is and what it may become.

If we are to assume that each of these three dominant approaches to international relations theorizing contains valuable and essential insights, the question is no longer *if* an approach is legitimate, but rather *when* it is applicable. A response to the field’s current debates that gives an unreflective primacy to one perspective over another perpetuates a certain theoretical morass. To step outside the debate and acknowledge

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<sup>9</sup>Finnemore and Sikkink (1998), 385

the conditional legitimacy of all views recognizes the degree to which these conceptions of international politics are “competing views of human capabilities, domestic political ends, and the opportunities of world politics” that function as a normative political choice.<sup>10</sup> It has been argued in this dissertation that this simultaneous distancing and synthesis from a theoretical perspective would benefit from a deeper and more systematic account of the normative foundations of international society. To understand when and how specific normative principles achieve real-world policy relevance is to understand context. To understand context in international relations is, in part, to understand the fundamental norms that define international society and its moral basis.

The norms that form the basis of international society carry with them injunctions for behavior not encompassed by a straightforward application of March and Olsen’s logic of consequences. At the same time, focusing attention on a logic of appropriateness neglects the impact of the material world and the realities of self-interest. Spain’s self-perception as a Catholic monarchy may not have been the sole factor in its decision to appeal to the papacy in its conflict with Portugal over rights to exploration in the Americas; however, given the historical continuity of these appeals to the Church as a mediating body, the content of its justification being based in Catholic theology, and the sincere earnestness with which the Spanish scholastics approached the task of integrating maritime exploration into their understanding of the Christian *nomos*, ignoring the real impact of ideas and normative principles on state action is equally limiting in providing a comprehensive understanding of foreign policy behavior and the constitutive ideas underlying international society.

That balance between these various considerations - a parsimonious but historically-superficial account and a historical treatise which loses all theoretical relevance, an analysis that recognizes the importance of moral values and intersubjective beliefs

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<sup>10</sup>Doyle (1997), 36



without rejecting the material world's impact on the expression of those principles - has certainly not been achieved in its entirety in this dissertation. It does, however, represent a step towards that broader and theoretically beneficial integration. Such a synthesis is provided in the arguments contained within the dissertation.

First, the dissertation has argued that, although actors are guided by the pursuit of self-interest, what constitutes self-interest is socially determined within a political community. Conventional rational choice theory posits that actors favor a strategy in which the ends justify the means. In Weberian terms, political life does not allow for the use of an ethic of conviction in which moral duty dictates action regardless of its consequences. The ethic of responsibility in which the ultimate goal permits the use of any means necessary irrespective of its ethical merits. I argue that these two, ostensibly competing, claims are in fact integrated. Without the underlying set of values required to determine a cause, an individual cannot be a political actor. Instead, political action is the pursuit of normative goals via strategic means - an instance where the ethic of conviction determines the end to be pursued by the ethic of responsibility. These ethics of conviction are the product of social forces and can vary among actors. These complexes of ethical principles can also form the basis of communities of international actors, what we may refer to as international society.

During the negotiations for the 1609 Treaty of Antwerp, Grotius and Oldenbarnvelt petitioned Spain for the recognition of the Dutch right to engage in trade in the East Indies unmolested by the Habsburg power as a condition for peace. That, in itself, is entirely unremarkable and easily explained through recourse to existing theories of international relations that draw upon concepts of power and self-interest. What is less clear is why the Dutch adopted a line of argumentation in their defense against Spanish claims that rejected existing international norms entirely. The historical narrative presented in the dissertation provides an answer: the Dutch justification was based in domestic conceptions of the United Provinces' right to unimpeded trade.

That same right to engage in international commerce without foreign restrictions or intervention, grounded in a Protestant humanist understanding of the rights of the individual, may also explain the Dutch decision to proceed unilaterally. France, for example, successfully petitioned Spain in the Treaty for Cateau-Cambrésis for rights to exploration in regions considered part of the Spanish sphere of influence under the Treaty of Tordesillas. Where France's request reflects a tacit recognition of the legitimacy of the Church's authority in the donation of property, the United Provinces approach of presenting Spain with a *fait accompli* illustrates the impact of normative principles in establishing a goal that is then pursued strategically by international actors.

Second, international actors that adhere to similar normative principles form communities which serve to perpetuate and promulgate the moral values of their members. Although similar, this is conceptually distinct from discussions of polarity. Structural models of the international system presume a relationship between system polarity and power politics. The creation of communities, in contrast, is the product of shared ideas. Power may certainly play a role in this process, in particular when considering change within international societies, but it need not. A thief may use a weapon to persuade me to hand over my wallet, yet no stick is large enough to convince me that I should feel gratitude for being relieved of the extra weight in my pocket. Neither are shared norms a sufficient guarantor for the absence of conflict. Continuing with the previous metaphor, the thief and I might both embrace the values of life, liberty, and the pursuit of happiness, yet interpret those terms in radically different ways.

