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**CONSTRUCTING INTERNATIONAL LAW
IN THE EAST INDIAN SEAS:
PROPERTY, SOVEREIGNTY, COMMERCE
AND WAR IN HUGO GROTIUS' *DE IURE
PRAEDAE*—THE LAW OF PRIZE AND
BOOTY, OR “ON HOW TO DISTINGUISH
MERCHANTS FROM PIRATES”**

Ileana M. Porras^{*}

I. INTRODUCTION

Throughout history, and across the globe, peoples and nations have encountered and entered into relationship with one another. While keeping in mind the dangers of oversimplification, it could nevertheless be argued that despite their variety, international relations fall mostly into either of two familiar types: The first takes the form of war or conquest, while the second pertains to commerce or international trade.¹ It is evident that these two categories are not mutually exclusive; war and trade have often gone hand in hand. War has more often than not served the needs of commerce, while commerce has fueled the capacity for war. Nevertheless, war and trade have traditionally been treated as distinct and even antithetical realms of international relations. War, typically associated with state-on-state violence, destruction and subjugation, is understood as international relations pursued by public authorities under the register of coercion—war is antagonistic and creates enmity. Trade, on the other hand, imagined as involving private commercial transactions and associated with reciprocity and mutual advantage, is

^{*} Visiting Professor, Arizona State University College of Law. I would like to thank the organizers and participants of the War and Trade Symposium for a rich and enjoyable experience. The work and friendship of many of the participants have over the years served as a great inspiration and support. I would also like to thank the remarkable group of Grotius scholars who welcomed me in their midst and, in the course of the workshop on Piracy, Property, Punishment—Hugo Grotius and *De Iure Praedae*, held at the Netherlands Institute of Advanced Studies (NIAS) in June 2005, introduced me to a new multidisciplinary Grotius. Special thanks, however, go to Dan Danielsen for his careful and generous reading of an early draft of this article, but above all for his unflinching encouragement and friendship on the journey.

1. Another form of international relations that intersects with the first two in a number of complicated ways and is perhaps equally pervasive is that of religious or spiritual propagation. The exploration of this third leg of the international relations stool however, is beyond the scope of this article.

understood as international relations pursued by private actors under the register of consent—trade is friendly and produces amity.

Recent scholarship has raised serious challenges to each of these categories, terms and associations, yet our modern legal and international relations regimes still reflect a fundamental division between war (public and coercive) and trade (private and consensual). Because war has come to be considered an evil that interferes with human flourishing, the official project of public international law has been to limit and constrain war, if not to prohibit it altogether. The project of international trade law, on the other hand, has been to encourage and facilitate international commercial transactions on the assumption that international trade is consensual and welfare enhancing. One striking outcome of the contrast so readily drawn between war and trade is that today it is proclaimed that an end to the scourge of war and global insecurity will arrive in the wake of a commitment to worldwide trade liberalization.

This article sets out to challenge some of the tradition's conventional assumptions about the distinct roles of war and trade in the history of international law. Through a reading of an early seventeenth century text, *De Iure Praedae* (The Law of Prize and Booty)² written by a young Hugo Grotius (1583–1645) sometime between 1604 and 1608,³ I explore the surprisingly crucial role played by concepts and views of commerce and commercial competition at the origins of international law, including the law of war. It is in this early work, a text whose professed intent was to justify the seizure and prize-taking of a Portuguese merchant vessel by a corporate-owned Dutch merchant vessel in the East Indies, that Grotius, still revered by many as the father of international law,⁴ first

2. 1 HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS* [COMMENTARY ON THE LAW OF PRIZE AND BOOTY] (Gwladys L. Williams & Walter H. Zeydel trans., Clarendon Press 1950) (1604), in *THE CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed., 1950). This Carnegie translation is being reissued by the Liberty Press as HUGO GROTIUS, *COMMENTARY ON THE LAW OF PRIZE AND BOOTY* (Martine Julia van Ittersum ed., Liberty Fund, forthcoming May 2006), in *NATURAL LAW AND ENLIGHTENMENT CLASSICS* (Knud Haakonssen ed., 2006).

3. For a brief biography of Hugo Grotius, see C.G. Roelofsen, *Grotius and the Development of International Relations Theory: "The Long Seventeenth Century" and the Elaboration of a European States System*, 17 *QUINNIPIAC L. REV.* 35 (1997).

4. Recent scholarship has challenged the characterization of Hugo Grotius as the father of modern international law. See, e.g., David Kennedy, *Primitive Legal Scholarship*, 27 *HARV. INT'L L.J.* 1, 76–95 (1986). See also PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* [GROTIUS AND THE DOCTRINE OF JUST WAR] (1983); Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QUINNIPIAC L. REV.* 3, 8–14 (1997). See also JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* (1934) (dis-

elaborated a comprehensive theory of justice, a doctrine of the freedom of the seas, and a law of war. While his thoughts on the subject of the rights of war and peace in particular continued to evolve throughout his career, their fundamental character was formed in *De Iure Praedae*, in the context of what we might call a commercial dispute between Europeans in the East Indies.

European ideas about the law of nations and the law of war had, until the sixteenth century, been used primarily to address questions of diplomacy and war arising within a familiar European context. The doctrines of just war were useful for regulating or prohibiting armed conflict among Christian sovereigns in Europe (wars framed as dynastic disputes or arising out of sovereign ambition for territory) and to justify war against pagans and heathens on the borders of Europe (wars waged in defense of Christianity or her holy places). The European period of “discovery” and the encounter with the unknown peoples of the New World broke the familiar frame and required a re-tooling of European doctrines to address the new exigencies generated by the unprecedented European conquest. In his magisterial work on the colonial origin of international law, Antony Anghie argued that many of the basic doctrines of international law “were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.”⁵ According to Anghie, the set of structures created by international law out of the moment of New World-European encounter, structures that he convincingly demonstrates are repeated throughout the history of modern international law, constructed the “difference” of the native subject in such a way as to disable him vis-à-vis normal international law, even as it turned him into a prime object of concern and reform. By the sixteenth century then, the Christian European law of nations and the law of war had begun its radical transformation into a secular (or natural) and universally applicable international law.

At the beginning of the seventeenth century, a new and violent encounter took place in the East Indies, one which further challenged the assumptions of international law. As European nations other than Spain and Portugal, the powers which for over a century had dominated the seas, began to build and expand their maritime capacity, their merchants turned their sights on promising new commercial ventures in the East

cussing the proposition that the Spanish jurists rather than Grotius should be considered the founders of international law).

5. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 3 (2005).

Indies. In the face of Iberian claims of exclusivity in the Indies trade, the merchants of Protestant Britain and those of the United Provinces⁶ (also known as the Dutch) pooled their resources, investing their capital in corporations chartered to undertake trading missions to the Indies. The stage was set for the encounter of European traders with one another in the distant seas of the Indies, and it proved a violent affair. Fueled by an endemic state of war in Europe, the conflictual predisposition of the European vessels' commanders, crew and traders, was in the Indies apparently exacerbated by commercial competition.

Building on the work of Antony Anghie, I would like to propose that the violent encounter of Europeans with one another over competition for trade in the Indies was as generative of international law as the direct encounter of Europe with Native America. This article does not seek to contest Anghie's important and original insight concerning the foundational role of the colonial encounter for international law. Rather, by turning to the theater of the East Indies in the early seventeenth century instead of that of the New World in the sixteenth century, it seeks to complicate the story in two significant respects: by noticing the triangulated character of the colonial encounter and, in tandem, by stressing the vital role played by commercial competition in that encounter.

A. Hugo Grotius' De Iure Praedae and its Seventeenth Century Context

Hugo Grotius' *De Iure Praedae* is a lengthy and complex work which was never published in his lifetime.⁷ Indeed, it lay all but forgotten until the 1860's when a manuscript of the text in Grotius' handwriting was

6. In this article the term "United Provinces" has been retained to designate the entity that is sometimes referred to as the "United Provinces of the Netherlands" or the "United Netherlands." This entity is sometimes in the literature somewhat misleadingly referred to as the "Dutch Republic." In the early years of the seventeenth century, however, the United Provinces had not yet achieved uncontested recognition as an independent nation or state, nor had its leaders unambiguously settled on the political form of a republic. Full recognition as an independent republic was achieved only in 1648 when the Dutch Republic signed a comprehensive peace treaty with Spain, one of the agreements that came to be known as the Peace of Westphalia.

7. Structurally, the work is comprised of fifteen chapters that can be broken down into five distinct sections: (1) The introduction and *Prolegomena*, in which Grotius sets forth a comprehensive theory of justice (chapters I & II); (2) A theoretical analysis of just war (chapters III–X); (3) An historical account of the events (the facts) that led to the taking of the *Santa Catarina* (chapter XI); (4) An application of the law of war to the facts, first as a case of just private war (chapter XII) and then as a case of just public war (chapter XIII); and (5) A discussion of whether the taking of the *Santa Catarina* was honorable and beneficial in addition to being legitimate (chapters XIV & XV).

discovered.⁸ In this extensive tract, part history, part politico-philosophical dissertation, part advocacy brief, Grotius vigorously sought to demonstrate the unimpeachable legitimacy of an act of violent acquisition in the East Indies. At stake were not native lands taken by Europeans, but a richly laden Portuguese-flagged carrack, the *Santa Catarina*, captured off the coast of Sumatra by a fleet of merchant vessels belonging to the recently chartered Dutch East India Company (VOC) in 1603.⁹ The legal question addressed by Grotius in *De Iure Praedae* was whether under the particular facts of the case, the taking of the *Santa Catarina*, could legitimately be considered a “seizure of prize,” “the acquisition of enemy property through war.”¹⁰

The immediate economic stakes were fabulous. The *Santa Catarina*, a fourteen hundred ton carrack, which at the time of its capture had been porting from the Portuguese settlement at Macao in China to Goa in India, held merchandise that when sold at public auction yielded about three and a half million florins.¹¹ The legal and moral stakes were equally

8. The text, which bears no title in the manuscript, was named *De Iure Praedae Commentarius* [Commentary on the Law of Prize and Booty] by its first editor. It is interesting to note, however, that in his correspondence, Grotius always referred to this early work as *De rebus Indicis* [On Indian Matters], which tends to hint at its close connection to Francisco de Vitoria’s earlier work *De Indis Noviter Inventis* [On the Indians Lately Discovered], commonly referred to as *De Indis*. FRANCISCUS DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (Ernest Nys ed., John Pawley Bate trans., William S. Hein & Co. 1995) (1557), in *THE CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed., 1995). The edition relied upon spells the author’s last name as “Victoria,” however, because he is commonly referred to as “Vitoria,” all citations will be to Vitoria.

9. The Dutch East India Company, known by its Dutch acronym “VOC,” was incorporated on March 20, 1602 by the States-General of the United Provinces. The *Verenigde Oost-Indische Compagnie* was created by the union of six small companies, usually referred to as the pre-companies. Between them, these pre-companies—of which the Amsterdam and Zeeland-based companies were by far the most significant—had commissioned a total of sixty-five merchant vessels to sail to the East Indies between 1595 and 1602. For a concise summary of the history of the foundation and complex structure of the VOC, see F.S. Gaastra, *Foundation of the VOC—The Charter*, http://www.tanap.net/content/voc/organization/organization_found.htm. The fleet involved in the taking of the *Santa Catarina* was owned and managed by the Amsterdam-based pre-company, the *Gede Amsterdamse Oostindische Compagnie* when it set sail from the United Provinces. By the time of the capture, however, which took place on February 25, 1603, the *Gede Amsterdamse Oostindische Compagnie* had been subsumed under the VOC. *Id.*

10. 1 GROTIUS, *supra* note 2, at 30.

11. “At the time, this was equivalent to one half of the paid-in capital of the Netherlands’ United East India Company (VOC), established in 1602, and more than double that of its English counterpart, the Honorable East India Company (EIC), founded in 1600.” Peter Borschberg, *The Santa Catarina Incident of 1603: Dutch Freebooting, the*

high. In theory, either the *Santa Catarina* was a lawfully and, as Grotius would argue, a gloriously taken “prize,” and the vessel and her goods could be kept, or Jacob van Heemskerck, commander of the Dutch merchant fleet, had perpetrated an ignominious act of “piracy,” and the vessel and her goods would have to be returned to their legitimate owners.

There is good evidence that Grotius was commissioned to prepare a defense of the taking by some of the directors of the VOC, but no evidence that Grotius' unpublished text was ever put to practical use in the legal dispute. Indeed, by the time Grotius completed work on *De Iure Praedae*, the *Santa Catarina* had been duly confiscated, and the prize adjudicated by the Admiralty Board of Amsterdam.¹² The Board's predictable verdict in favor of Van Heemskerck and the VOC was based on a jumble of “loosely related arguments” in which self-defense, just war doctrine, natural law and the law of nations were all brought to bear. According to Van Ittersum, who has undertaken careful and detailed research of the documentary evidence available, Hugo Grotius' *De Iure Praedae* should be understood as a response to the Board's written verdict, an attempt at putting some order into the unsatisfying tangle of legal principles.¹³ According to Van Ittersum, while the directors of the VOC may have turned to Grotius to produce a convincing historico-political tract denouncing Portuguese depredations in the East Indies, peppered liberally with gestures to familiar and high-sounding legal doctrines and unimpeachable principles, they were not commissioning a work of legal theory.¹⁴ What they sought was a work of *apologia* or propaganda. What Grotius produced was rather more complex and multifaceted. Justification of the taking of the *Santa Catarina* remained the work's central concern and functioned as an organizing principle. It could also be argued, however, that the events surrounding the seizure and the legal, political, economic, and moral questions it gave rise to, served as a vehicle for Grotius to study and then expand upon recent scholarship on sovereignty and just war theory, to reflect on the subject of property and natural rights, and to develop some original ideas concerning the role of commerce in interna-

Portuguese Estado da Índia and Intra-Asian Trade at the Dawn of the 17th Century, 11 REV. OF CULTURE 13, 13 (2004).

12. Martine Julia van Ittersum, *Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Iure Praedae (1604–1606)*, 31 ASIAN J. SOC. SCI. 511, 521 (2003).

13. *Id.* at 524.

14. *Id.* at 525–26. Though a fairly young man at the time, Grotius, a protégée of the powerful Pensionary Oldenbarnevelt, had been appointed Historiographer of Holland in 1601, a post he held until 1604. In 1607, his political career was significantly advanced when he was promoted to Advocaat Fiscaal. Roelofsen, *supra* note 3, at 43–44.

tional relations. The result of Grotius' application to the subject yielded a rich intellectual harvest: *De Iure Praedae* is the original context of *De Mare Liberum*, the important Grotian tract on the freedom of the seas, published anonymously in 1609,¹⁵ and it contains the prototype of the most important Grotian contribution to international law, the influential *de Iure Belli ac Pacis*, first published in 1625.¹⁶

Any foray into the reading of a seventeenth century text such as *De Iure Praedae* is fraught with peril. It is not just a matter of the ever-present danger of falling into anachronism. The past is indeed a foreign country and we do not speak the language. It is thus almost impossible to read a seventeenth century text in its own terms. We can only guess at the motivations of the actors, and at the association of ideas which colored their understanding of what they were "up to."¹⁷ Over three hundred years separate us from these precursors; three centuries over the course of which the nature and practice of commerce and war have changed dramatically, while the international law that under-girds them has gone through many currents and countless iterations. Yet our tendency is to read the past as somehow coherent in itself and congruent with the present. Thus, it is almost impossible not to look back into history without having the past be colored by the prism of the as yet undetermined future. Inescapably, given the future role of the Dutch (and the British) as colonial powers in the East Indies, and the part played in this development by the rival East India Companies, it is difficult not to read the story of *De Iure Praedae* as deeply implicated in the story of empire and colonialism. And, since imperial ideologies are discredited in the minds of most modern readers, we are equally tempted to impute disingenuous-

15. *The Freedom of the Seas (a.k.a. The Free Sea)* is in substantial part a reworking of chapter XII of *De Iure Praedae*. 1 GROTIUS, *supra* note 2, at 216–82. Its publication in Leiden in 1609 coincided with Spanish-Dutch truce negotiations. All references to the particular case of the taking of the *Santa Catarina* were eliminated and the tract focused more generally on the legal basis for the Dutch claim to a general right of access to the seas. Beginning in 1610 Anglo-Dutch disputes over fisheries erupted and a number of British scholars attacked *Mare Liberum*, having concluded that its real purpose was to open up British coastal waters to Dutch fishing. HUGO GROTIUS, *THE FREEDOM OF THE SEAS, OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (Ralph Van Deman Magoffin trans., Oxford University Press 1916) (1608), *available at* http://oll.libertyfund.org/Texts/Grotius0110/FreedomOfSeas/HTMLs/0049_Pt03_English.html.

16. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS* (A.C. Campbell trans., M. Walter Dunne 1901) (1625), *available at* http://oll.libertyfund.org/Texts/Grotius0110/LawOfWarPeace/0138_Bk.html.

17. *See generally* 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978).

ness and devious purpose to those who in any way participated in or contributed to the production of the colonial enterprise. We can resist this temptation to some extent, but are always at risk of faltering back into the fallacy of retrojection because of the demands of a coherent narrative arc. The challenge is made all the more difficult when, as in this case, the seventeenth century author has come to hold a prominent place in the canon and is considered by many a significant contributor in the history of ideas of multiple modern academic fields.¹⁸

The past may be a foreign country. Yet, for all that, we are entangled with it in a complex and often obscure web. For better or worse, we cannot escape it. Despite the inevitable pitfalls and our own limitations, we strive to make sense of the present through a past that is inherently opaque. While we cannot hope to render the past transparent or fully intelligible nor, for that matter, completely avoid making anachronistic or culturally incoherent associations, we can at least attempt to avoid some of the most palpable incongruities. A brief sketch of the historical context¹⁹ within which Grotius prepared his tract justifying the taking of the *Santa Catarina* will, despite being inevitably partial and contestable, serve to sharpen our understanding of the multiplicity of thorny issues that Grotius had to address in his text and help us to identify his unique contribution.

B. The Context of the United Provinces

At the turn of the seventeenth century, despite being embroiled in continuous conflict and war against Spain, the United Provinces had already entered a period of economic expansion and cultural and social renewal that has come to be known as the Dutch Golden Age.²⁰ Though it would take almost another half century for the newly forged union to be formally recognized as independent by its erstwhile sovereign, the King of Spain, it was a prosperous time.²¹ The traditional maritime trades were

18. Grotius was actively involved in the religious, political and philosophical controversies of his age. He was a renowned and prolific author. In today's overly segmented disciplinary terms, we could say that his main contributions were in the fields of theology and Christian apologetics, legal and political theory, philosophy, international relations, and history. See Roelofsen, *supra* note 3, at 44.

19. For a much richer description of some of this historical context, see JONATHAN ISRAEL, *DUTCH PRIMACY IN WORLD TRADE, 1585–1740* (1989).

20. See generally SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLDEN AGE* (1987).

21. The Dutch rebellion may be said to have begun around 1568. Philip II, King of Spain and sovereign over an impressive number of nations, cities, principalities and other territories dispersed over all four known continents, was officially deposed as Count of Holland by the promulgation of the Act of Deposition on July 26, 1581, an act whereby

flourishing, as was the shipbuilding industry. The war with Spain had brought political and religious refugees from the southern provinces of the Low Countries²² still under Habsburg rule, and the émigrés brought with them commercial and technological know-how, already established pan-European trading networks, as well as large quantities of capital now seeking investment opportunities.²³

Beginning in 1595, enterprising Dutch merchants had sent vessels to explore new commercial opportunities in what was considered to be one of the most potentially profitable trades of the time: the spice trade from the East Indies, a trade until then monopolized almost exclusively by the Portuguese who claimed and controlled the sea routes from Europe. Though Grotius in *De Iure Praedae* intimates that the Dutch were driven to make this incursion into waters claimed by the Portuguese because of “necessity,”²⁴ it seems fairly clear that the ventures were prompted first and foremost by the fortuitous 1595 publication of Jan Huygen van Linschoten’s *Reysgheschrift*, which made the zealously guarded navigational instructions of the Portuguese to the East Indies finally available.²⁵ King Philip II of Spain’s ill-considered decision to cut off his rebellious Dutch subjects from their profitable role as Europe’s middlemen for the Iberian trade served to justify the Dutch ventures,²⁶ while the relative calm in the Spanish-Dutch conflict following the king’s death in 1598, further en-

the States-General of the United Provinces sought to declare “independence” and transfer sovereignty to the Duke of Anjou. It was only in 1648, however, eighty years after the beginning of the conflict that Philip IV formally recognized Dutch independence. For a concise account of the Dutch rebellion and its causes, see Roelofsen, *supra* note 3, at 40–43. For a more detailed account of the Dutch revolt, see JONATHAN ISRAEL, *THE DUTCH REPUBLIC: ITS RISE, GREATNESS, AND FALL, 1477–1806* (R.J.W. Evans ed., 1995).

22. The southern provinces of the Spanish Netherlands, also known as the Southern Netherlands, eventually gained independence in 1831 and is today known as Belgium.

23. BENJAMIN SCHMIDT, *INNOCENCE ABROAD: THE DUTCH IMAGINATION AND THE NEW WORLD, 1570–1670*, at 140–42 (1st paperback ed. 2006). Émigrés from the south, for instance, provided 40 percent of the VOC’s start-up capital. *Id.* at 140. For an in-depth account of the transformation of the Dutch economy in this period, see JAN DE VRIES & ADRIAAN VAN DER WOUDE, *THE FIRST MODERN ECONOMY: SUCCESS, FAILURE, AND PERSEVERANCE OF THE DUTCH ECONOMY, 1500–1815* (1997).

24. 1 GROTIIUS, *supra* note 2, at 178.

25. SCHMIDT, *supra* note 23, at 153–54. According to Schmidt, the publication of the *Reysgheschrift* in 1595 and of the accompanying *Itinerario* in 1596, instantly launched Dutch trade to the East. Indeed the first major Dutch fleet to set sail to the Indies under Cornelis de Houtman in 1595 is said to have carried a copy of the *Reysgheschrift* on board. *Id.* at 154.

26. Halfway between the Iberian Peninsula and the Baltic region, and a natural entryway into northern and central Europe, during the sixteenth century the ports of the Low Countries had become major warehousing and distribution centers for Portuguese spices and Baltic grain. See DE VRIES & VAN DER WOUDE, *supra* note 23, at 356.

couraged Dutch boldness.²⁷ The initial forays to the East Indies by Dutch merchants were profitable enough to inspire further ventures and, by 1601, the English had followed the Dutch example.²⁸

Already by the time Admiral Van Heemskerck's fleet, which was to take the *Santa Catarina*, left Holland in April 1601, the Dutch had sent at least sixty-five merchant ships to the East Indies and established a series of "factories," including one at the Japanese port of Bantam. This Dutch toe-hold in the vicinity of the Spice Islands may well have caused serious concern among the Portuguese, who considered the East Indies-European trade as their exclusive domain, but the establishment of a factory in the East Indies should not be confused for an attempt at establishing a settlement, much less a colony. "Factories" were pragmatic responses to the price inflation that inevitably attended the sudden arrival of large European vessels in search of East Indian trading goods. A kind of guarded warehouse, the factory served primarily to stockpile wares. In theory, East Indian products could be acquired by company factors when prices were favorably low, while European trade goods could be disposed of over a longer period of time, thus avoiding a market glut.

It is important to remember that in the early seventeenth century commercial exchange with Europeans constituted no more than a small proportion of the overall commercial activity in the East Indies. The bulk of commercial exchange in Asia was regional. The great domestic markets of China, India and Java were served by Chinese, Japanese, Arab, Malay and other local merchant vessels.²⁹ Furthermore, while it is not impossi-

27. In the historical narrative, Grotius describes the Dutch decision to brave the perils of the East Indies as a direct result of having been cut off from the intermediary role:

After that period, indeed, when it became apparent that the enemy had entered upon a systematic attempt to subjugate through hunger and want the nation which it had been unable to subjugate by armed force—that is to say, when the Iberian trade that had hitherto constituted our people's principal means of subsistence was cut off—we ourselves gradually began to turn our attention to lengthy voyages, and to distant nations which were known to the Portuguese but not subject to them.

1 GROTIUS, *supra* note 2, at 178.

28. The British East India Company (EIC) chartered in 1600 sent its first small fleet to the East Indies in February 1601.

29. Recent research suggests "that until 1800 an integrated world economy was dominated by India and China." Robert Markley, *Riches, Power, Trade and Religion: The Far East and the English Imagination, 1600–1720*, 17 *RENAISSANCE STUD.* 494, 494 (2003). The need to reassess the Eurocentric assumptions of early modern history has also been stressed by Linda Colley, who provides a lively and sobering reminder of the distance between the rhetoric and the reality of Britain's early claims to rule the waves. LINDA COLLEY, *CAPTIVES: BRITAIN, EMPIRE, AND THE WORLD, 1600–1850* (2002).

ble that some Dutch merchants and other adventurers were interested in the possibility of overseas territorial acquisition, there was little sense that large scale colonization was either feasible or desirable.³⁰ Unlike New World natives, the peoples of the East Indies could not easily be dismissed as naked, uncivilized savages with no sense of property relations. On the contrary, Europeans were impressed by what they saw of the Chinese and Japanese civilizations, and by the manners, rituals and obvious wealth of the multitude of Muslim princelings that they encountered on their commercial adventures. Furthermore, while the image of limitless riches “there for the taking” still beckoned, by the early seventeenth century it was becoming evident to the Dutch that the Spanish (and to a lesser extent the Portuguese) territorial conquest of the New World was not the unequivocal glorious or profitable enterprise that it had seemed to be at first blush. While the gold and silver extracted from the mines seemed inexhaustible, the prohibitive cost of maintaining military and administrative control over the source of these riches was beginning to show. A common assessment was that the Iberians’ New World conquests had led to tyranny abroad and had brought depopulation and impoverishment at home.³¹ For those investing their capital in the inherently risky long distance East Indies trade, the goal was to secure maximum profits and a quick return. Sinking capital into colonies, settlements and fortresses was not part of the plan. Even the building and maintaining of fortifications to protect the factories were viewed as unfortunate if unavoidable expenditures.³² Within a remarkably short time,

30. It is perhaps worth noting that at the turn of the seventeenth century, neither the Dutch nor the English had any experience in overseas settlement or colonization. While the Spanish and Portuguese had extended their rule over lands in the Caribbean, Central and South America and obtained some territorial concessions in Asia, European presence in North America had only barely begun. The earliest British settlement attempt at Roanoke (1584–1590), Sir Walter Raleigh’s plantation, had been abandoned; whereas the first hundred settlers destined for its successor, the Virginia settlement, did not arrive in North America until April 1607. The Pilgrims (or Leiden Separatists), for their part, made landfall in Massachusetts only in 1620, while the Dutch settlement of New Amsterdam (later New York) was not undertaken until 1625.

31. See DAVID ARMITAGE, *THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE 166–67* (2000); ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500–C. 1800*, at 66–73 (1995).

32. When after many years of promotion by interested parties the Dutch West Indies Company (WIC) was finally chartered in 1621, it failed at first to generate the necessary capital investment. Investors, it appears, were suspicious of the overt double purpose of the WIC. The terms of the charter foresaw that the WIC would be involved not only in trade as such, but in the settlement of colonies, while taking an active military role against Spanish interests in the West Indies. See Charter of the Dutch West India Company: 1621, June 3, 1621, available at <http://www.yale.edu/lawweb/avalon/westind.htm>.

the picture would take on different character, one in which the Dutch by force of arms subjugated and seized control of the spice islands, brutalized the local populations and dealt ruthlessly with European competitors. Even then, however, the VOC was not wholeheartedly committed to a project of settlement or colonization and, consequently, the shareholders and many of its directors resisted and protested territorial expansion and its attendant costs.

When Van Heemskerck's small fleet set sail for the East Indies in 1601, there is no question that it was engaged upon a commercial, rather than a colonial or military, adventure. Like all merchant vessels engaged in the long distance seaborne trade, however, it was armed. At a time when armed conflict in Europe was a constant, it could not have been otherwise. The Spaniards, with whom the Dutch had by 1601 been at war for about forty years, had a massive naval presence and economic interests to defend around the world. Furthermore, they controlled the adjacent ports of the southern provinces of the Spanish Netherlands.³³ Skirmishes were common. Keeping their major ports open and Dutch shipping safe were significant concerns of the two great Dutch maritime provinces, Holland and Zeeland, whose economies were largely dependent on the fishing industry and seaborne trade. Furthermore, journeys to the East Indies were long (a return trip averaging twenty-two months) and the vessels faced many perils along the route, both natural and human. Pirates and hostile local populations were ever-present dangers, but of equal concern was that of running into a Portuguese vessel, as it was assumed that they would greet Dutch vessels trespassing on their turf with certain violence. All Dutch merchant vessels were therefore armed and ready for self-defense. But Dutch merchant vessels, like the English East India Company ships that followed their lead into the East Indies seas, were also primed for privateering.

Indeed, by the turn of the century Dutch merchantmen already had a long experience of privateering. The so-called Dutch "Sea Beggars," a fleet of privateers commissioned by William, Prince of Orange, had played a key role in the beginning of the Dutch rebellion (and had subsequently been transformed into the first Dutch navy), while Zeeland-based privateers continued to choke off all commerce with the port of Antwerp, occupied by Spain in 1585.³⁴ Privateers functioned as a kind of merce-

33. Defeated by the English (and the weather) in 1588, the Spanish Armada had rapidly been rebuilt and improved.

34. Oscar Gelderblom, *The Political Economy of Foreign Trade in England and the Dutch Republic (1550–1650)*, at 5 (June 2004) (unpublished working paper, *available at* http://www.lowcountries.nl/2004-8_gelderblom.pdf).

nary navy at a time when war ships were few and far between.³⁵ During times of war, a sovereign could commission a private vessel by means of an official document known as a Letter of Marque. The private vessel would thereby receive official sanction to arm herself and harass or attack enemy shipping. It was a lucrative trade and privateering commissions could often be sold by the sovereign. Ships taken by privateers, like enemy ships taken by war ships, would be considered “prize” to be adjudicated by the relevant admiralty court. Once adjudicated, the “prize” would be sold at auction and the profits distributed to the prize taker, her crew and the government in accordance with some predetermined arrangement.

In theory, privateering was an officially regulated activity, but as the events surrounding the taking of the *Santa Catarina* (and other Portuguese vessels) would show, commanders of merchant vessels were ready and willing to take matters into their own hands. The temptation to shortcut the long, economically uncertain trading missions by seizing and appropriating the cargo of well-laden Portuguese vessels was almost irresistible. Taking of prize was attractive to the commander and crew of a vessel because in addition to their formal share of the prize, it was a source of unofficial private booty. Equally important, the captured vessel and its cargo, once officially confiscated and adjudicated by an admiralty court, constituted a substantial windfall for the directors and shareholders of the VOC, as well as for the relevant ruling elite. Not surprisingly perhaps, plunder, along with more traditional commercial exchange and war, became one head of the “incontestable and indivisible trinity upon which the company built a good chunk of its early fortunes.”³⁶ However profitable (and relatively effortless), privateering was nevertheless morally and politically risky. Only a fine line served to distinguish the unlawful (and much condemned) piratical seizure of merchant vessels

35. Privateering was until well into the nineteenth century an accepted practice. The United States Constitution, for example, specifically authorizes Congress to issue Letters of Marque and Reprisal. U.S. CONST. art. 1, § 8. Privateers played a significant role on all sides of the U.S. War of Independence and the follow-up Anglo-American War of 1812. Officially sanctioned privateering was mostly outlawed by the Declaration of Paris of 1856, which prohibited the issuance of Letters of Marque and Reprisal. Declaration of Paris, April 16, 1856, available at <http://elsinore.cis.yale.edu/lawweb/avalon/lawofwar/decparis.htm>. The United States, however, was not a signatory.