To illustrate this point, consider the differences in the relationships between the four states examined: Spain, Portugal, the United Provinces, and England. The shared understanding of being part of a larger Christian community did not preclude numerous military conflicts between the two. At the same time, the existence of clear international norms did provide a mechanism for the resolution of disputes with

respect to Portugal's right to colonize the Canary Islands and Spain's right to exploit its discovery of the Americas. Common perception of international law as created by states and not based on an interpretation of divine will did not prevent the Anglo-Dutch wars over fishery rights in the North Sea. The shared principles did, however, allow both actors to recognize war as a legitimate means of dispute resolution in the event of a failure to reach a negotiated settlement.

## **Justification in International Society**

While Spanish and Portuguese justifications of their claims to jurisdiction over the world's oceans echoed existing international norms on maritime law, they also referenced shared understandings with respect to four principles: the relationship between the individual and the political community; the sources of government legitimacy; the structure of social institutions; and methods of dispute adjudication. As illustrated in table 5.2, these four dimensions are shared between the Spanish and Portuguese justifications and the philosophy of the Catholic scholastics.

The Spanish and Portuguese approach to territorial expansion and maritime jurisdiction as a means by propagating the Christian faith reflected the scholastic understanding of man as being, first and foremost, a member of the Christian community. As individuals or kings, the Spanish and Portuguese could not legitimately conquer foreign lands. As missionaries, however, they embraced the Christian imperative to share the good news of Christ's resurrection. The use of canon law and Church theology to support these claims echoed the scholastic principle of law as an expression of divine will. Law existed as something separate from man and the Church served a mediating function as discerning and interpreting God's intent for mankind before its codification into secular laws.

As missionaries rather than conquerors, Spanish and Portuguese rulers also acknowledged their obligation to the papacy as a feudal lord. Viewing property as

	<b>Spanish and Portuguese Justification</b>	<b>Catholic Scholastic Philosophy</b>
<i>community</i>	colonization of newly-discovered territories outside of Europe done in the interest of spreading the faith	community of the Christian faithful designed to promote individual salvation
<i>legitimacy</i>	claims legitimized by recourse to canon law and precedent established by the Church	divine will as interpreted through Church doctrine and tradition
<i>institutions</i>	secular rulers as representatives of the faith and beholden to the pope in spiritual matters; expansion outside Europe funded by personal treasuries	pope as representative of Christ on earth; hierarchical social structure based on divine order; social structures as covenants among individuals
<i>adjudication</i>	recourse to Vatican in the instance of disputes	establishment of Church as the final court of appeal in secular and spiritual matters (post-1075 Gregorian Reform)

Table 5.2: Spanish and Portuguese Justifications

bestowed rather than claimed echoed a long-standing feudal tradition of lords granting fiefs to their vassals. This, in turn, echoed the view of Christ as having granted the Church the proverbial keys to his kingdom. Because of this authority to dispose of property, the Church also served as an adjudicating body in disputes over jurisdiction over it. This was, in turn, reflected in Spain and Portugal's willingness to submit their disputes to papal mediation.

The Dutch and English justifications for their maritime claims likewise reflected a shared philosophical basis, in this case through a common embrace of Protestant humanist theory. Luther's doctrine of salvation through faith alone rejected the impact of human behavior in currying divine favor. Man was saved or man was doomed, but in either case the outcome in the hereafter rested entirely in God's hands. This theological focus on the individual's relationship with God also shaped the Protestants' view of the secular universe. Even though Luther's doctrine of the two kingdoms called for a radical separation of spiritual and secular matters, the view of the individual colored both approaches. First, the individual's ability to interpret the word of God absent a mediating body extended the individual's range of action to encompass an ability to act as judge and jury in matters regarding natural law. Second, the office of secular ruler was separated from the personality of individual rulers. While the office may have been analogous to the authority with which God directly ruled his creation, the individual maintained his presence in that office through the consent of the people rather than the grace of the divine. Third, the Lutheran concept of the individual as characterized primarily by a morally bankrupt and sinful nature was extended to provide a description of the nature of political life. Combining this pessimism about man's innate character with the emergent recognition of the state as a corporate actor with a unique personality based on the characteristics of its component parts (i.e., people), the political community was not a benign force but contained within it an ever-present, pervasive capacity to exercise

coercive control over its members.

Table 5.3 illustrates the comparison between the Dutch justification for the freedom of the seas with the Protestant humanist philosophy discussed above. Implicitly drawing upon Luther's two kingdom doctrine, Grotius had no truck with clerical intervention in secular matters and clearly stated that the only laws to which states were beholden were those they made themselves. By equating the rights of states with the rights of the individual, Grotius also incorporated the individual's ability to know and punish transgressions of natural law. By equating the Portuguese with thieving bullies whose acts in the East Indies flew in the face of right action, Grotius not only drew upon popular anti-Habsburg sentiment in the United Provinces, but equated the Portuguese and Spanish with authorities who had violated their divine mandate to rule justly and, therefore, deserved to be removed from office.

Through the lens provided by the justification of Spanish, Portuguese, Dutch, and English claims to maritime jurisdiction, the dissertation explored four interrelated questions that sought to clarify our understanding of the relationship between normative values and international society. First, what are the sources of justifications of international law? Constructivist accounts point to the existence of an international society characterized by a set of norms and values. In order to be considered legitimate, justifications must refer to these commonly-shared understandings. In contrast, the case of the *Santa Catarina* provides us with an example of justifications which are entirely self-referential to the extent that they are formed by and for actors with reference to domestic conceptions of right and wrong rather than international ones. Existing norms of maritime law in 1603 could not account for the content of the Dutch justification. The Protestant humanist philosophy embraced by Grotius's audience, however, does.

Second, what functions do justifications serve internationally? Constructivist accounts focus on justifications as an instrument for creating, establishing, and revising

	<b>Dutch Justification</b>	<b>Protestant Humanist Philosophy</b>
<i>community</i>	expansion of trade in the East Indies a legitimate means of accruing wealth for national and individual benefit	individual's relationship with God based on salvation through faith alone rather than good deeds
<i>legitimacy</i>	claims legitimized by recourse to concepts of natural law that provide for the rights of the individual to self-defense and the unimpeded engagement in trade	divine authority expressed through the secular office rather than individual rulers; rulers must act in their citizens' best interests
<i>institutions</i>	secular rulers as representatives of the people and beholden to their people and the protection of their interests; expansion outside Europe funded by personal investments and public funds	the state viewed as a corporate actor with a personality based on that of the individual
<i>adjudication</i>	recourse to the possible exercise of military power in the instance of disputes	individual right to act as interpreter of the laws of nature and punish violations of natural law in the absence of a higher adjudicative authority

Table 5.3: Dutch Justifications

international norms. This focus, however, presumes that actors involved in a communicative interaction are either willing or capable of changing the norms upon which those justifications are based. As seen in the Dutch interaction with the Spanish and, later, the English, justifications do, in fact, serve to share information with others. The nature of that information, however, is more in line with our understanding of the term in its bargaining context than in its usefulness in persuasion. In their negotiations with the Spanish prior to the Twelve Years' Truce, the Dutch negotiating team - led by Oldenbarnevelt and Grotius - in no way changed their justifications for the rightness of their claims or their actions. Through the years leading to the truce with Spain and throughout their protracted conflict with the English, the Dutch consistently expressed the same principles found in *Mare Liberum*. Negotiating positions could, and did, change. In early negotiations with the Spanish, Oldenbarnevelt expressed his willingness to disband the VOC in exchange for peace. Upon protests from Maurice of Nassau and others who supported continuing war with Spain, Oldenbarnevelt later withdrew this bargaining chip. His defense of the decisions and the content of the justifications for his actions - the primacy of national interest - remained consistent.

Third, how and why do justifications change? Again turning to the concept of international society, constructivists would point to the norms and values of international society as being crucial in shaping justification. This emphasis on the cohesive language of international society is necessary to the constructivist project - without the universality of that language, communicative action has no meaning and, therefore, no relevance for state behavior. Taking Grotius and Selden's justification on the ownership of the seas, we see that the norms and values of international society - if we interpret that society to be Spain's Catholic, European world order - played the role of straw man. Papal donation and medieval theories of sovereign state power were mentioned only to be immediately discounted as legitimate bases for justification.



This suggests that changes in the source of justification - domestic audiences and the normative principles they embrace - are likewise the means by which justifications are changed.

Fourth, how do actors adjudicate between competing justifications? Constructivist accounts do not address this question as directly as one would hope. The process of communicative action is, in itself, the means of adjudication. Listening, evaluating, and compromise are how some justifications are accepted as legitimate whereas others are dismissed. What appears to be missing from this account is an appreciation of the persuasive power of a credible threat of the use of force. The constructivist literature has stated that the use of force is a situation in which communicative action ceases to exist. The Dutch/Spanish example suggests that this view might unnecessarily remove communicative action from theoretical consideration at a point when it is actually very relevant. Because there is no central authority, actors must rely on the potential use of power as an enforcement mechanism. What this suggests is that communicative approaches may be very fruitful in the analysis of the transformation of norms and values within particular societies. It cannot, however, be applied to the study of international relations given the plurality of values and the absence of a non-violent, non-coercive adjudicating body. To suggest that states are members of a society which is relevant for behavior makes the mistake of conflating similarities in domestic institutions with the presence of international social structures.