36. Peter Borschberg, *Luso-Johor-Dutch Relations in the Straits of Malacca and Singapore, c. 1600–1623*, 28 *ITINERARIO* 15, 21 (2004). What was true of the VOC would also be true of the EIC. Indeed, absent James Lancaster’s enthusiastic involvement in privateering, it is unlikely that the first venture of the EIC in 1601 would have broken even financially, much less proven a success. See JOHN KEAY, *THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY 14–18* (1991).

from the capture of prize by privateers. Indeed, from the point of view of the seized vessel, her crew and the owners of the cargo, the two events were nearly indistinguishable.³⁷

It was in this context that Grotius prepared his defense of the taking of the *Santa Catarina*. Many factors made the case a difficult one to argue: Commander Van Heemskerck, in charge of a private merchant fleet, did not carry a written sovereign commission in the form of a Letter of Marque which would have given him official sanction to engage in an offensive war against “enemy” shipping. The taking of the *Santa Catarina* had been effected at a distance and in a world far removed from any European theatre of war. While the Dutch fleet might have been able to rely on a claim of self-defense, the Portuguese merchant vessel was not known to have initiated an attack, but instead Van Heemskerck had lain in wait for her. The case for a standing Portuguese “enmity” against the Dutch was weak as what enmity existed was merely the result of a forced union under the King of Spain.³⁸ Finally, even if Portugal was to be considered the enemy of the Dutch because of this union, there remained the problem of the status of the United Provinces: Were the Dutch true sovereigns or were they merely rebels?

It was Grotius’ genius to have taken these difficulties and resolved them in the original and multilayered *De Iure Praedae*, a work whose significance went well beyond the dispute in question. In his hands, the violent encounter of European merchants in the distant seas of the East Indies and the conundrums it posed served as a catalyst for a re-interpretation of international law. To explore the impact this new intra-European merchant encounter had on the development of international law, in this article I identify an undercurrent and a line of reasoning that run through the Grotian enterprise in *De Iure Praedae* and which I have broken down into three movements: first, the centrality of the theme

37. A fascinating near contemporaneous account of a prize capture by Dutch merchant vessels has been left by Francesco Carletti, a Florentine merchant who was in 1601 heading back to Europe with his goods aboard a Portuguese vessel when she was seized just off St. Helena. From Carletti’s perspective, the Dutch vessels were lying in wait and took the *Santiago* under the flimsiest of pretexts, occasioning the death of many crew and passengers. See FRANCESCO CARLETTI, *VOYAGE AUTOUR DU MONDE DE FRANCESCO CARLETTI (1594–1606)*, at 267–84 (Paolo Carile ed., Frédérique Verrier trans., 1999).

38. Following a dynastic crisis caused by the untimely death without issue of King Sebastian, the crown of the Kingdom of Portugal had passed to Philip II, King of Spain, in 1580, a right Philip made good through conquest. Though they shared a sovereign from 1580 to 1640, relations between Spain and Portugal were far from amicable. The personal union of the two kingdoms under Philip, however, had a serious impact on the character of Portuguese-Dutch relations. 9 THE NEW ENCYCLOPÆDIA BRITANNICA 376–77 (15th ed. 2005); 25 THE NEW ENCYCLOPÆDIA BRITANNICA 1056–57 (15th ed. 2005).

of commerce and Grotius' elaboration of a right to engage in trade; second, his expansion of just war doctrine to encompass just "private" war; and third, Grotius' novel characterization of prize law as a mechanism whereby title to coercively acquired enemy "goods" is permanently transferred. In brief, my analysis of Grotius' argument proceeds as follows: Responsive to the importance of international commerce, Grotius anchored Dutch national identity and sovereignty to the rock of seaborne long-distance trade and discovered a far reaching right to engage in trade founded on Divine Providence, natural reason and the consent of nations. Interference with this right, Grotius proclaimed, was not only a personal injury, but constituted a universal offense, comparable to piracy. On behalf of the private (corporate) merchants sailing on the distant seas, Grotius reworked just war doctrine to encompass the possibility of just "private" war. According to Grotius, in places such as the sea that were by nature free of jurisdiction, the private actor returned to his original sovereignty and could engage in just war in self-defense or in retaliation for injury, including an interference with the right to trade. In the course of a just war (whether public or private) the injured belligerent was entitled to seize any enemy goods in reparation for the injury. A merchant vessel injured by interference with its right to engage in trade was thus privileged to seize an enemy vessel as prize. But seizure of property was not in itself sufficient to effect transfer of true title. Something more was needed. In Grotius' analysis, this was the function of prize law. Prize law was the mechanism whereby title to property was transferred without the consent of the prior owner. Indeed, in a contemporaneous unpublished work, *Commentarius Theses XI*,³⁹ Grotius had even gone so far as to argue that sovereignty itself could be lawfully transferred in the course of a just war through the mechanism of prize law. From the perspective of the merchants, however, the significance of prize law was that seized goods were freed to enter the market without taint, having become indistinguishable from trade goods acquired through commercial transactions in the Indies.

39. PETER BORSCHBERG, HUGO GROTIUS "COMMENTARIUS IN THESES XI": AN EARLY TREATISE ON SOVEREIGNTY, THE JUST WAR, AND THE LEGITIMACY OF THE DUTCH REVOLT 269-83 (1994).

II. THE ROLE AND POWER OF "COMMERCE" AND THE RIGHT TO ENGAGE IN TRADE

"Commerce" is at the heart of the Grotian enterprise in *De Iure Prae-dae*; it is the cement that binds the work together. In this section I will focus on the manifold functions that commerce plays throughout Grotius' oeuvre, and underline the originality of Grotius' discovery of a right to engage in commerce. For Grotius, as we will see, international commerce is the life blood of the fledgling nation. He sees in it the natural character and destiny of the Dutch. It is also, and here Grotius taps into an already centuries' long tradition, desired by God, as it brings peoples together, begetting peace and harmony in its wake. Some eighty years prior, Francisco de Vitoria had justified the New World's conquest as a just response to the barbarians' refusal to offer hospitality to the Spanish.⁴⁰ Vitoria had evoked a right to hospitality (which included a right to engage in trade) to justify European violence against supposedly intractable New World barbarians.⁴¹ Despite his reliance on Vitoria, Grotius, as I will show, bypasses the issue of hospitality and discovers a natural right to engage in trade per se. Mutually beneficial, necessary for the vitality and integrity of the nation, and desired by God, commerce could, according to Grotius, only be secured by the assertion of such a right. Interference with the right could be considered tantamount to an injury, sufficient to give good cause for "just war." In this way, Grotius expanded on a right that, in Vitoria, was no more than a consequence or effect of the right to hospitality. By finding a right to engage in trade outside of the context of a right to hospitality, I argue, Grotius opened up the category of those against whom a just war in defense of the right to trade could be fought to include other Europeans, perhaps for the first time explicitly justifying European violence against other Europeans on behalf of trade.

As he introduces his project, Grotius opens with a declaration warning of the perils that will ensue if Dutch merchantmen are not allowed to engage in prize taking: The Iberians will retain exclusive access to the East Indies and the Dutch economy will collapse. Grotius declares that the merchants must be encouraged to engage in prize taking through economic incentives (a share in the profits) for otherwise they would quite reasonably not take the risk. Moreover, Grotius proclaims, prize taking is

40. VITORIA, *supra* note 8, at 119. See also Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996).

41. For a more detailed discussion of Vitoria's version of the right to engage in commerce, see *infra* text accompanying notes 95–100.

a most effective weapon granted by God to the Dutch for use against their Iberian enemies. Dutch liberty depended upon it:

[I]f the Dutch cease to harass the Spanish [and Portuguese] blockaders of the sea (which will certainly be the outcome if their efforts result only in profitless peril), the savage insolence of the Iberian peoples will swell to immeasurable proportions, the shores of the whole world will soon be blocked off, and *all commerce with Asia will collapse—that commerce by which (as the Dutch know, nor is the enemy ignorant of the fact) the wealth of our state is chiefly if not entirely sustained*. On the other hand, if the Dutch choose to avail themselves of their good fortune, God has provided a weapon against the inmost heart of the enemy's power, nor is there any weapon that offers a surer hope of liberty.⁴²

Despite its rather strident tone, Grotius' opening salvo perfectly conveys a series of connections he will develop throughout the work between Dutch prize taking, freedom of the seas, commerce, profit, wealth, the nation, and the prosecution of war. In Grotius' account, defending the right of the Dutch to engage in the Indies commerce in the face of Iberian claims to exclusivity is of vital importance because the "wealth of our state is chiefly *if not entirely* sustained [by it]."⁴³ Later, he will reiterate the claim in even stronger terms:

[W]ho is so ignorant of the affairs of the Dutch as to be unaware of the fact that the sole source of support, renown, and protection for those affairs lies in navigation and trade? Among all of the Dutch enterprises in the field of trade, moreover, our business in the East Indies easily occupies first place in worth, extent, and resultant benefits.⁴⁴

Empirically, the claim that the economy of the United Provinces was dependent on the Indies commerce was not only wrong, but quite misguided.⁴⁵ Yet Grotius can be excused for this rhetorical exaggeration, for, as evidenced in contemporary tracts, the promise of immense profits to be reaped from the Indies trade, occupied a place in the collective imagination quite incommensurate with its actual (or comparative) value.⁴⁶ The promise of almost inexhaustible riches available in the Indies had been fed not so much by the moderately successful trading ventures of

42. 1 GROTIUS, *supra* note 2, at 1–2 (emphasis added).

43. *Id.* at 1 (emphasis added).

44. *Id.* at 340.

45. *See generally* DE VRIES & VAN DER WOUDE, *supra* note 23.

46. *See generally* SCHMIDT, *supra* note 23; DE VRIES & VAN DER WOUDE, *supra* note 23.

the Dutch, but by the immense riches discovered in the holds of the captured Portuguese prizes.⁴⁷

To be fair to Grotius, however, even if the direct Asian trade was not in the early seventeenth century a significant factor in the overall economic growth of the United Provinces, the carrying trade, along with the equally important fishing industry, was the backbone of the economy of the maritime provinces, and the merchants of Holland and Zeeland had certainly taken a big hit in the 1580s when they had been suddenly excluded from their role as Europe's intermediaries for the Indies trade. That the future well-being of the United Provinces lay in continuing expansion in search of new trading opportunities was generally accepted. When, in early 1602, the States-General of the United Provinces labored to consolidate the small competing trading companies into a single United Dutch East India Company and granted it a twenty-one year monopoly, they were expressing a collective assessment that the success of the East India trade was important enough to the whole nation that it should be regulated and supported by that governing body of the new union, which had been given special responsibility for foreign affairs and naval and military matters.⁴⁸

Returning to Grotius' opening statement, we can now trace the line of his reasoning. Because the Indies commerce is of vital importance not just to the prosperity, but to the very existence of the United Provinces, the Iberian blockade of the seas is a direct attack on the homeland itself. It is, he will later suggest, tantamount to an act of war. The "insolent" Iberians must thus be resisted at all costs. Dutch prize-taking is a form of harassment that disrupts the Iberians' "insolent" ambition. Grotius takes

47. Grotius says of the prize aboard the *Santa Catarina*:

Indeed, when the prize from the *Catherine* [*Santa Catarina*] was recently put up for sale, who did not marvel at the wealth revealed? Who was not struck with amazement? Who did not feel that the auction in progress was practically the sale of royal property, rather than of a fortune privately owned?

1 Grotius, *supra* note 2, at 342.

48. The exact nature of the United Provinces as a political entity has always been difficult to describe. Neither unified state, nor federation as such, the Union, formed by seven "independent" Provinces, boasted in this period a complex, decentralized structure of authority. The States-General of the United Provinces shared sovereignty with the Provinces (each in turn enjoying its own unique form of decentralized power), a Council of State, an elected hereditary Stadholder (traditionally a member of the House of Orange), and a Land's Advocate or Council-Pensionary. Not surprisingly, the decisions of the States-General were often ignored by the provincial governments, and the mystery for contemporary observers was that the Union, despite its evident structural incoherence, somehow managed to be successful on a military front and to thrive economically.

for granted that Dutch merchantmen, rather than, for instance, a Dutch navy or a dedicated fleet of officially commissioned privateers, should be at the front line of the struggle over the freedom of the sea. Moreover, they should be entitled to reap the benefit of their seizure for if, warns Grotius, “the outcome of their efforts result only in profitless peril,” the Dutch merchantmen will “cease to harass the Spanish [and Portuguese] blockaders of the sea.” Grotius recognized that the Dutch vessels venturing into the seas of the East Indies were not bent on reckless adventure or heroic exploits; rather they were backed by serious capital investment in search of a good return. They were, in other words, commercial ventures limited by the willingness of the merchants to take a calculated financial risk. He also recognized, however, that from a commercial point of view it made little difference if the profits were achieved from goods acquired through regular trade or from plunder acquired through prize-taking—the only important issue was the rate of return on a particular investment.

That Dutch merchants should be motivated by a healthy regard for the bottom line was, for Grotius, not only quite natural but a form of virtue. Indeed, Grotius proudly ascribes a mercantile character to the whole Dutch nation. According to Grotius, the Dutch are “a people surpassed by none in their eagerness for honorable gain.”⁴⁹ There was, it is evident, nothing either shameful or sinful about the pursuit of profit by the Dutch. On the other hand, profit-seeking, if taken to excess, could become a vice and Grotius, in *De Iure Praedae*, drew a sharp contrast between the virtuous pursuit of profit and a “consuming greed for gain,” which he qualified as “a vile disease of the spirit.”⁵⁰ As we might expect, throughout the text Grotius emphasizes that the Portuguese are driven by avarice and greed while he lauds the Dutch for their moderation. The Portuguese are, he insists, more like pirates than merchants.⁵¹ Nonetheless, concerned that some Dutch merchants might view prize-taking as tainted by its similarity to piracy, Grotius also warns that the Dutch should be mindful not to fall into the contrary vice of an excess of prudence, which might cause them to neglect opportunities to promote their own interest.⁵²

49. 1 GROTIUS, *supra* note 2, at 1.

50. *Id.* at 2.

51. “[T]he Portuguese, though they assume the guise of merchants, are not very different from pirates.” *Id.* at 327.

52. “[In abstention from greed], we should guard against excess,” as it is equally a sin to “neglect[] opportunities to promote one’s own interests.” *Id.* at 2. In chapter II, titled *Prolegomena*, the contrast is recast as that between self-interest, which is the right object of (divinely inspired self-love), “the first principle of the whole natural order,” and “immoderate self-interest,” a vice which results from an excess of such love. *Id.* at 9.

Grotius understands that the quest for profit is one of the primary motors of commerce. According to Grotius, however, the commercial activity of a merchant should be viewed as conferring a public benefit. Yet because he is also investing his labor and bearing a risk, a merchant should be justly rewarded. “[Commerce] was established in order that one person’s lack might be compensated by recourse to the abundance enjoyed by another, *though not without a just profit for all individuals taking upon themselves the labour and peril involved in the process of transfer.*”⁵³ The merchant and his quest for profit are treated as eminently rational. In explaining why the prize (the *Santa Catarina*) “should” be granted to the merchants who had financed the company’s venture, Grotius does not mince words: “[T]he wise man does not incur expense unless the attendant risk is cancelled by the prospect of a fair profit.”⁵⁴ The quest for profits, the practice of commerce and even the acquisition of riches are all positive values for Grotius. In the closing chapter of *De Iure Praedae*, a chapter dedicated to demonstrating that the taking of the *Santa Catarina* was “beneficial,” as well as legal and honorable, he argues that spoils, so long as they are justly and honorably acquired are not to be spurned: “[S]poils are beneficial primarily because the individuals honourably enriched thereby *are able to benefit many other persons, and because it is to the interest of the state that there should be a large number of wealthy citizens.*”⁵⁵ Riches, it would seem, circulate and bring benefit to many persons, while having rich citizens is an advantage to the state. Moreover, according to Grotius, even God’s eschatological plan is furthered by Dutch commercial success:

Another aspect of the benefits to be received by the public lies in the fact that great numbers of the vast multitude comprising the common people are engaged in commerce or navigation and derive support from no other source. *Thus it will come to pass, as Isaiah prophesied, that all merchandise and all profit shall be consecrated to the Lord: it shall not be treasured nor laid up, but shall be for them that dwell before the Lord, that they may eat unto fullness and be clothed sufficiently.*⁵⁶

Whether he imagines it as held in the hands of wealthy citizens or serving the needs of the common people, riches from the East become virtuous by association when owned by the Dutch. Unlike the Iberians, whose unhealthy and insatiable greed for riches led them to “spread terror throughout the world,” the riches obtained by the honorable and moder-

53. *Id.* at 261 (emphasis added).

54. *Id.* at 356.

55. *Id.* at 339 (emphasis added).