## Bibliography

## Bibliography

- Akashi, Kinji. *Cornelius van Bynkershoek: his contribution to the development of international law*. The Hague: Martinus Nijhoff Publishers, 1998.
- Alsop, J.D. "William Welwood, Anne of Denmark and the sovereignty of the sea." *Scottish Historical Review* 59, 2: (1980) 171–174.
- Anand, R.P. *Origin and Development of the Law of the Sea*. The Hague: Martinus Nijhoff Publishers, 1982.
- Armstrong, Dave. *Development of Catholic Doctrine: Evolution, Revolution, Or an Organic Process?* London: Gardners Books, 2007.
- Art, Robert J., and Kenneth N. Waltz. *The Use of Force*, Lanham: University Press of America, 1983, chapter Technology, Strategy, and the Uses of Force.
- Ashburner, Walter. *The Rhodian Sea-Law*. Scientia Verlag, 1976.
- Augustine. *City of God*. New York: Penguin Classics, 1972.
- . *The city of God against the pagans*. Cambridge: Cambridge University Press, 1998.
- Barnett, Randy E. "A Law Professor's Guide to Natural Law and Natural Rights." *Harvard Journal of Law and Public Policy* 20, 3: (1997) 655–681.
- Beaulac, Stéphane. "The Westphalian Legal Orthodoxy - Myth or Reality?" *Journal of the History of International Law* 2: (2000) 148–177.
- Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition*. Harvard University Press, 1983.
- . *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Harvard University Press, 2003.
- Bernhardt, John W. *Itinerant Kingship and Royal Monasteries in Early Medieval Germany, C.936-1075*. Cambridge: Cambridge University Press, 2002.
- Black, Antony. *The new Cambridge medieval history*, Cambridge: Cambridge University Press, 1998, chapter Popes and Councils, 65–86.
- Bloch, Marc. *Feudal society*. New York: Routledge, 1989.

- Blumenberg, Hans. *The legitimacy of the modern age*. Boston: MIT Press, 1985.
- Blussé, Leonard. "Brief Encounter at Macao." *Modern Asian Studies* 22, 3: (1988) 647–664.
- Borschberg, Peter. "The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602 - c.1616)." *Journal of Southeast Asian Studies* 33, 1: (2002) 31–62.
- . "Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)." *IILJ Working Paper* 14.
- Bull, Hedley. *The Anarchical Society*. Columbia University Press, 1995 [1977], 2nd edition.
- Burgess, Douglas R. *The pirates' pact*. Chicago: McGraw-Hill, 2008.
- Calvin, John. *Calvin: Institutes of the Christian Religion*, volume 1 of *The Library of Christian Classics*. Westminster John Knox Press, 1960.
- Canning, Joseph P. *The Cambridge History of Medieval Political Thought c.350-c.1450*, Cambridge: Cambridge University Press, 1988, chapter Law, Sovereignty and Corporation Theory, 1300-1450, 454–476.
- Cheyney, Edward P. "International Law under Queen Elizabeth." *The English Historical Review* 20, 80: (1905) 659–672.
- Cicero, Marcus Tullius. *De officiis*. London: A. L. Humphreys, 1902.
- de Viera y Clavijo, José. *Noticias de la historia general de las islas de Canaria*. Madrid: Impr. de Blas Román, 1772.
- Cohen, David. *The Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, 2005, chapter Commercial Law, 290–356.
- Cohen, Edward E. *Ancient Athenian Maritime Courts*. Princeton: Princeton University Press, 1973.
- Coleman, Janet. *The individual in political theory and practice*, Oxford: Oxford University Press, 1996, chapter The Individual and the Medieval State, 1–34.
- . *Transformations in medieval and early-modern rights discourse*, Dordrecht: Springer, 2006, chapter Are There Any Individual Rights or Only Duties? On the Limits of Obedience in the Avoidance of Sin according to Late Medieval and Early Modern Scholars, 3–36.
- Crocker, Henry Graham. *The extent of the marginal sea: a collection of official documents and views of representative publicists*. Washington, D.C.: Government Printing Office, 1919.

- Cuttler, Simon Hirsch. *The Law of Treason and Treason Trials in Later Medieval France*. Cambridge: Cambridge University Press, 2003.
- Davenport, Frances Gardiner. *European Treaties bearing on the History of the United States and its Dependencies to 1648*. The Carnegie Institute of Washington, 1917.
- Davies, Godfrey. *The Early Stuarts*. Oxford: Clarendon Press, 1959.
- Dawson, Samuel E. *The Lines of Demarcation of Pope Alexander VI and the Treaty of Tordesillas*. J. Hope Sons, 1899.
- DeBurigny, M. *The Life of the Truly Eminent and Learned Hugo Grotius*. Fairford: Echo Library, 2006.
- Dee, John. *General and rare memorials pertayning to the perfect arte of nauigation*. EEBO, 1577.
- Doyle, Michael W. *Ways of War and Peace*. New York: W.W. Norton Company, 1997.
- Dyson, R. W. *St Augustine of Hippo: the Christian transformation of political philosophy*. London: Continuum International Publishing Group, 2005.
- Ekelund, Robert Burton. *Sacred trust: the medieval church as an economic firm*. Oxford: Oxford University Press, 1996.
- England, Wales. Sovereign (1603-1625: James I), and Thomas Milton. *A note of the head-lands of England [as] they [beare] one from another, agreeing with the plot of the description of the countrey, with their seuerall distances, as followeth*. London: Robert Barker, 1605.
- Fahlbusch, Erwin, and Geoffrey William Bromiley, editors. *The Encyclopedia of Christianity*, volume 4. Grand Rapids: Wm. B. Eerdmans Publishing, 2005.
- Fenn, Percy Thomas. "Justinian and the Freedom of the Sea." *The American Journal of International Law* 19, 4: (1925) 716–727.
- . "Origins of the Theory of Territorial Waters." *The American Journal of International Law* 20, 3: (1926) 465–482.
- Finnemore, Martha. *The culture of national security: norms and identity in world politics*, New York: Columbia University Press, 1996, chapter Constructing Norms of Humanitarian Intervention, 153–185.
- Finnemore, Martha, and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, 4: (1998) 887–917.
- de Freitas, Serafim. *Freitas contre Grotius sur la question de la liberté des mers*. Paris: J.P. Aillaud, Guillard et cie, 1882.

- Fruin, Robert. "An unpublished work of Hugo Grotius." *Bibliotheca Visseriana* 5: (1925) 3–71.
- Fulton, Thomas W. *The Sovereignty of the Sea*. William Blackwood and Sons, 1911.
- Gallardo, Luis Fernández. *Alonso de Cartagena (1385-1456): Una biografía política en la Castilla del siglo XV*. Castilla: Consejería de Educación y Cultura, 2002.
- Gentili, Alberico, John Carew Rolfe, and Coleman Phillipson. *De iure belli libri tres*. London: Wildy Sons, 1964.
- von Gierke, Otto Friedrich. *Political theories of the middle age*. Cambridge: University Press, 1900.
- Gillespie, Michael Allen. *The theological origins of modernity*. Chicago: University of Chicago Press, 2008.
- Greenlee, William B. "The Background of Brazilian History." *The Americas* 2, 2: (1945) 151–164.
- Greif, Avner, Paul Milgrom, and Barry R. Weingast. "Coordination, Commitment, and Enforcement: The Case of the Merchant Guild." *The Journal of Political Economy* 102, 4: (1994) 745–776.
- Grotius, Hugo. *Mare Liberum (The Free Sea)*. Indianapolis: Liberty Fund, 2004.
- . *Commentary on the Law of Prize and Booty*. Indianapolis: Liberty Fund, 2006.
- Guggisberg, Hans R. *The individual in political theory and practice*, Oxford: Oxford University Press, 1996, chapter The Secular State of the Reformation Period and the Beginnings of the Debate on Religious Toleration, 79–98.
- Habermas, Jürgen. *The Theory of Communicative Action*, volume Volume 1: Reason and the Rationalization of Society. Boston: Beacon Press, 1981.
- Hall, Peter, and Rosemary Taylor. "Political Science and the Three New Institutionalisms." *Political Studies* 44, 5: (1996) 936–957.
- Harrisse, Henry. *The Diplomatic History of America*. B.F. Stevens, 1897.
- Hendrix, Scott. *The Cambridge History of Christianity: Reform and Expansion 1500-1660/1660*, Cambridge: Cambridge University Press, 2007, chapter Martin Luther, reformer, 3–19.
- Herbert, Gary B. *A Philosophical History of Rights*. New Brunswick: Transaction Publishers, 2002.
- Herman, Shael. "Trusts Sacred and Profane: Clerical, Secular, and Commercial Uses of the Medieval Commendatio." *Tulane Law Review* 71, 3: (1997) 869–896.