56. *Id.* at 342–43 (emphasis added).

ate Dutch will serve “as a means of protecting life and liberty.”⁵⁷ Indeed, so virtuous is the Dutch pursuit of wealth that God himself, according to Grotius, has intervened on behalf of the Dutch in their East Indies enterprise. In the face of the Spanish “savagery” that had interrupted Dutch commercial activities (in other regions), in response to the “ferocity of the foe,” who sought to keep them out from the Indies, God had resolved to point the Dutch in the right direction and brought their East Indies venture to fruition.⁵⁸ In its vivid imagery which evokes tempests and snares and a journey into the unknown, the conflict between the Iberians and the Dutch takes on biblical proportions. There is no doubt about the identity of God’s elect. God’s care saves the Dutch from certain ruin and keeps them from the “dejection of spirit” that would have resulted from failure. Indeed, so attentive was God to the usefulness of Dutch success in the Indies that he had even inspired the States-General of the United Provinces to establish the VOC!⁵⁹

In fact, “commerce,” especially that characterized by long distance seaborne travel, had not always been applauded in the European, Christian tradition. Over the centuries, commerce was routinely decried for its propensity to encourage fraud, greed and avarice. Denounced for being excessively speculative, censured for presenting too great a hazard to life and property in the service of procuring unnecessary foreign luxuries, international commerce was also periodically deplored because it encouraged dependence rather than self-sufficiency.⁶⁰ Grotius and many of his contemporaries, however, were drawn by an alternative, equally ancient, but radically different view of seaborne commerce. This view, dubbed the “doctrine of the providential function of commerce” by the economist Jacob Viner, holds that far from being a vicious and sinful practice, commerce is the handiwork of God himself, the result of God’s grand design—a human activity made necessary by God’s careful planning.⁶¹ The classic formulation of this doctrine, which Viner traced back to the fourth century, combined two related sets of assumptions concerning God’s purpose and the function of trade.

God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. *And so he called commerce into being*, that all men might be able

57. *Id.* at 342.

58. *Id.* at 341.

59. *Id.*

60. See, e.g., JACOB VINER, THE ROLE OF DIVINE PROVIDENCE IN THE SOCIAL ORDER: AN ESSAY IN INTELLECTUAL HISTORY 32–36 (1972).

61. *Id.* at 37.

to have common enjoyment of the fruits of earth, no matter where produced.⁶²

On this view, God's ultimate purpose was that human beings should be sociable—"cultivate a social relationship"—with one another. Unfortunately, left to his own devices, Man (in his fallen state) had a tendency to isolation. In order to remedy this problem, God had designed the world in such a way that no people or nation could ever hope to be self-sufficient. God's gifts were therefore judiciously dispersed across the world. Every nation lacked for something, while having an abundance of some other necessary good. By Divine design the problem of lack (or need) could be overcome only by means of exchange. Each nation could acquire what it lacked by supplying another nation with those gifts of which it had been given an abundance. Lack, the need for each others' goods, generated a state of interdependence. To thrive, peoples could not remain in isolation but would have to enter into relationship with one another. And in this relationship lay harmony, friendship and even love. This is why God had brought commerce into being, that men might come to friendship.

As Viner has shown, while the set of ideas which comprise this "doctrine of the providential function of commerce" resurfaced periodically over the centuries, it was never properly theorized. Rather, each statement of the "doctrine" merely repeated the classic formulation within its own particular context. Moreover, even its proponents failed to recognize it as a distinctive philosophic or economic theory with a long pedigree. In *De Iure Praedae*, we find Grotius articulating his own elaborate version of the doctrine, which he uses to support his contention that there is a natural right to engage in commerce:

For God has not willed that nature shall supply every region with all the necessities of life; and furthermore, He has granted pre-eminence in different arts to different nations. *Why are these things so, if not because it was His Will that human friendships should be fostered by mutual needs and resources*, lest individuals, in deeming themselves *self-sufficient*, might thereby be *rendered unsociable*? In the existing state of affairs, *it has come to pass, in accordance with the design of Divine Justice, that one nation supplies the needs of another*, so that in this way (as Pliny observes) whatever has been produced in any region is regarded as a product native to all regions

Consequently, anyone who abolishes the 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 vio-

62. *Id.* at 36–37 (quoting Libanius, *Orationes*, fourth century A.D.) (emphasis added).

lence to nature herself. Consider the ocean, with which God has encircled the different lands, and which is navigable from boundary to boundary; consider the breath of the winds in their regular courses and in their special deviations, blowing not always from one and the same region but from every region at one time or another: are these things not sufficient indications that nature has granted every nation access to every other nation? In Seneca's opinion, the supreme blessing conferred by nature resides in these facts: *that by means of the winds she brings together peoples who are scattered in different localities, and that she distributes the sum of her gifts throughout various regions in such a way as to make a reciprocal commerce a necessity of the members of the human race.*⁶³

The conventional elements of the doctrine are all here, along with a number of additional flourishes. God desires human sociability. To achieve his purpose in the face of mankind's predilection for isolationism and self-sufficiency, God has deliberately granted different gifts to diverse peoples while permitting that each nation suffer lack in some respect, thus fostering a condition of mutual need and interdependence. Commerce abolishes lack by supplying the needed resources in the course of mutual exchange, thereby bringing peoples together in friendship. Reciprocity is the quality of commercial exchange most highlighted by Grotius. According to Grotius, commerce brought about mutual advantage. Since by definition friendship was a relationship that produced mutual advantage, commerce could be said to engender friendship.⁶⁴ Those who traded with another across the oceans would become friends.⁶⁵ Friendship brought humanity together in love, producing a harmony pleasing to God. Universalizing in its sweep, the "doctrine" recast differences across the world as providential and non-essential. East Indian peoples, despite their distance and strangeness, could be depicted by Grotius as reaching out to the Dutch, desiring to be embraced in the circle of mutual exchange.⁶⁶ Nonetheless, while all peoples could reach out in desire, only the merchants in their vessels held the key; only they could put an end to geographical separation by traversing the oceans:

63. 1 GROTIUS, *supra* note 2, at 218 (emphasis added).

64. "[F]riendships rest on mutual benefits . . ." *Id.* at 158.

65. An echo of this association of terms can be heard in the name of the ubiquitous "Treaties of Friendship, Navigation and Trade."

66. Grotius makes repeated reference to the East Indians' desire to enter into commercial relationships with the Dutch. Despite Portuguese calumny, once the native peoples encounter the virtuous Dutch merchants, who, in Grotius' account, desire nothing better than to enter into fair commercial transactions, they cannot help but be impressed. Their rulers encourage the Dutch merchants and seek alliances of friendship with the Dutch sovereigns. 1 GROTIUS, *supra* note 2, at 213–14.

they were the midwives of the brave new world community. In this role the Dutch held a place of honor, for Dutch geography and character had, it seemed, combined to produce a nation turned in a special way to this philanthropic maritime enterprise:

[E]veryone knows that the situation of the Dutch coast and the assiduity of the natives are such that merchandise is very conveniently transported from all parts of the said coast to all other localities whatsoever, since a natural bent (so to speak) for maritime enterprise characterizes our people, *who regard it as the most agreeable of all occupations to aid humanity, while finding a ready means for self-support, through an international exchange of benefits from which no one suffers loss.*⁶⁷

Here again are the familiar themes. Commerce is a peaceable activity, everyone stands to benefit and so it follows that those who engage in commerce are serving humanity.⁶⁸

The corollary of this line of reasoning (or “doctrine”), as Grotius makes explicit in the earlier quote, is that interference with commerce is interference with an activity that serves mutual advantage. It interferes with the forging of friendship, and fosters disharmony: It is, in other words, an interference with God’s work. “Consequently, anyone who abolishes the 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.”⁶⁹ By means of the “doctrine of the providential function of commerce,” Grotius elevates the offense of the Portuguese to a crime against nature, an affront to God’s design. The Iberian blockade of the oceans, the Portuguese refusal to allow Dutch merchants to engage in trade with the East Indies, is no longer condemned merely as an attack on the economic well-being (and existence) of the United Provinces, it is rather an affront to all of humanity, a humanity in search of a means to overcome lack

67. 1 GROTIUS, *supra* note 2, at 171 (emphasis added).

68. The notion of commerce as an activity that tends to world peace was picked up by Kant who in 1795 wrote an essay arguing for a cosmopolitan right to engage in commerce. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS 93, 114 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (1970). While Kant’s ultimate (or ideal) goal was world peace, in practice, the cosmopolitan right to engage in commerce served to justify European-led colonial expansion. In an eighteenth century context, in which commerce had come to be understood as an agent and product of “manners” and civilization, commercial relations could be imposed even upon the unwilling as civilization was the basis of peace. *See id.*; *see also* J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY (1985).

69. 1 GROTIUS, *supra* note 2, at 218.

while finding a corresponding outlet for its resources, a humanity eager in its desire for fellowship and sociability. All of humanity is implicated, and the depraved Iberians worthy of universal abhorrence, for, says Grotius: “[T]here is no stronger reason underlying our abhorrence of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human intercourse.”⁷⁰ Toward the end of his treatise Grotius takes the analogy one step further, alleging that the Portuguese are pirates and should be treated as such:

For if the name of ‘pirate’ is appropriately bestowed upon men who blockade the seas and impede the progress of international commerce, shall we not include under the same head those who forcibly bar all European nations (even nations that have given them no cause for war) from the ocean and from access to India . . . ? Therefore, since it was invariably held in ancient times that persons of this kind were worthy objects of universal hatred in that they were harmful to all mankind, and since even now there is no one, or at the most a very few individuals who would absolve the Portuguese from the charge of belonging to this class, why should anyone fear that he might incur ill will by inflicting punishment on them?⁷¹

The “doctrine of the providential function of commerce” was peculiarly well adapted to a commercial people, one newly attractive in an age seeking to ennoble and justify commercial expansion. Over time, it would come to enjoy the dubious privilege of a tenet of faith, a belief stated and firmly held, but rarely examined.⁷² As we have seen, in

70. *Id.* at 220.

71. *Id.* at 327. While Grotius has Portuguese vessels in mind, it is evident that from another point of view, he is essentially claiming that Portugal itself is a piratical nation, worthy of universal abhorrence and subject to punishment by all. The reasoning, it is interesting to note, is not unlike that marshaled today by certain sectors against so-called “rogue states.”

72. A near contemporary deployment of the “doctrine” is clearly discernible in a letter entrusted by Queen Elizabeth to Sir James Lancaster, commander of the first fleet to sail from England on behalf of the newly chartered East India Company (1600):

ELIZABETH by the Grace of God, Queene of England, France, and Ireland, defendresse of the Christian Faith and Religion. To his great and mightie King of Achem, &c. in the Iland of Sumatra, our loving Brother, greeting. The Eternall God, of his divine knowledge and providence, hath so disposed his blessings, and good things of his Creation, for the use and nourishment of Mankind, in such sort: that notwithstanding they growe in divers Kingdomes and Regions of the World: yet, by the Industrie of Man (stirred up by the inspiration of the said omnipotent Creator) they are dispersed into the most remote places of the universall World. To the end, that even therein may appeare unto all Nations, his marvellous workes, hee having so ordained, *that the one land may have*

Grotius' hands, the "doctrine" acquired a significant new element, for Grotius makes an explicit association between the "doctrine" and a right to engage in commerce. Grotius, however, fails to spell out the nature of the connection. Rather, he appears to find the "right" inherent in the "doctrine," as absent the right; God's plan, expressed in the "doctrine," would be frustrated. In order to understand why he finds it unnecessary to explain the relationship between the "doctrine of the providential function of commerce" and a right to engage in commerce, we must turn back to the theory of justice that Grotius develops in the *Prolegomena* of *De Iure Praedae*, which frames the subsequent legal arguments, for Grotius is too much of a modern to be satisfied with affirming the existence of a right based on nothing more than divine authority. Yet, in the end, as we will see, Grotius' elegant analysis fails to produce any basis for a right to engage in commerce more substantive than that of Divine design.

In the *Prolegomena*, by methods he describes as mathematical and proper to natural reason, Grotius perfects a comprehensive theory of justice comprised of two related legal systems. Grotius begins by describing and deriving the sources and content of natural law and then proceeds to elaborate the sources and content of positive law. Altogether, Grotius posits nine general "rules" (principles) from which he derives thirteen "laws" (precepts).⁷³ Of these, the first three principles and the first six precepts concern natural law proper and serve as a source for positive law, whereas the final six principles and five precepts are within the exclusive domain of positive law. Together, the nine general principles and thirteen precepts, combining natural and positive law, function as the "preliminary assumptions" or "premises" that Grotius claims as the foundation for his legal arguments in *De Iure Praedae*.

The first principle with which Grotius launches his analysis in the *Prolegomena*, the principle to which he ascribes "pre-eminent authority" is that: "*What God has shown to be his Will, that is law.*"⁷⁴ Law, as used here by Grotius, is that which is commanded. "In any case," he adds,

need of the other. And thereby, not only breed intercourse and exchange of their Merchandise and Fruits, which doe superabound in some Countries, and want in others: but also ingender love and friendship betwixt all men, a thing naturally diuine.

Markley, *supra* note 29, at 497–98 (emphasis added).

73. Grotius' terminology of "rules" and "laws" in the *Prolegomena* is confusing and somewhat misleading. What he means by these terms is better conveyed by the alternative terms he also sometimes employs: "principle" for "rule" and "precept" for "law." In an attempt to minimize confusion I have chosen to substitute the terms "principle" and "precept" throughout the remainder of my discussion of Grotius' theory of justice.

74. 1 GROTIUS, *supra* note 2, at 8.

“the act of commanding is a function of power, and primary power over all things pertains to God”⁷⁵ “The Will of God,” pursues Grotius, “is revealed, not only through oracles and supernatural portents, but above all in the very design of the Creator; for it is from this last source that the law of nature is derived.”⁷⁶ In other words, the first principle is nothing other than the instauration of the “design of the Creator” as the ultimate source of natural law. From here it is an easy step for Grotius to ascertain that “since God fashioned creation and willed its existence, every individual part thereof has received from Him certain natural properties whereby that existence may be preserved”⁷⁷ What Grotius discovers in God’s design is that God wills the self-preservation of his creation. From this he makes a case for self-interest, characterizing it as the first object of love: “[L]ove, whose primary force and action are directed to self-interest, is the first principle of the whole natural order.”⁷⁸ From the beginning, Grotius seems to have the virtuous profit-seeking merchant in mind: The prototypical Dutchman motivated by the right kind of self-interest. As if to ensure that the point is not lost, Grotius reiterates that “the first principle of a man’s duty relates to himself.”⁷⁹ He then proceeds to distinguish the right kind of moderate self-interest from immoderate self-interest, which he describes as “an excess of self love.”

Consequently, from the first principle—God’s will—Grotius, applying the methods of logical proof, derives what he terms the two most important “precepts” of the law of nature, which are both concerned with self-preservation: “It shall be permissible to defend one’s own life and to shun that which proves injurious” [Precept 1]; and “It shall be permissible to acquire for oneself, and to retain, those things which are useful for life” [Precept 2].⁸⁰ Grotius then uses the first principle, “*What God has shown to be His Will, that is law,*”⁸¹ along with the two derivative precepts—the right to self-defense and the right to acquisition and use—to elaborate what we may call a theory of proto-property in the state of nature⁸²—a theory which assumes a “common grant” but a right of seizure

75. *Id.*

76. *Id.*

77. *Id.* at 9.

78. *Id.*

79. *Id.*

80. *Id.* at 10.

81. *Id.* at 8.

82. Grotius never makes use of the term “state of nature,” but both here and elsewhere he makes reference to a historical time before the emergence of separate political communities and the advent of civil law. It is important, however, to recognize that Grotius’ image of “the state of nature” is radically different from that subsequently imagined by Hobbes in *The Leviathan* in at least one important respect. For Grotius, in the

for individual use.⁸³ Only after a duty of self-interest and a protean form of property rights in the state of nature has been established does Grotius turn to the duty to care for the “welfare of our fellow beings”—Grotius also seems to discover this duty from God’s design. In Grotius’ words:

God judged that there would be insufficient provision for the preservation of His works, if He commended to each individual’s care only the safety of that particular individual, without also willing that one created being should have regard for the welfare of his fellow beings, in such a way that all might be linked in mutual harmony as if by an everlasting covenant.⁸⁴

As with the contrast Grotius draws between self-love and excessive self-love, these images have a familiar ring. They are after all a form of the claim about God’s divine interest and purpose in commerce. God’s will is that men care for each other’s welfare (love one another) so that there might be sufficient provision for the preservation of all, and that they might be linked in mutual harmony.

In Grotius’ system of law, the first principle and its two derivative precepts hold a place of honor, for they are derived directly from the design or will of God. Next in line is what Grotius terms the “primary law of nations.” In Grotius’ rendering, the primary law of nations, though it arises out of the mutual accord of human beings, is (indirectly) received from God, for it is born of man’s rational faculty, which is the imprint of God’s image in man. Grotius articulates it as the Second Principle: “*What the common consent of mankind has shown to be the will of all, that is law.*”⁸⁵ It is important to note that in Grotius’ system of law we are still in a period prior to civil society and prior to the division of the world into separate polities. What Grotius seems to have in mind here is a minimalist but universal ethic, which has the force of law (or command). According to Grotius, what mankind agrees on is “that it behoves us to have a care for the welfare of others,”⁸⁶ which he understands to be

state of nature, man lives in a world community subject to the first three principles and the first six precepts of his theory of justice. *Id.* at 8–30. This primary natural and universal community is not destroyed by the subsequent division into polities.

83. Grotius expands on his theory of property in chapter XII, as part of his proof concerning freedom of the seas. *Id.* at 228–55. Since Richard Tuck’s intervention on the subject in *The Rights of War and Peace*, there has been some interesting debate as to what exactly Grotius had in mind here. See RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* 78–108 (1999). However, we do not have to solve the puzzle at this point.

84. 1 GROTIUS, *supra* note 2, at 11.

85. *Id.* at 12.

86. *Id.*

the basis of a kind of universal society and at the origin of justice.⁸⁷ Bringing together his first two principles, the force of command arising out of divine will and from the common consent of mankind, two forces which according to Grotius can never be in opposition, Grotius derives two further precepts that should guide human beings' relationship with others. These take the form of prohibitions: the precept of inoffensiveness (in other words, don't injure others) [Precept 3], and the precept of abstinence (that is, don't seize another's possession) [Precept 4].⁸⁸ In a certain respect, these two prohibitions could be understood as the negative limits of the first two precepts concerning self-interest: the right to self-defense and the right to acquisition and use. Grotius then rounds out these four precepts with two further precepts, which he qualifies as being precepts of justice: evil deeds must be corrected (retaliation or punishment) [Precept 5]; and good deeds must be recompensed (restitution or reward) [Precept 6].⁸⁹ Finally, Grotius enunciates a third principle—the principle of good faith—which stands at the origin of pacts (and contracts).⁹⁰ Up to this point in the analysis, Grotius' objective has been to establish a system of natural law, the set of principles and precepts that govern human beings even before the advent of civil society. Natural law, for Grotius, is the law of the universal human society, a superior law that precedes civil law and can never be abolished. Indeed, when Grotius at last turns to the subject of civil society and positive law, these are presented as necessary evils in a post-lapsarian world.

When it came to pass, after these principles had been established, that many persons (such is the evil growing out of the nature of some men!) either failed to meet their obligations or even assailed the fortunes and the very lives of others, for the most part without suffering punishment . . . there arose the need for a new remedy, lest the laws of human society be cast aside as invalid.⁹¹

The need was urgent, there were more human beings, they were scattered about “with vast distances separating them and were being deprived of opportunities for mutual benefaction.”⁹² According to Grotius, these conditions lead men to gather into social units, and this movement in turn gives birth to the commonwealth—“not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify

87. *Id.* at 13.

88. *Id.*

89. *Id.* at 15–18.

90. *Id.* at 18–19.

91. *Id.* at 19.

92. *Id.*

that universal society by a more dependable means of protection”⁹³ Again we find in Grotius’ depiction an emphasis on vast distances separating men and the claim that they were being deprived of opportunities for mutual benefaction. The remedy here, however, is not commerce but the political community, which is a replica in miniature of the world society. The commonwealth is not, in its essence, part of the problem of fracture and estrangement but part of the solution. Civil or municipal law, according to Grotius, exists to support and strengthen natural law, which is why it can never contradict it. The closer bonds of friendship that unite a commonwealth do not extinguish the natural bonds of universal human society; rather they should serve to strengthen them. Following the discussion of municipal law, Grotius turns to what he terms “the secondary law of nations.” This he considers “a species of mixed law, compounded of the [primary] law of nations and municipal law”⁹⁴

Fortunately it is not necessary for us to follow Grotius in his lengthy analysis of civil law or the secondary law of nations, for the right to engage in commerce is never mentioned explicitly by Grotius in these sections of the *Prolegomena*. While a right to engage in commerce is not specifically identified in the section on natural law either, I have tried to demonstrate that each line of Grotius’ analysis seems to imply its necessity. As we have seen, in Chapter XII, Grotius appears to imply the right from the need to give effect to God’s beneficent will as described in the “doctrine of the providential function of commerce.” In the *Prolegomena*, Grotius presents God’s will as the first and most authoritative principle in the systematic analysis of law. God’s will is presented as the source of authority and command, yet it must be ascertained from God’s design. As Grotius deciphers God’s plan in the section on natural law, elements from the “doctrine” make their appearance. God’s particular plan concerning the distribution of scarcity and abundance, needs and resources, and God’s desire that mankind enter into fellowship through the process of exchange, is played out in a variety of registers. At length, the “doctrine” appears to inhabit both the structure and the substance of the natural law. Commerce becomes a necessity to protect self-interest and to serve the welfare of others. The right to engage in trade must be asserted to give effect to God’s will.

Grotius, it should be noted, was not the first to make reference to a right to engage in commerce; rather, he was able to rely on the earlier work of the Spanish Dominican theologian and legal theorist Francisco

93. *Id.*

94. *Id.* at 26.

de Vitoria. Yet as my analysis will show, Grotius' right to engage in commerce was a radical revision of the right first identified by Vitoria. In 1539, three quarters of a century before Grotius, in a lecture later published as *De Indis*, Vitoria had argued that the refusal of Native Americans to allow the Spaniards to carry on trade with them was a wrong that provided sufficient justification for the Spaniards to initiate a "just war" against them.⁹⁵ According to Vitoria, the native lands that had fallen into Spanish possession in the course of such a just war, could be lawfully seized and might be legitimately kept. Unlike Grotius, however, Vitoria had not based his claim on a strong version of the doctrine of the providential function of commerce. Indeed, it is not clear that he had intended to assert an autonomous and distinctive "right to engage in trade," as Grotius proceeded to do. Vitoria's overall objective in *De Indis* is to clarify the legal relationship that exists between the Spaniards and the New World natives whose lands they have conquered. The specific legal question that motivates the work is whether the Spanish conquest of native lands in the New World in the early sixteenth century was justly undertaken. In *De Indis*, Vitoria begins by critiquing the arguments or "titles" by which the Spaniards had until then conventionally justified their conquest. According to Vitoria, neither discovery, the Pope's or the Emperor's authority, nor the natives' unbelief or sinfulness, could in themselves justify dispossessing the natives of their lands. Having dismissed the traditional claims, Vitoria turned his attention to possible "just titles" that might nonetheless justify the conquest. The first "just title" that Vitoria proposes is "*that of natural society and fellowship.*"⁹⁶ Vitoria's first conclusion under this title is that:

The Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them.

Proof of this may in the first place be derived from the law of nations (*jus gentium*), which either is natural law or is derived from natural law (*Inst.*, I, 2, I): "What natural reason has established among all nations is called the *jus gentium*." For, congruently herewith, it is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.

Secondly, it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel

95. VITORIA, *supra* note 8, at 154–55.

96. *Id.* at 151.

wheresoever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common uses which prevailed among men, and indeed in the days of Noah it would have been inhumane to do so.⁹⁷

While the reference to “reciprocity” and the mention of “division” hint at some connection with the “doctrine of the providential function of commerce,” the accent is clearly on showing hospitality to strangers and on sociability. The story Vitoria is telling is that of a world before property or political boundaries. At that time everyone was free to wander about, to travel and visit without limitation. The “division of property” was not intended to abolish this original (and universal) privilege, because such an abolition would have been considered “inhumane.” Humanity itself imposes a duty of hospitality and sociability on the natives. Twelve additional proofs are then mustered by Vitoria to support the proposition that the Spaniards have the right to travel and sojourn in native lands.

The second proposition that Vitoria develops under the “just title” of “*natural society and fellowship*” is that:

The Spaniards may lawfully carry on trade among the native Indians, so long as they do no harm to their country, as, for instance, by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance. Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives. This is proved by means of my first proposition. [That concerning the “right” to travel and sojourn.]⁹⁸

Vitoria bases this second proposition on the law of nations and divine law (which he says is not opposed to it) and then adds that in any case, “the sovereign of the Indians *is bound by the law of nature to love the Spaniards*. Therefore, the Indians may not causelessly prevent the Spaniards from making their profit where this can be done without injury to themselves.”⁹⁹ This curious addition reminds us that for the Spanish theologian, the ultimate optic through which law, whether natural, divine, international, or human, is examined, is that of “love”—which is what the duty of hospitality to strangers and sociability is all about. When the Indians of the New World refuse to enter into commercial relationship with the visiting Spaniards, their offense is an offense against

97. *Id.*

98. *Id.* at 152.

99. *Id.* (emphasis added).

love. That the offense against love has a potential economic dimension is noted, but not given center stage.¹⁰⁰

Unlike Vitoria, in *De Iure Praedae*, Grotius places commerce squarely at the heart of his analysis. When he refers to Vitoria's earlier work, he quotes him approvingly, but he reverses the order of things. Vitoria had started with the duty of hospitality to strangers and sociability. Love of neighbor was the guiding principle. The privileges of the Spaniards to travel or sojourn, to trade, to share in the common goods, to dwell in native lands and to acquire nationality were all derivative from the duty of hospitality. Grotius, on the other hand, begins by claiming that the "doctrine of the providential function of commerce," as he has elaborated it "is the source of the sacrosanct law of hospitality."¹⁰¹ Vitoria, says Grotius, holds that:

[I]f the Spaniards should be prohibited by the American Indians from traveling or residing among the latter, or if they should be prevented from sharing in those things which are common property under the law of nations or by custom—if, in short, they should be debarred from the practice of commerce—these causes might serve them as just grounds for war against the Indians; and indeed as grounds more plausible than others.¹⁰²

Hospitality, the right to travel or reside, the right to share in the common ownership—all these are for Grotius merely expressions of the practice of commerce.

The distinction between the two men may seem minor, yet Grotius' reversal of terms had an important consequence. In Vitoria's scheme, the Indians, if they prevented the Spaniards from enjoying any of the "rights" to which they were entitled under the head of duties of "hospitality and sociability," including the "right" to trade, would be causing an offense to the Spaniards, and the Spaniards would have sufficient cause to initiate a "just war." The fundamental offense of the Indians was a refusal to engage in a loving relationship with the Spaniards. The only "injured" party, under this system, was the party with whom the Indians refused to engage. Such an injury was limited in range because it was a personal injury. No third party could claim to be injured by the Indians' refusal to offer hospitality to the Spaniards. Furthermore, while in theory the right and the potential injury were universal, in practice, it was evident that it could only be used to justify a European "just war" against barbarians. Its claims, based on a universal duty of hospitality and socia-

100. *Id.* at 152–53.

101. 1 GROTIUS, *supra* note 2, at 219.

102. *Id.* (emphasis added).

bility, assumed both no prior (commercial) relationship and non-Christian peoples, as a common Christianity was considered a bond of love. No European nation would be able to assert it against another. By placing the accent on commerce and on a right to engage in commerce, Grotius' reversal partly eliminated this limitation.

The offense of the Portuguese against the Dutch in the East Indies was clearly not an offense against hospitality. Instead, the Portuguese injury was the interference with a trading relationship between third parties. The injury based on a right to engage in trade had become, in Grotius' hands, good cause to justify a European nation's initiating "just war" against another European nation. Furthermore, the Portuguese blockade of the seas could now be viewed as not only an injury against the Dutch, but as an offense against the East Indian peoples who sought to enter into a mutually advantageous commercial relationship with the Dutch. It could even be viewed as a universal injury, for the blockade affected all of humanity in its pursuit of greater harmony and sociability. Europeans defending their right against other Europeans could thus perceive themselves as triply virtuous.

III. JUST WAR—SOVEREIGN ANXIETY, PRIVATE WAR AND THE FREEDOM OF THE SEAS

The framework within which Grotius explored and developed his ideas on commerce, the right to engage in commerce, war and prize law in *De Iure Praedae* was the doctrine of just war. The just war doctrine, traceable in its Christian form back to Augustine, had received its classic formulation in Thomas Aquinas' *Summa Theologica*,¹⁰³ written in the fourteenth century. In the course of this important and immensely influential theological treatise, Aquinas raised the question that had plagued thoughtful Christians since their beginning: Was waging war against God's law? Was it, in other words, a sin? Though he discusses "war" under the heading of "vices" that offend against "charity (love)," Aquinas nonetheless sides with the pragmatic and fiery Augustine in holding that under the right conditions some wars are just, and therefore not sinful:

In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. . . . Secondly, a just cause is required, namely that those who are attacked,

103. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. 2, question 40 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

should be attacked because they deserve it on account of some fault Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.¹⁰⁴

By the beginning of the sixteenth century, Aquinas' formulation and his three conditions for "just war:" sovereign authority, just cause and right intention, had become the standard. Moreover, Aquinas' theological doctrine had quickly been transposed into the kindred realm of law. Vitoria, for instance, expounded on Aquinas' doctrine of just war in his *Second Relectio, Sive De Ivre Bellis Hispanorum in Barbaros* (On the Law of War Made by the Spaniards on the Barbarians),¹⁰⁵ the companion piece to *De Indis*. Familiar as it was, the young Grotius considered the "law of war" to be in certain respects, "exceedingly confused,"¹⁰⁶ and one of his stated purposes in *De Iure Praedae* was to clarify it once and for all.

The specific legal controversy that Grotius sought to address in *De Iure Praedae* was whether the taking of the *Santa Catarina* was legitimate.¹⁰⁷ For Grotius, the answer to this question was bound up with a proper understanding of the doctrine of "just war." The *Santa Catarina*, a Portuguese merchant ship, had been violently attacked and seized by a Dutch merchant vessel on the high seas. From a legal perspective, the only way to render this violent act legitimate, rather than a reprehensible act of piracy, was to show that the *Santa Catarina* had been taken in the course of just war and had accordingly become a lawful prize—enemy property taken in the course of a just war. Such a demonstration required that Grotius apply just war doctrine to the facts of the case. From a certain perspective, we might have expected the application to be quite straightforward. After all, the *Santa Catarina* was a Portuguese vessel and the Dutch were at war with the King of Spain, who was now also the King of Portugal. This much seemed easily ascertainable. Thus, all that Grotius would have to show was that the ongoing Dutch war against Spain (and Portugal) was a just war. The rest would follow. The case, however, did not prove so easy to resolve for the facts were somewhat contentious and made application of the traditional doctrine awkward. In brief, Grotius was laboring under three disabilities: First, the sovereignty of the United Provinces was in question; second, it was not certain that the Portuguese were at war with the Dutch; and third, the Dutch merchant fleet was privately owned and not officially commissioned as a privateer. In order to

104. *Id.* question 40, art. 1.

105. VITORIA, *supra* note 8, at 269–97.

106. 1 GROTIUS, *supra* note 2, at 7.

107. *See id.* at 216–317.

arrive at a satisfying resolution in face of these messy facts, Grotius could not simply apply the doctrine of just war as he found it in Aquinas and Vitoria; instead he found it necessary to modify and round it out. In a masterly fashion Grotius was then able to apply a revised doctrine to the facts in a series of variations that all confirmed the existence of a just war and thus established the legitimacy of the taking.

In seeking to elaborate his own theory of just war in *De Iure Praedae*, however, Grotius had to work within the constraints of the already well-established formulation of just war doctrine. He had to contend with Aquinas' three conditions: sovereign authority, just cause, and right intention.¹⁰⁸ Aquinas' first condition, that there be a sovereign by whose authority the war was to be waged, had two constraining functions: First, it sought to restrict the scope of just war to public war, thus delegitimizing the concept of private war, for: "If an individual had a quarrel, he could seek redress of his rights from the tribunal of his superior."¹⁰⁹ In Aquinas' view, "strife" or private war was always a sin "because it takes place between private persons, being declared not by public authority, but rather by an inordinate will."¹¹⁰ The only partial concession he made was in the case of self-defense. Even then, Aquinas imposed two additional conditions, requiring that the defender not be motivated by hatred or vengeance and that he not exceed moderation in defending himself. Under those circumstances, according to Aquinas, private war or strife might be considered no more than a venial sin. The second constraining function of Aquinas' condition of "sovereign" authority was to limit as much as possible the circle of those wielding public authority who might legitimately undertake a war. In theory at least, the smaller the circle, the less war was likely. Consequently, only those fighting a war authorized by the sovereign himself might be entitled to the immunity from sin conferred by just war doctrine.