- Herodotus. *The Histories*. New York: Penguin Books, 1996.
- von der Heydte, Friedrich August Freiherr. "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law." *The American Journal of International Law* 29, 3: (1935) 448–471.
- Hitchcock, Robert. *A pollitique platt for the honour of the prince, the greate profite of the publique state, relief of the poore, preseruation of the riche, reformation of roges and idle persones, and the wealth of thousandes that knowes not howe to liue. Written for an newyeres gift to Englande, and the inhabitantes thereof by Robert Hitchcok late of Cauersfeelde in the countie of Buckyngham gentleman*. London: Ihon Kyngston, 1580.
- Hobbes, Thomas. *Leviathan*. Indianapolis: Hackett Publishing Company, Inc., 1994.
- Holdsworth, William Searle, and Edward Potton. *A history of English law*. Boston: Little, Brown, 1922.
- Horne, Thomas Allen. *Property rights and poverty*. Chapel Hill: University of North Carolina Press, 1990.
- Hübner, Rudolf, Francis S. Philbrick, Paul Vinogradoff, and William E. Walz. *A History of Germanic Private Law*. Boston: Little, Brown, 1918.
- Israel, Jonathan I. *Empires and Entreposts: The Dutch, the Spanish Monarchy and the Jews, 1585-1713*. London: The Hambledon Press, 1990.
- . *The Dutch Republic: Its Rise, Greatness, and Fall 1477-1806*. Oxford: Clarendon Press, 1995.
- van Ittersum, Martine Julia. "Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Jure Praedae." *Asian Journal of Social Science* 31, 3: (2003) 511–548.
- . "Mare Liberum Versus the Propriety of the Seas? The Debate between Hugo Grotius (1583-1645) and William Welwood (1552-1624) and its Impact on Anglo-Scotto-Dutch Fishery Disputes in the Second Decade of the Seventeenth Century." *The Edinburgh Law Review* 10: (2006a) 239–276.
- . *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615)*. Leiden: Brill, 2006b.
- Jados, Stanley S. *Consulate of the Sea and Related Documents*. University: University of Alabama Press, 1975.
- Johnston, David. *The Roman law of trusts*. Oxford: Oxford University Press, 1988.
- Kantorowicz, Ernst H. *The King's Two Bodies*. Princeton: Princeton University Press, 1997.

- Kaplan, Morton A. "Balance of Power, Bipolarity and Other Models of International Systems." *The American Political Science Review* 51, 3: (1957) 684–695.
- Keene, Edward. *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*. Cambridge University Press, 2002.
- Kempshall, M. S. *The common good in late medieval political thought*. Oxford: Oxford University Press, 1999.
- Keohane, Robert O. "International Institutions: Two Approaches." *International Studies Quarterly* 32, 4: (1988) 379–396.
- Khalilieh, Hassan Salih. *Islamic maritime law: an introduction*. Leiden: Brill, 1998.
- Kilcullen, John. *The Cambridge companion to Ockham*, Cambridge: Cambridge University Press, 1999, chapter The Political Writings, 302–325.
- Klee, Hans. *Hugo Grotius und Johannes Selden: Von den geistigen Ursprüngen des Kampfes um die Meeresfreiheit*. Berlin: Verlag Paul Haupt, 1949.
- Knight, W.S.M. "Seraphin de Freitas: Critic of Mare Liberum." *Transactions of the Grotius Society* 1–9.
- Krasner, Stephen D. *Ideas and foreign policy: beliefs, institutions, and political change*, Cornell: Cornell University Press, 1993, chapter Westphalia and All That, 235–264.
- . *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press, 1999.
- Lanni, Adriaan. *Law and justice in the courts of classical Athens*. New York: Cambridge University Press, 2006.
- Leiter, Brian. "Heidegger and the Theory of Adjudication." *The Yale Law Journal* 106, 2: (1996) 253–282.
- Lipset, Seymour Martin. "Some Social Requisites of Democracy: Economic Development and Political Legitimacy." *The American Political Science Review* 53, 1: (1959) 69–105.
- Luther, Martin. *Martin Luther's basic theological writings*. Minneapolis: Fortress Press, 2005.
- . *Works of Martin Luther*. New York: Lindemann Press, 2007.
- Mäkinen, Virpi. *Property rights in the late medieval discussion on Franciscan poverty*. Leuven: Peeters, 2001.
- March, James G., and Johan P. Olsen. "The Institutional Dynamics of International Political Orders." *International Organization* 52, 4: (1998) 943–969.
- Marín, Jose Carlos Gil. *Codex Canariensis*. Madrid: Cultiva Comunicacion SL, 2009.



- Marsden, Reginald Godfrey. *Documents relating to law and custom of the sea*. Union, New Jersey: The Lawbook Exchange, Ltd., 1999.
- Mattingly, Garrett. "No Peace beyond What Line?" *Transactions of the Royal Historical Society* 13: (1963) 145–162.
- McGrath, Alister E. *Reformation thought: an introduction*. Oxford: Wiley-Blackwell, 1999.
- Meliá, Juan Tous. *Guía histórica del Museo Militar Regional de Canarias*. Santa Cruz de Tenerife: Secretaría General Técnica Museo Militar Regional del Centro de Historia y Cultura Militar de Canarias, 2000.
- Modelski, George. "The Long Cycle of Global Politics and the Nation-State." *Comparative Studies in Society and History* 20, 2: (1978) 214–235.
- Mommsen, Wolfgang J. *The Political and Social Theory of Max Weber: Collected Essays*. Chicago: University of Chicago Press, 1992.
- Morgenthau, Hans. *In Defense of the National Interest: A Critical Examination of American Foreign Policy*. New York: Alfred A. Knopf, 1951.
- Morgenthau, Hans J. "Positivism, Functionalism, and International Law." *The American Journal of International Law* 34, 2: (1940) 260–284.
- Muldoon, James. *The Americas in the Spanish World Order: The Justification for Conquest in the Seventeenth Century*. Philadelphia: University of Pennsylvania Press, 1994.
- Müller, Harald. "Arguing, Bargaining and all that: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations Theory." *European Journal of International Relations* 10, 3: (2004) 395–435.
- Oakeshott, Michael. *On human conduct*. Oxford: Oxford University Press, 1991.
- O'Brien, Patrick Karl. "Contentions of the Purse between England and its European Rivals from Henry V to George IV: a Conversation with Michael Mann." *Journal of Historical Sociology* 19, 4: (2006) 341–363.
- O'Callaghan, Joseph F. "Castile, Portugal, and the Canary Islands: Claims and Counterclaims, 1344-1479." *Viator* 24: (1993) 287–309.
- . *Reconquest and crusade in medieval Spain*. Philadelphia: University of Pennsylvania Press, 2004.
- O'Donovan, Joan Lockwood, and Oliver O'Donovan, editors. *From Irenaeus to Grotius: a sourcebook in Christian political thought, 100-1625*. Grand Rapids: Wm. B. Eerdmans Publishing Company, 1999.
- Ogilvie, Paul Morgan. *International Waterways*. The Macmillan Company, 1920.

- Organski, A.F.K. *World Politics*. New York: Alfred A. Knopf, 1961.
- Osiander, Andreas. *Empires, systems and states: great transformations in international politics*, Cambridge: Cambridge University Press, 2001a, chapter Before sovereignty: society and politics in ancien régime Europe, 119–146.
- . “Sovereignty, International Relations, and the Westphalian Myth.” *International Organization* 55, 2: (2001b) 251–287.
- . *Before the state: systemic political change in the West from the Greeks to the French Revolution*. Oxford: Oxford University Press, 2007.
- Panizza, Diego. “Political Theory and Jurisprudence in Gentili’s De Iure Belli. The great debate between ‘theological’ and ‘humanist’ perspectives from Vitoria to Grotius.”, 2005. The Program in the History and Theory of International Law, New York University School of Law.
- Pennington, K. *The Cambridge History of Medieval Political Thought c.350-c.1450*, Cambridge: Cambridge University Press, 1988, chapter Law, legislative authority, and theories of government, 424–453.
- Pepys, Samuel. *The diary of Samuel Pepys*. London: G. Bell Sons, 1904.
- Phillipson, Coleman. *The International Law and Custom of Ancient Greece and Rome*, volume Volume I. London: Macmillan and Co., Limited, 1911.
- Plutarch. *Plutarch’s Cimon and Pericles*. New York: Charles Scribner’s Sons, 1910.
- Poggi, Gianfranco. *The development of the modern state: a sociological introduction*. Palo Alto: Stanford University Press, 1978.
- Potter, Pitman B. *The freedom of the seas in history, law, and politics*. New York: Longmans, Green and Co., 1924.
- Prichard, M.J., and D.E.C. Yale, editors. *Hale and Fleetwood on Admiralty Jurisdiction*. London: Selden Society, 1993.
- Rasch, William. “Conflict as a Vocation: Carl Schmitt and the Possibility of Politics.” *Theory Culture Society* 17, 6: (2000) 1–32.
- Reed, C.M. *Maritime Traders in the Ancient Greek World*. Cambridge: Cambridge University Press, 2003.
- Reus-Smit, Christian. “The Constitutional Structure of International Society and the Nature of Fundamental Institutions.” *International Organization* 51, 4: (1997) 555–589.
- . *The Moral Purpose of the State*. Princeton: Princeton University Press, 1999.

- Risse, Thomas. "Let's Argue!": Communicative Action in World Politics." *International Organization* 54, 1: (2000) 1–39.
- Roth, Guenther, and Wolfgang Schluchter. *Max Weber's Vision of History: Ethics and Methods*. Berkeley: University of California Press, 1984.
- Rothwell, Harry. *English Historical Documents 1189-1327*. London: Routledge, 1996.
- Rousseau, Jean-Jacques. *A Discourse on Inequality*. London: Penguin Books, 1984.
- Runciman, David. *Pluralism and the Personality of the State*. Cambridge: Cambridge University Press, 2005.
- Salmon, J.H.M. "Cicero and Tacitus in Sixteenth-Century France." *The American Historical Review* 85, 2: (1980) 307–331.
- Salter, John. "Hugo Grotius: Property and Consent." *Political Theory* 29, 4: (2001) 537–555.
- Sanborn, Frederic R. *Origins of the Early English Maritime and Commercial Law*. The Century Co., 1930.
- Sandars, Thomas Collett. *The Institutes of Justinian*. London: Longmans, Green and Co., 1917.
- Schama, Simon. *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age*. New York: Vintage Books, 1987.
- Schmitt, Carl. *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles, 1923-1939*. Berlin: Duncker & Humblot, 1994.
- . *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Telos Press, Ltd., 2003.
- Selden, John. *Mare Clausum*. EEBO, 1635.
- Servin, Manuel. "Religious Aspects of Symbolic Acts of Sovereignty." *The Americas* 13, 3: (1957) 255–267.
- Simon, Herbert A. "Human Nature in Politics: The Dialogue of Psychology with Political Science." *American Political Science Review* 79: (1985) 293–304.
- Smith, Thomas W. *Augustine and politics*, Lanham: Lexington Books, 2005, chapter The Glory and Tragedy of Politics, 187–216.
- Solana, Javier. "Securing Peace in Europe." Accessed July 4, 2010. <http://www.nato.int/docu/speech/1998/s981112a.htm>.
- Spruyt, Hendrik. *The Sovereign State and its Competitors*. Princeton: Princeton University Press, 1994.