For Grotius, each dimension of Aquinas' condition of "sovereign authority" posed a difficulty. He had to address two obvious problems: The first concerned the validity of the claim to sovereignty of the United Provinces. Under this head, there were two issues with which Grotius had to contend: the Spanish counterclaim that the United Provinces should be considered a rebellious province, and the fact that sovereignty in the United Provinces, even if it could be claimed, was a dispersed and

108. This third condition does not cause Grotius much concern. In those few instances when he mentions the problem of "right intention," he dismisses it as a matter of conscience not susceptible to proof which, most significantly, does not interfere with the retention of spoils as it has no legal effect. *Id.* at 129.

109. 2 AQUINAS, *supra* note 103, pt. 2, question 40, art. 1.

110. *Id.* question 41, art. 1.

disaggregated affair little resembling the conventional notion of the sovereign prince. The second problem that Grotius had to address remained the ticklish matter of the private character of the Dutch vessels that had seized the *Santa Catarina*. Indeed, buried within the folds of *De Iure Praedae* we can detect two related and powerful anxieties over distinctions that Grotius' analysis seeks to dispel: First is the anxiety over how to distinguish rebels from sovereigns, and second is an anxiety over the boundary between the inherently unstable categories of piracy and freebootery. In both cases, as we will see, the boundary would be determined in Grotius' work by a proper understanding of just war and sovereignty.

In the early seventeenth century, when Grotius worked on the text of *De Iure Praedae*, Philip III, King of Spain, still deemed the citizens of the United Provinces as little more than rebellious subjects. Until his death in 1598, King Philip II, who had never recognized the authority of the States-General to depose him, had waged an unrelenting war against them. After his death, due to a financial crisis, the conflict entered a cooler phase, but it is evident that his son, Philip III, had not renounced, and despite the escalating costs of the war, did not intend to renounce, his historical claim to sovereignty over all of the erstwhile Burgundian lands in the Low Countries. For the Spanish Habsburgs, the Low Countries were no peripheral outpost; they were a strategic political and economic pivot of the massive empire, entranceway to the heart of Europe as well as center of their own family identity.¹¹¹ Moreover, in 1581, at the time of the deposition of Philip II, the States-General had not immediately declared themselves a Republic. Instead, they searched for a substitute prince to exercise sovereignty over them. Both Henry IV, King of France, and Elizabeth I, Queen of England, had their own quarrels with Philip II; both welcomed the disturbance in the Low Countries as a distraction and an expense for their enemy, yet neither was eager to do

111. Charles V, father of Philip II, was born in Ghent, brought up in the Low Countries, and lived there during much of his reign.

Dynastic accident had brought together in [his person] four separate inheritances, each of them a major political entity. From his father's father, Charles received the ancestral estates of the Habsburg's in southeastern Germany and (after 1519) the title of Holy Roman Emperor; from his father's mother he inherited the Burgundian lands in the Netherlands. From his mother's mother Charles received Castile and the Castilian conquests in North Africa, the Caribbean and Central America; from his mother's father he inherited Aragon and the Aragonese overseas dominion of Naples, Sicily and Sardinia.

GEOFFREY PARKER, *PHILIP II* 4 (1978). In the course of his reign, Charles V added significant new territories to his already impressive patrimony, including, most importantly, a vast swathe of South America. *Id.*

much more than assist the rebels financially and, in the case of England, strategically. Not only did neither sovereign relish a new cause of war with Spain, but neither could approve subjects who rose in rebellion against their legitimate sovereign. Having failed to convince any prince to take on the job of sovereign, in 1585, the States-General of the United Provinces came to a compromise and voted to accept a governor-general appointed by a reluctant Queen Elizabeth. This politically delicate and controversial arrangement, much disapproved by the powerful Province of Holland, had in any case fallen through within two years. Only following this fiasco did the United Provinces decide at last to proceed without a “foreign” sovereign. Even then, however, the provinces did not draw up anything resembling a federal constitution. Instead their political system remained *ad hoc* and pragmatic.¹¹² The United Provinces was at base a defensive union of self-governing provinces, each jealous of its historic rights and privileges. The self-governing provincial authorities did not consider themselves bound by the dictates of the central authority of the States-General. Even Maurice of Nassau, Prince of Orange, Commander of the Army and Admiral of the Navy, was not really a “prince,” but the appointed “Stadtholder” or “governor” over five of the provinces, (while his cousin was recognized as Stadtholder over the remaining two). Sovereignty, such as it was, was dispersed across a bewildering array of public authorities in the United Provinces.

Under the circumstances, it is hardly surprising that Grotius at the turn of the century should evidence some anxiety over the question of whether there was a sovereign in the United Provinces, with authority to engage in “just war,” under the Aquinan formulation. Given that civil war under Aquinas’ definition could never be just, Grotius’ first task was to show the United Provinces were not engaged, as the King of Spain would have it, in a civil war of rebellion against their legitimate sovereign.¹¹³ The argument Grotius makes in *De Iure Praedae* to counter the charge of rebellion closely tracks the analysis he develops at greater length in the near contemporaneous *Commentarius in Theses XI*.¹¹⁴ In

112. Hans W. Blom, *The Republican Mirror: The Dutch Idea of Europe*, in *THE IDEA OF EUROPE: FROM ANTIQUITY TO THE EUROPEAN UNION* 91, 97 (Anthony Pagden ed., 2002) (“It thus seems inadequate to label the Republic a federal state, if only because it possessed no detailed regulation of the respective rights and duties of its different parts.”).

113. Grotius’ response to the unspoken challenge to the legitimacy of Dutch sovereignty is carried primarily in the historical narrative (chapter XI). 1 GROTIIUS, *supra* note 2, at 168–71. In chapter XIII, he makes the case for the taking as an act of just “public” war. *Id.* at 283–317.

114. See generally BORSCHBERG, *supra* note 39.

short, the accusation of rebellion is answered by recourse to a theory of sovereignty which relies on a non-unified concept of sovereignty, as against the dominant Bodinian model,¹¹⁵ and which places the nation before sovereignty, rather than having the sovereign define the nation.

In Grotius' historical account of the events that led to the Dutch revolt, the spark was lit when the Duke of Alba, appointed by Philip II to govern the Low Countries, exceeded his legitimate sovereign powers by attempting to alter some laws and judicial procedures and impose additional taxes on the citizens of the Province of Holland without seeking the approval of the local authority, an injustice which led to a popular uprising. At length, the States-Assembly of Holland, which, according to Grotius, had been "a true commonwealth for all of seven centuries" and was "a guardian of the rights of the people,"¹¹⁶ gathered in assembly and under its own authority declared war against Alba. This war was then joined by other peoples in the Low Countries. The resulting conflict was by all accounts exceedingly cruel and expensive:

It would be too long a story, if we attempted to tell what quantities of blood have been shed from that time on; what plundering on the part of the Spaniards and what expenditures on the opposite side have drained the resources of the Low Countries (expenses so heavy, in fact, that an accurate reckoning would show them to be in excess of those borne by any other people in any age)¹¹⁷

Philip II, rather than punish the excesses of the Duke of Alba, had encouraged them and, says Grotius, "sought to obtain by force of arms a power greater than was legitimate" until, having no other recourse, the States-General had deposed him: "This was the beginning of the movement in which oaths were taken in support of the sovereignty of the States-General as against Philip."¹¹⁸

Augustine in the fourth century had proclaimed that the end of just war was peace, and that "the natural order, the order adapted to the maintenance of peace among mortals, demands that authority and discretion for the undertaking of wars should reside in princes."¹¹⁹ As we have seen, Aquinas too had sought to constrain the scope of just war to sovereigns. Vitoria, concurring with Augustine and Aquinas, had nonetheless stated

115. Julian H. Franklin, *Introduction*, in JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH xii–xiii (Julian H. Franklin ed. & trans., Cambridge University Press 1992) (1583).

116. 1 GROTIIUS, *supra* note 2, at 169.

117. *Id.* at 170.

118. *Id.*

119. VITORIA, *supra* note 8, at 168–69, citing Augustine, *Contra Faustum*.

the proposition in a slightly different form. Vitoria had emphasized that the authority to wage war resided in the state, rather than in the sovereign. He had, however, also insisted that, "where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace."¹²⁰ In addressing the further question of what was to count as a state, Vitoria had offered the definition that: "A perfect State or community . . . is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates . . ." ¹²¹ Then, taking account of the reality of sixteenth century Europe and perhaps especially of the manner in which the Spanish King, Holy Roman Emperor Charles V, held personal sovereignty over a vast but disparate array of states and lands, he added, that: "[T]here is no obstacle to many principalities and perfect States being under one prince. Such a [perfect] State, then, or the prince thereof, has authority to declare war, and no one else."¹²²

Grotius, while starting from the same Augustinian proposition, and without explicitly rejecting Aquinas' formulation of just war, proceeded to take a yet a different turn by making an additional distinction for those circumstances in which the prince is absent or negligent:

In my opinion, however, when the prince is absent or negligent, and when no law exists expressly prohibiting this alternative course, the magistrate next in rank will undoubtedly have power not only to defend the state, but also to make war, to punish enemies, and even to put malefactors to death.¹²³

According to Grotius, the term "public war" is applicable in such cases, "[f]or such wars are supported by the will of the state; and the state's will, whether expressly or tacitly indicated, ought assuredly to be regarded as authority for the waging of war . . ." ¹²⁴ Applying theory to

120. *Id.* at 169.

121. *Id.*

122. *Id.*

123. 1 GROTIUS, *supra* note 2, at 64.

124. *Id.* It is important to remember, however, as Kingsbury has pointed out in reference to Peter Haggemacher's work, that:

Grotius does not have a closely defined concept of "the state" in the senses subsequently developed in western legal theory. *Civitas*, *respublica*, *populus*, *regnum*, and *imperium* are all used in *JBP* in ways that touch on the modern concept of "state," but only "civitas" is defined, and Grotius does not employ a taxonomy that feeds into later analytic usages.

Kingsbury, *supra* note 4, at 14.

facts, Grotius then concludes that “the state of Holland, even if it was subject to a prince, did not lack authority to undertake a public war independently of that ruler”¹²⁵ The State-Assembly of Holland, which according to Grotius, had since ancient times been the guardian of the people, had justly sought to defend the citizens of Holland against usurpation of their rights by the Duke of Alba and the Spanish King. When the deposed King had sought to regain his lost sovereign status by force of arms, he had given the Dutch just cause for war.¹²⁶ Grotius’ argument was not intended as a theory of a right of rebellion held by the people against a legitimate sovereign. On the contrary, in Grotius’ view there had been no rebellion. According to Grotius, the “prince,” Philip II, Count of Holland and King of Spain, was not in Holland an absolute monarch holding all the “marks” or “powers” of sovereignty.¹²⁷ The power to tax, for instance, was concurrently held by the prince and the state assembly. When the prince had attempted to bypass the state assembly and authorize new taxes without seeking that body’s approval, it was an attempted usurpation of the “mark” of sovereignty retained in this body, whose duty it then was to defend itself against the prince. “*He who holds some mark of sovereignty has the right to wage war in defence of that mark [of sovereignty], even [if this be conducted] against a party which holds another mark.*”¹²⁸ Grotius’ view of disaggregated sovereignty was thus composed of a double assertion: First, the “marks” or “powers” of sovereignty were not necessarily always held in a single “prince,”¹²⁹ and second, every holder of a “mark” of sovereignty was privileged to engage in public war in defense of its own mark. Furthermore, as we have seen, Grotius maintained that in the absence of the sovereign, or when the sovereign was negligent, the magistrates could wield sovereign powers and, if necessary, declare public war. The net result was to significantly open up the category of those whose authority was sufficient to wage just war.¹³⁰

While these technical arguments were perhaps sufficient to counter the charge that the conflict with Spain was a war of rebellion, the question remained, whether the United Provinces could be considered a state at all. It was not just that the United Provinces boasted a bewildering array

125. 1 GROTIUS, *supra* note 2, at 284.

126. *Id.* at 289.

127. For a discussion of this line of argument in the *Commentarius*, see *infra* text accompanying notes 192–97.

128. BORSCHBERG, *supra* note 39, at 237 (alterations in original).

129. *Contra* BODIN, *supra* note 115.

130. For discussion of the relationship between prize law and the acquisition of marks of sovereignty in war, see *infra* text accompanying notes 198–200.

of competing or concurrent sovereignties which co-existed in uneasy harmony held together only by a common external threat. The United Provinces also suffered from border indeterminacy. The Dutch had sought to push back the sea, and in that arena they had enjoyed significant successes; yet, their political boundaries shifted daily with the vagaries of the successes and failures of war. Many of the provinces and cities, which had signed the treaty of the Union of Utrecht in 1579 and those that had abjured the sovereignty of Philip II in 1581, were in the early seventeenth century back under Spanish control. Furthermore, the Dutch did not share a strong sense of national identity. The population was far from being homogeneous: Their numbers since the break with Spain had swollen through immigration, mostly from the southern Hapsburg controlled provinces, but also from England, France, Spain and Portugal. The Dutch army reflected and magnified this diversity as it was composed of large numbers of foreigners, including whole battalions under foreign command. The people of the United Provinces spoke different languages and worshipped in different sects. Their economic interests split along the cleavage that separated the maritime from the interior provinces. The Province of Holland, a behemoth among equals, dominated the union economically and politically and was not trusted by the other provinces. Moreover, if it was unclear what or who the United Provinces were, there was even less consensus about what or who they should become. At the most basic level, for instance, at the beginning of the seventeenth century, there was no accord on whether the future of the United Provinces should encompass the southern provinces still under Spanish rule.

At the time of the taking of the *Santa Catarina*, the United Provinces was a polity in search of a national identity. In response to anxiety about its character as a true nation, the people of the United Provinces adopted a variety of strategies. Among these, the Batavian myth, the claim that the Dutch were descended from a noble Germanic tribe that had valiantly resisted the Roman conquerors and been much admired by them, gave the new polity an ancient pedigree;¹³¹ self-identification as the new Israel gave it a spiritual ideology and divine recognition;¹³² and the tales of Spanish cruelty and enmity, depicted in art, performed on stage, and recounted in the popular literature and pamphlet press, served to unite them

131. SCHAMA, *supra* note 20, at 75. Indeed, Grotius contributed to the elaboration of the myth in his history of the ancient Batavians, *Liber de Antiquitate Republicae Batavorum* (1610).

132. *Id.* at 93.

against a common oppressor.¹³³ All three of these strategies are brought to bear by Grotius in *De Iure Praedae*.¹³⁴ In building the implicit case for a Dutch nation at the front of the state, however, Grotius incorporates a number of additional elements which all work toward the goal of giving the fact of the nation an incontrovertible feel of reality. First of these is the association Grotius makes between Dutch geography, Dutch character, and Dutch destiny.¹³⁵ When Grotius refers to the character of the people and its connection to the geographic reality of the nation, its resources and physical character, he is building the image of a natural entity; the people of Holland have become the maritime nation of the United Provinces. The United Provinces, in this telling, is bounded by water, its character is set by water, and its relationship to the rest of the world is determined by this characteristic. Its productiveness and industry are the result of geography. Thus, nature herself had compelled the Dutch to their maritime destiny; commerce was not simply a chosen activity but their vocation. It is thus possible for Grotius to approach this entity (bounded by the sea, inhabited by merchants) as an economic unit, with its own unique interior economic reality (needs, resources, skills), and this economic character sets it apart from and separates it out from other “natural” groups.

If Dutch geography, character and destiny had made merchants of them, then the state could be properly imagined as a political community of merchants, and the merchants’ interests became the state’s interests. As we have seen, Grotius describes the survival of the United Provinces as bound up with Dutch commercial expansion into the East Indies. Commerce in the United Provinces was a matter of nationwide concern, for, according to Grotius, even the mass of the common people had an economic stake in it. In Grotius’ account, commerce had become a major

133. See generally SCHMIDT, *supra* note 23.

134. See, e.g., 1 GROTIUS, *supra* note 2, at 1, 168, 338.

135. 1 GROTIUS, *supra* note 2, at 171. In the seventeenth century, similar claims concerning English geography, character, and destiny would begin to be made. In the case of England (Britain) the insular nature of the nation gave it its character and led to its destiny as a seaborne empire. As Armitage argues in *The Ideological Origins of the British Empire*, one significant advantage of the distinctive seaborne quality of the destiny of the English (then British) was that a seaborne empire could be associated with liberty and commerce, and distinguished from the conquest and tyranny of the land-based empires of antiquity and of Spain. ARMITAGE, *supra* note 31, at 100–01. Obviously this distinction also served the Dutch, who prided themselves on being purveyors of liberty along with commerce. *Id.* at 166.

matter of public concern, a national concern, as important, if not more important, than war. Consequently, one of the protean state's core functions had become to take responsibility for securing commerce and for facilitating the expansion of trading opportunities on behalf of the "nation."¹³⁶

A further indication of the degree to which Dutch character, Dutch commercial interest, the nature of the Dutch polity, and her future had become intertwined can be found in Grotius' remarks in *De Iure Prae- dae*, approving the States-General of the United Provinces for their prescience and solicitude in first seeking to consolidate and then granting a "federal" charter (and a twenty-one year monopoly) to the VOC, a corporate conglomerate that united under one umbrella the many disparate and previously locally chartered East India Companies.¹³⁷ The ostensible purpose of the federal incorporation of the VOC had been to avoid duplication and reduce wasteful, self-defeating internal competition. The Dutch nation as a whole would suffer if the privately owned companies of each province vied with each other for the same pepper crop, inflating the price of pepper in the East Indies, or if they glutted the Asian market with European goods. In response to this inefficient competition fraught with the dangers of inter-company and inter-provincial conflict, the States-General had recognized the need for "federal" regulation of commerce.¹³⁸ Under the aegis of the VOC, the companies would now be required to coordinate their activities, and while they might sail on behalf of one of the local companies, at least in the East Indies they could present themselves as Dutch merchants, members of a distinctive national community and citizens of a sovereign state. Paradoxically, the idea of a Dutch nation was being forged in the open seas, in regions far distant

136. The idea that commerce was a central or crucial matter of state interest became prevalent in the late seventeenth century, but it was not so in the early part of the century. While merchants may very well have made such claims in an earlier period, it was not generally so understood until much later.

137. 1 GROTIUS, *supra* note 2, at 341. For the text of the VOC Charter, see *The Licence Granted by the States General to the Dutch East India Company on March 20, 1602*, in *VOC 1602–2002: 400 YEARS OF COMPANY LAW* 29, 29–38 (Ella Gepken-Jager et al. eds., 2005).

138. The VOC Charter stated:

We, the States General, have made due reflection after thoroughly considering the importance to the United Netherlands and its good inhabitants that this same shipping trade and commerce [to the East Indies] be maintained and allowed to expand by means of an appropriate general regulation of its policy, mutual relations and its administration.

Id. at 29.

from any claim to territory, borders, population or self-government, by traders who were employees of a corporation.

Moreover, with “federal” incorporation of the VOC came nationwide ownership of shares. The ambition that the company be truly representative of the nation and its interests and that all citizens become stakeholders (or, from our perspective, the goal that the VOC help give shape to a nation), was incorporated into the very design of the VOC. A striking term of the charter provided that: “*All of the inhabitants of these United Netherlands shall be allowed to be shareholders in this Company and to do so with as small or as great an amount as they see fit.*”¹³⁹ Nor were these merely empty words, for its purpose was given effect by a further proviso that if too much capital was offered, then those who had invested an amount greater than 30,000 guilders would be required to “decrease this capital pro rata in order to make place for others.”¹⁴⁰ Furthermore, the charter made provision for adequate publicity: “In the months that follow, the inhabitants of this land shall be kept informed of developments by means of public posters pasted in those places where they are usually pasted.”¹⁴¹ Following its incorporation, the VOC was immensely successful in raising the necessary start-up capital. Initial shares were acquired by all sectors of society, including villages, charitable associations and relatively humble tradespeople, although soon enough, those least able to afford to hold risky and long-term investments sold-up and left corporation ownership in the hands of a narrower set of more traditional and wealthier owners.¹⁴² Nonetheless, stakeholders in the VOC included not only individual private investors, but the whole range of public authorities who shared sovereignty across the United Provinces: City governments, provincial governments, the States-General, and the Statholder all held shares in the company. Along with economic stake came a voice in corporate governance, for, the VOC’s corporate structure, as described in the charter of 1602, mirrored and gave concrete form to the complex, weighted, multi-sovereign, decentralized political system that had developed ad hoc in the United Provinces.¹⁴³ Moreover, in its insistence on a nationwide unity of interest, in its attention to the joint commercial and political interests of the company that now represented a nation, the charter of the VOC also reflected the centralizing aspirations of the States-General of the United Provinces.

139. *Id.* at 31 (emphasis added).

140. *Id.*

141. *Id.*

142. Claudia Schurmann, *The VOC, the WIC, and Dutch Methods of Globalization in the Seventeenth Century*, 17 *RENAISSANCE STUD.* 474, 478 (2003).

143. *See id.* at 29–38.

The fact that a private commercial corporation such as the VOC could serve as template for and representative of the Dutch “nation in formation” in 1602, may help explain Grotius’ second departure from Aquinas’ formulation of just war theory—the significant introduction of the category of just “private” war. As we have seen, Aquinas did not recognize the possibility of just “private war.” For Aquinas, war was by definition a matter of public authority—commanded by a sovereign and waged in pursuance of a just cause which Aquinas had specified meant that “those who are attacked, should be attacked because they deserve it on account of some fault.”¹⁴⁴ Conceptually, such wars concerned the public function of correction or punishment. For Aquinas, private strife was always sinful, for private persons always had recourse to public authorities in case of injury. Vitoria had restated Aquinas’ principle as: “There is a single and only just cause for commencing a war, namely, a wrong received.”¹⁴⁵ Unlike Aquinas, however, Vitoria had recognized a limited role for “private war.” According to Vitoria, anyone could wage a private war in defense of his person, property or goods. A private person, however, had no right to avenge wrongs done him. Furthermore, self-defense could only be resorted to in a moment of danger. Once the necessity had passed, the legitimacy of private war was at an end.¹⁴⁶

Grotius went much further in legitimizing private war. As we saw earlier, in *De Iure Praedae*, Grotius had gone back to first principles and mapped out a comprehensive theory of justice in order to produce a systematic law of war.¹⁴⁷ At the conclusion of the *Prolegomena*, summariz-

144. 2 AQUINAS, *supra* note 34, pt. 2, question 40, art. 1.

145. VITORIA, *supra* note 8, at 170.

146. According to Vitoria:

Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force Hence any one can make this kind of war, without authority from any one else, for the defense not only of his person, but also of his property and goods.

Id. at 167. Furthermore,

[B]e it noted that the difference herein between a private person and a State is that a private person is entitled, as said above, to defend himself and what belongs to him, *but has no right to avenge a wrong done to him, nay, not even to recapt property that has been seized from him if time has been allowed to go by since the seizure.* But defense can only be resorted to at the very moment of the danger, or, as the jurists say, *in continenti*, and so when the necessity of defense has passed there is an end to the lawfulness of war.

Id. at 168 (emphasis added).

147. See *supra* text accompanying notes 71–87.

ing his position on just war, Grotius makes it clear that in his view just war might be public or private:

A war is said to be 'just' *if it consists in the execution of a right*, and 'unjust' if it consists in the execution of an injury. It is called 'public' when waged by the will of the state, and in the latter concept the will of magistrates (e.g. princes) is included. . . . *Those which are waged otherwise . . . are 'private' wars*, although some authorities have preferred to describe such conflicts as 'quarrels' rather than 'wars'. . . . In the present work, the terms 'seizure of prize', 'seizure of booty', are used to refer to the acquisition of enemy property through war [whether public or private].¹⁴⁸

In Grotius' system, the natural rights of states are derived by analogy from the natural rights of private individuals living in a world society, a sort of "state of nature" that existed historically prior to the creation of civil society. The state is an artificial creation that cannot, in Grotius' view, receive any right that did not first belong to the individual. And this, as we will see, includes the right to punish and correct, and even to avenge injuries—that is, to wage just war—under the right circumstances.

Much of *De Iure Praedae* is taken up with Grotius' revision and application of just war theory.¹⁴⁹ As his analysis unfolds, Grotius covers all the bases. First, he examines the facts from the perspective of "private war" and poses the question of whether the VOC, viewed strictly as a private person, would have been justified in waging private war. Then, he looks at the facts and considers the case from the perspective of "public" war, arguing that the VOC ship was engaged in a "public war" on behalf of the sovereign. These two series of arguments, one from the perspective of private war and the other from the perspective of public war are presented by Grotius as arguments in the alternative. In each context, he maps out a series of competing and overlapping claims about the Portuguese injury or offense that could have been sufficient to supply cause

148. 1 Grotius, *supra* note 2, at 30 (emphasis added).

149. About a quarter of the text of *De Iure Praedae* (chapters III–X) is devoted to further theoretical analysis of the many questions underlying just war: Whether war can ever be just; whether just war can be waged against Christians; who can wage it; for what cause(s); whether the nature of the cause(s) is different in the case of public or private war; who can take prize; what (and how much) may be taken as prize; who may be legitimately despoiled; and who gets to keep the spoils. *Id.* at 31–167. These issues are taken up again and given further nuance in chapters XII–XIII, in which Grotius applies his theory of just war to the facts. *Id.* at 216–317. Their contours are again revisited in chapters XIV and XV in the course of a discussion of whether the taking of the *Santa Catarina* was honorable and beneficial in addition to being legitimate. *Id.* at 318–66.

for just war. Each approach, each formulation of the facts, leads him to the same conclusion. Whether he approaches it from the perspective of the Dutch commander Van Heemskerck, the VOC, the United Provinces, the East Asian “allies” or the world community, the conditions of just war doctrine are met and the taking of the *Santa Catarina* is determined to have been a legitimate action taken in the course of “just” war.

I do not propose to review the twists and turns of Grotius’ analysis in detail. Rather, I wish to focus on some consequences arising out of his categorical embrace of just “private” war. The intuition that underlies my analysis is that Grotius’ decision to provide theoretical sanction to just “private” war in the face of the tradition’s disfavor can be traced back to his central preoccupation with commerce (including his awareness that Dutch national identity had come to be conjoined with commerce) and to the sovereign anxiety that he labored under.

One of the most interesting consequences of Grotius’ decision to endorse the possibility of just private war is that it inspired him to defend a doctrine of the freedom of the seas. In *De Iure Praedae* we can observe this doctrine serving two distinct functions: First, it served to support the claim that in blockading the sea the Portuguese were inflicting an injury, an injury that could in turn serve to justify either “private” or “public” just war in defense of the right to trade. Second, it provided the grounds for the exceptional case of necessity that justified van Heemskerck’s prosecution of a private war against the Portuguese. For, while Grotius was willing to entertain the possibility of just private war, he was not ready to make the benefits of just war doctrine available indiscriminately to all private persons seeking to avenge an injury. His solution was to circumscribe the doctrine by limiting its availability to those situations where private individuals were in effect returned to the pre-civil law natural state.

According to Grotius, “[i]n the natural order . . . every individual is charged with the execution of his own rights.”¹⁵⁰ Since “just war consists in the execution of a right,”¹⁵¹ it would seem that individuals in the natural order were privileged to engage in just private war. Nonetheless, Grotius recognized that when individuals had entered into civil society, the state became the arbiter of disputes that concerned them. The fear was that an excess of self-love might corrupt the ability of the individual to be judge and executor in his own cause. Thus, private individuals were required under civil law to submit their causes to civil tribunals. The civil law, created to support and help enforce the natural order had, however,

150. *Id.* at 60.

151. *Id.* at 66.

merely displaced but not extinguished the natural rights of individuals. Thus, in the exceptional case of “necessity,” when judicial means for the attainment of his rights proved defective, the individual was in Grotius’ view still privileged to execute his own rights. “[I]n so far as a defect exists, to that extent recourse to force—or, in other words, private execution in accordance with the natural order—is just.”¹⁵² According to Grotius, two kinds of necessity could be recognized: *temporary necessity*, as in the case where a person is being attacked and must defend his person or his property because his rights are about to be violated—in which case, necessity and therefore the justice of private war cease the moment when recourse to an adjudicator becomes possible; and *continuous necessity*, which may be due to a defect in law or fact.¹⁵³ A continuous “defect in fact” occurs “whenever the person to whom jurisdiction properly pertains, is disregarded by those subject to him.”¹⁵⁴ For our purposes, however, the “defect in law” is the more interesting category. “It is a defect in law,” says Grotius, “when in a given place *there is no one possessing jurisdiction, a state of affairs which may exist in desert lands, on islands, on the ocean* or in any region where the people have no government.”¹⁵⁵ Grotius reiterates:

In such cases . . . the situation becomes very much what it was before states and courts of justice were established. But in those days human beings were governed in their mutual relations solely by the six laws which we laid down first of all. Those six precepts were the source of all law, and also of the principle that each individual was the executor of his own right¹⁵⁶

Thus, we find that in Grotius’ opinion, the ocean is a space outside of civil jurisdiction; a space where a “defect in law” and so “necessity” exists in a permanent form. In such a space, individuals are returned to their original state before civil law and are freed to become judges and executors in their own case, or, in other words, to engage in just private war in response to an injury.

That the ocean is a place empty of jurisdiction (and so permanently available for private war), is a conclusion that Grotius arrives at in the context of reviewing the legitimacy of possible Portuguese claims justifying their “demand . . . that noone save themselves shall approach the

152. *Id.* at 87.

153. *Id.* at 88.

154. *Id.*

155. *Id.* (emphasis added).

156. *Id.*

East Indies for purposes of trade.”¹⁵⁷ Grotius proceeds step by step. He begins by demonstrating that the Portuguese can have no claim to ownership of the regions visited by the Dutch in the East Indies. These lands, argues Grotius, were clearly the property of the East Indian peoples and their sovereigns before the advent of the Portuguese. Grotius then reviews possible Portuguese claims to ownership from actual possession or title to possession (from discovery, papal donation, or just war) and dismisses each in turn. Having satisfactorily demonstrated that the Portuguese had “not acquired any legal right over the East Indian peoples, lands or governments,” Grotius turns his attention to the question of whether they had nonetheless brought “the sea and matters of navigation, or the conduct of trade, under their own jurisdiction.”¹⁵⁸ It is at this point in his analysis that Grotius develops his doctrine of the “freedom of the seas,” a doctrine that is at root a theory of property.

The basic argument runs as follows: In the beginning there was no private ownership but all things were held in common.¹⁵⁹ Through a gradual process, moveable goods that could be consumed (or whose usefulness was reduced by prior use) and those immoveable goods which were not sufficient for indiscriminate use by all persons came to be apportioned through the physical act of attachment. So was born the institution of private property (and the law to govern it). Since the origin of private property lay in the removal of goods from “common property” for exclusive use through an act of physical attachment, “occupation” came to be recognized as the root of title for private property. It was, according to Grotius, in this same period of time that the establishment of states was first undertaken. “Accordingly . . . those things which were wrested from the original domain of common ownership have been divided into . . . public property . . . owned by the people . . . [and] strictly private property . . . belong[ing] to individuals.”¹⁶⁰ The sea cannot, by its nature, be occupied—it cannot be bounded or enclosed. Furthermore, adds Grotius, even if it could be enclosed, there is no reason to seek to apportion the sea, for it can be used by all equally without diminishing its usefulness. Those things which are “capable of serving the convenience of a given person without detriment to the interests of any other person . . .” should remain free to all, for “they proceeded originally from nature and have not yet been placed under the ownership of anyone . . . [and] it is evident

157. *Id.* at 217.

158. *Id.* at 226.

159. By “common ownership,” Grotius does not mean to imply joint ownership or community ownership which is a kind of private property. Rather, he means to denote a form of ownership that existed prior to the creation of private property.

160. 1 GROTIUS, *supra* note 2, at 230.