- Stevenson Jr., William R. *The Cambridge Companion to John Calvin*, Cambridge: Cambridge University Press, 2004, chapter Calvin and political issues, 173–206.
- Thelen, Kathleen. “Historical Institutionalism in Comparative Politics.” *Annual Review of Political Science* 2: (1999) 369–404.
- Thucydides. *The Peloponnesian War*. Indianapolis: Hackett Publishing Company, Inc., 1998.
- Tierney, Brian. *The idea of natural rights*. Grand Rapids: Wm. B. Eerdmans Publishing Company, 1997.
- Tilly, Charles. *The Formation of National States in Western Europe*, Princeton: Princeton University Press, 1975, chapter Reflections on the History of European State-Making, 3–83.
- Tuck, Richard. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press, 1981.
- . *The Cambridge History of Political Thought 1450–1700*, Cambridge: Cambridge University Press, 1991, chapter Grotius and Selden, 499–529.
- . *Philosophy and Government 1572-1651*. Cambridge: Cambridge University Press, 1993.
- . “The Dangers of Natural Rights.” *Harvard Journal of Law and Public Policy* 20, 3: (1997) 683–694.
- . *The rights of war and peace*. Oxford: Oxford University Press, 1999.
- Ullmann, Walter. *The Growth of Papal Power in the Middle Ages: A study in the ideological relation of clerical to lay power*. London: Methuen & Co, 1962.
- . *A Short History of the Papacy in the Middle Ages*. Methuen Co, 1972.
- VanDoren, Charles Lincoln. *A history of knowledge: past, present, and future*. New York: Random House, Inc., 1992.
- Verzijl, Jan Hendrik Willem, Wybo P Heere, and J. P Offerhaus. *International law in historical perspective: Stateless domain*. Leiden: Sijthoff, 1971.
- Vieira, Monica Brito. “Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas.” *Journal of the History of Ideas* 64, 3: (2003) 361–377.
- Vieira, Mónica Brito, and David Runciman. *Representation*. Cambridge: Polity, 2008.
- Villa, Dana R. “Max Weber: Integrity, Disenchantment, and the Illusions of Politics.” *Constellations* 6, 4: (1999) 540–560.

- Vinogradoff, Paul. "The Legal Background of Demosthenes' Speech in Zenothemis v. Demon." *Tijdschrift voor Rechtsgeschiedenis* 3: (1922) 163–174.
- de Vitoria, Francisco. *Political Writings*. Cambridge: Cambridge University Press, 1991.
- de Vivo, Filippo. "Historical Justifications of Venetian Power in the Adriatic." *Journal of the History of Ideas* 64, 2: (2003) 159–176.
- Waltz, Kenneth N. *Theory of International Politics*. New York: McGraw-Hill, 1979.
- Weber, Max. *Weber: political writings*. Cambridge: Cambridge University Press, 1994.
- . *The Protestant ethic and the "spirit" of capitalism and other writings*. New York: Penguin Classics, 2002.
- . *From Max Weber: essays in sociology*. New York: Routledge, 2003.
- Weithman, Paul. *The Cambridge companion to Augustine*, Cambridge: Cambridge Univ. Press, 2002, chapter Augustine's political philosophy, 234–252.
- Wendt, Alexander. "Anarchy is what States Make of it: The Social Construction of Power Politics." *International Organization* 46, 2: (1992) 391–425.
- . *Social Theory of International Politics*. Cambridge: Cambridge University Press, 1999.
- Whitford, David M. *The Cambridge companion to Martin Luther*, Cambridge: Cambridge University Press, 2003, chapter Luther's political encounters, 179–191.
- Wight, Colin. "Inside the epistemological cave all bets are off." *Journal of International Relations and Development* 10: (2007) 40–56.
- Wolfers, Arnold. *Discord and collaboration: essays on international politics*. Baltimore: Johns Hopkins Press, 1962.
- Wood, Susan. *The proprietary church in the medieval West*. Oxford: Oxford University Press, 2006.
- Zutshi, P.N.R. *The New Cambridge Medieval History c.1300-c.1415*, Cambridge University Press, 2008, volume Vol. 6, chapter The Avignon Papacy, 653–673.