. . . that nature produced them for our common use.”¹⁶¹ The sea, argues Grotius, “is an element common to all, since it is so vast that no one could possibly take possession of it, and since it is fitted for use by all, ‘with reference to purposes of navigation and to purposes of fishing, as well.’”¹⁶² Thus, he concludes: “[T]he sea is included among those things which are not articles of commerce, that is to say, the things that cannot become part of anyone’s private domain.”¹⁶³ In other words, according to Grotius, the sea had remained in the original state of nature in which all things had been held in common. Nothing that the Portuguese could do would change that. The oceans remained under common ownership and thus could never come under any state’s jurisdiction, save in the limited case of an agreement between states, but such an agreement would, as positive law, be binding only on the contracting states.

As mentioned above, for Grotius one of the implications of finding that the ocean was a space by its very nature free of private ownership and thus not subject to any state jurisdiction, was that it became a space where “private” war could be legitimate. For when they were on the sea, private individuals were by definition in a situation where judicial recourse was lacking in a continuous manner, and so, in a state of permanent “necessity” if they suffered an injury. On the sea, in a sense, private individuals reverted back to the state of nature and, as Grotius had said, “In the natural order . . . every individual is charged with the execution of his own rights.”¹⁶⁴ As private “individuals” engaged in private war, the Dutch merchant vessels could now rely on a double line of reasoning to justify their “just war” taking of the *Santa Catarina*. First, they could make the claim of just defense against an unjust war begun by the Portuguese, for as Grotius had pointed out: “[T]hose same causes which render war just for the aggressor when they themselves are just, transfer this quality to the party defending itself if that justice is wrongfully claimed for them.”¹⁶⁵ Since Grotius had demonstrated that the Portuguese had no lawful basis for a claim to ownership or jurisdiction over the sea, one could take the view that the Portuguese blockade was itself an act of war, and conclude that the Dutch vessel’s defensive action was by the operation of reversal, automatically just. Second, either the Dutch vessel or the VOC could claim that in attacking the Portuguese carrack, they had merely been engaged in the execution of their own rights, for the Portuguese had (at a minimum) interfered with their right to free navigation

161. *Id.* at 231.

162. *Id.*

163. *Id.* at 236.

164. *Id.* at 60.

165. *Id.* at 217.

and with their right to engage in trade, both of which were universal and natural rights. The four recognized just causes of war, which originated in the most fundamental natural law principles, were self-defense, defense of one's property, recovery of debts arising out of contracts, and the punishment of wrongdoing or injury.¹⁶⁶ In attacking the carrack, the Dutch merchants had sought to defend their property, for in Grotius' view, property included the right to trade.

The defence or recovery of possessions, and the exaction of a debt or of penalties due, all constitute just causes of war. *Under the head of 'possessions', even rights should be included. . . . But the concept of 'rights' embraces both that which is due us in our capacity as private individuals, and that which is our due by the law of human fellowship . . . that is to say, the use of whatever is common—e.g. the sea and commercial opportunities—forms a part of the said concept. Therefore, if any person has quasi-possession of such a right, it will be proper for him to defend that claim.*¹⁶⁷

Furthermore, private individuals, at least in a situation where there was “no judicial recourse” (as was the case on the sea) were clearly endowed with the power to punish.¹⁶⁸ The Portuguese attempt to blockade the sea and prevent all other nations from engaging in mutually beneficial commerce was an offense not only against the Dutch merchants but against all of humanity. Thus, in attacking the carrack, the Dutch vessel had acted within its legitimate right to punish the offender on behalf of all of humanity.¹⁶⁹

166. Thus, states Grotius, “*insofar as concerns the persons who wage war . . . that war has a just cause, wherein the said persons defend their lives or their property, or seek to recover the latter, or attempt to exact either payment of that which is due or punishment for wrongdoing.*” *Id.* at 70 (emphasis in original).

167. *Id.* at 262 (emphasis added).

168. According to Grotius:

[J]ust as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement, as we demonstrated in our discussion of the Third Rule. Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.

Id. at 92.

169. What just end can be served by the private avenger? “[T]he private avenger has in view the good of the whole human race, just as he has when he slays a serpent” *Id.* at 93.

IV. PRIZE LAW—WAR AND EXCHANGE: ACQUIRING TITLE TO ENEMY PROPERTY

The coercive seizing of enemy property in the course of war was a ubiquitous practice in the early seventeenth century. As with war itself, however, not all such seizures could be considered legitimate. The line of discrimination was that of “just war.” “[A]ll seizures of prize or booty are just, which result from a just war,”¹⁷⁰ asserts Grotius, but “just war” did not simply provide a cleansing context within which coercive seizure became legitimate; rather the “cause” or “injury” that justified the war also turned seizure of enemy goods into a practical necessity. In Grotius’ terms:

[I]n warfare—whether public or private—everything necessary for the execution of one’s right is permissible. *It is indeed necessary, if we wish to obtain that which is our due, that we should acquire enemy property [rem hostilem]; and the acquisition of such property is nothing more nor less than that very practice which we call ‘acquisition of prize or booty’*¹⁷¹

In Grotius’ rendition of just war doctrine, since an injury is a taking away of something that belongs to us, our seizure of prize is a response through which we are doing nothing other than attaining what is rightfully ours. So intimate is the connection between just war and prize-taking that Grotius can agree with those authorities who hold that “*the essential characteristic of just wars consists above all in the fact that the things captured in such wars become the property of the captors.*”¹⁷²

As might be expected given this line of reasoning, in *De Iure Praedae*, Grotius had little difficulty demonstrating that prize-taking in just war was a legitimate activity.¹⁷³ Grotius’ central concern, however, was not with seizure per se, but with its operation within the ambit of property relations. Grotius acknowledged that war, like commerce, functioned as a means of exchange: goods in war clearly changed hands. Ever attentive to important distinctions, however, Grotius recognized that there was a difference between possession and ownership. While the act of possession might be sufficient to create title in goods that had no prior owner,

170. *Id.* at 58.

171. *Id.* at 132–33 (emphasis added).

172. *Id.* at 43 (emphasis added).

173. In chapter IV of *De Iure Praedae*, titled *Is Seizure of Prize or Booty Just?*, Grotius undertakes a rigorous demonstration to prove that prize-taking in just war is in accordance with the Divine Will and with every type of law, be it natural law, the law of nations or civil law, and in conformity with holy writ, the example of holy men and supported by authoritative opinion. *Id.* at 43–57.

the mere act of taking possession could not suffice to extinguish title in a previous owner. In the case of a voluntary exchange, the prior owner agreed to divest himself of title. When the act of exchange was involuntary however, something more was needed. For Grotius, this something more was “never lacking” in the case of just war, for the law of prize operated to transfer title from the dispossessed enemy to the new owner.¹⁷⁴ Prize law, in other words, served to “quiet title” and to return a good momentarily tainted by coercive dispossession into the stream of legitimate commerce. Indeed, so powerful is the urge to normalize the function of war as an exchange mechanism that Grotius will go so far as to claim that it is consensual, for, “wars carry with them a *tacit agreement of exchange*, so to speak, an agreement to the effect that each belligerent, acquiescing in the turn of the die as the contest proceeds, shall take the other’s property or lose his own”¹⁷⁵ War, in this image, is a game of chance, a game which participants enter willingly in full knowledge that they are engaged in a process of exchange in the course of which they might gain property or lose it.

That Grotius should approach prize law as a subset of property law makes perfect sense once we remember the starting point of *De Iure Praedae*. The specific legal controversy that Grotius sets out to address is whether the taking of the *Santa Catarina* was legitimate. But the anxiety behind this question is not about legitimate or illegitimate violence. Indeed, throughout the text the question of violence recedes into the background. The incident at the heart of the story, the taking of the *Santa Catarina*, is passed over without description. The reader is given no details of the confrontation between the “enemy” vessels. We are told nothing of the excitement of battle, there is no mention of the firing of cannon, no mention of casualties, indeed no mention of the violence necessary to subdue and board a large Portuguese carrack, nor of the violence inherent in the coercive seizure of the personal property of passengers, men, women and children, along with the trade goods carried in the hold of the vessel. Rather, the anxiety that Grotius sets out to assuage is that of the “legitimacy” of the goods themselves. As is clear from the introductory chapter of *De Iure Praedae*, there was some concern among Dutch merchants that the goods seized from the *Santa Catarina* might be tainted.¹⁷⁶ The more serious concern, however, was that the prior owners might still have some claim of title over the goods of which they had been dispossessed and such doubts could reduce the value of the goods in the market

174. *Id.* at 45–49.

175. *Id.* at 48 (emphasis added).

176. *Id.* at 5.

place. Consequently Grotius' task was to overcome such hesitations by demonstrating that, whatever view one took of the incident, whether it was a case of private war or public war, title to the goods had passed. The previous owners had been well and truly dispossessed by the operation of the laws of war and prize, and the goods were now indistinguishable from any other goods in the market.

It is this same concern with "quieting title" that accounts for another notable characteristic of Grotius' approach to prize law: the expansive view he adopts of what and how much can be taken as prize and from whom it can be seized. In theory, Grotius respects the idea of what we today would call the principle of proportionality. In pursuit of just war, a belligerent should seek only to recover his due. Thus, at least in theory, the limiting factor is the nature or quantum of the injury. By definition an injured party is entitled to seize booty or prize from the enemy up to the full amount of the debt owed. As it is applied by Grotius, however, the doctrine could be interpreted as imposing no limit whatsoever. Whether he approached the question from the perspective of just war or from that of public war, Grotius deemed injuries offenses against rights, making it hard to quantify the harm, especially when the right has a universal, as well as a personal dimension. For instance, as we have seen in the case of commander Van Heemskerck and the VOC, Portuguese interference with the Dutch right to engage in commerce could be viewed as an offense not only against Dutch merchants, but against the East Indian peoples or against the whole world. Thus, the size of the Portuguese "debt" was not solely determined by the loss in profits that the Portuguese blockade had caused the VOC, though that was, according to Grotius, already "truly enormous." The Portuguese liability extended to the debt incurred for the illicit seizure of a right pertaining to all of humanity in the natural order. Furthermore, if this argument should prove insufficient, there was, in Grotius' assessment of the facts, no end to the number and variety of Portuguese offenses against the Dutch nation, which could be attributed to individual Portuguese or to the Portuguese nation, making a careful accounting of the "debt" superfluous—nothing could ever suffice.¹⁷⁷

177. Grotius frames his argument in this way:

[L]et us put aside every claim to vengeance Let us turn our attention rather to the following contention [T]he Portuguese have prevented the Dutch from trading freely with whatsoever East Indian nations the latter might choose for their trade, and are therefore under an obligation to make reparation for all of the profits lost to the Dutch by reason of that interference. The losses so caused amount to a truly enormous sum, since the first voyages were rendered practically futile and fruitless in consequence of the snares set by the Portuguese.

As to the matter of the parties from whom prize might legitimately be seized in just war, Grotius' theory proved equally expansive—all enemy property was subject to seizure: “Therefore, we conclude that all [enemy] subjects, at all times, are liable to despoliation, but not necessarily to forfeiture of their lives.”¹⁷⁸ No one is excepted, not innocent subjects, not women and children and not merchants or farmers unless, of course, prior security against despoliation had been given.¹⁷⁹ In *De Iure Praedae* Grotius develops a number of theories to support the view that all subjects are liable for the “debts” of the state. First, he argues that individual citizens are bound by the act of the state and therefore liable for them. “Indeed,” he asserts, “it is in keeping with natural equity, since we derive advantages from civil society, that we should likewise suffer its disadvantages.”¹⁸⁰ Second, drawing an analogy from the law of partnership, Grotius argues that individual subjects should be considered as severally liable for the debts of their state:

The law of nations . . . does not recognize such distinctions [between groups and individuals]; it places public bodies and private companies in the same category. Now, it is generally agreed that private societies are subject to the rule that whatever is owed by the companies themselves may be exacted from their individual partners. . . . [T]he state is constituted by individuals . . . [and so] individuals are liable in the same fashion as the state in so far as concerns reparation for losses, even when the claim in question is founded on wrongdoing. . . . [P]ecuniary penalties owed by the state may be exacted from the subject, since there would be no state if there were no subjects.¹⁸¹

Finally, Grotius challenges the notion that there might be such a creature as a truly innocent enemy subject. In Grotius' view, even if the subjects themselves could be considered as innocent of wrongdoing, their property was always necessarily implicated in the injury, for all enemy wealth served as a means of supporting the war effort:

[Enemy] subjects, even when innocent, are liable to attack in war in so far as they impede the attainment of our rights; now, all subjects, even those who do not themselves serve as soldiers, impede our efforts by means of their resources, when they supply the revenue used in the

Id. at 275. This passage is followed by a careful accounting of the rest of the Portuguese crimes. On the question of “how much” can be taken, see *id.* at 48–49, 133–34.

178. *Id.* at 113.

179. In the narrative account of the events that precede the taking of the *Santa Catarina*, Grotius makes mention of the security that had been granted after 1580 to Portuguese merchants residing in the United Provinces. *Id.* at 173–74.

180. *Id.* at 107.

181. *Id.* at 107–08 (emphasis added).

procurement of those things which imperil our lives and which do not only hinder the recovery of our possessions but also compel us to submit to fresh losses; and therefore, subjects must be deprived of such resources Hence it is permissible to infer, not only that possessions may be forcibly taken from the said subjects, but also that these possessions may be added to our own.¹⁸²

Enemy property has lost its innocence and become a weapon of war. “[A]ll enemy possessions are so many instruments prepared for our destruction; that is to say, through them weapons are provided, armies are maintained, the innocent are stricken down.”¹⁸³ In a sense, Grotius’ argument amounts to the claim that in war, property loses its purely private character as it serves a public end. If the war is unjust then the property is subject to forfeiture automatically to pay the debt incurred by the state. From the just defendant’s perspective, all prize taken from enemy subjects is legitimate since the debtor could never fully discharge his debt. No careful keeping of accounts was therefore required. In conformity with this expansive view of prize, a buyer seeking to purchase prize goods in the marketplace would be free to disregard any scruples concerning the origin of the good. Prize goods that entered the marketplace were simply goods indistinguishable from other goods. But of course all this depended on the underlying assumption that the war in which the prize was taken was “just.”

It is evident that a corollary to the claim that just war rendered prize goods legitimate is that an unjust war would render them illegitimate. Logical though this conclusion might be, it was not satisfying from a practical perspective. That the legitimacy of a good acquired through the seizure of prize should depend on the validity of a just war claim left goods in the marketplace vulnerable to an indeterminacy that could reduce their value. Whose responsibility would it be to determine whether the war was just? Could a buyer rely on a public pronouncement or was he responsible for considering the question for himself? Who after all could verify that a prize was taken with the right intention? Could it turn out after the fact that the claim of justice for the war was misplaced? Would the goods then have to be returned to the previous owner who had been wrongly despoiled? Grotius’ analysis of the law of prize sought to eliminate all such quandaries.

182. *Id.* at 112 (emphasis added).

183. *Id.* at 44. In a similar move, Grotius argues that even if the Kingdom of Portugal was unwillingly joined to Spain in 1580, Spanish offenses (and enmity) could be attributed to Portugal as Portuguese taxes helped defray the Spanish war effort against the United Provinces.

Grotius' solution to the problem involved drawing a clear distinction between the sovereigns and their subjects. From the point of view of the sovereign (or the state), it was a logical impossibility that the war be just on both sides. In the case of belligerent states, only one could be engaged in a just war at any given moment. But, from the point of view of subjects, the case was, according to Grotius, radically different. Subjects were not required to make a determination of the justice of the cause for themselves. Justice in subjects consisted in following the command of the sovereign. The only qualification was in those instances where reason rebelled against the command "after the probabilities have been weighed," in which case the subject was freed from obedience to the sovereign.¹⁸⁴ From the perspective of the subjects then, public war could be just on both sides, and if war was just on both sides, then "spoils are justly taken and retained by subjects on both sides."¹⁸⁵ Subjects who seize spoils from enemy subjects in public war are analogized by Grotius to "good faith possessors," who cannot subsequently be dispossessed of their property. Troubled by the fact that at least insofar as irrevocable acquisition was concerned, his argument flew in the face of the natural law prohibition against the taking of private property, expressed within his theory of justice as the fourth precept,¹⁸⁶ Grotius turned for assistance to the "secondary law of nations" which, as we have seen, in his scheme is mixed in origin.¹⁸⁷ According to Grotius, all nations have agreed that things captured in war become the property of the captors of either belligerent party, regardless of the justice of their cause. The reason, adds Grotius, is pragmatic, for nations recognize that "citizens defend their state more zealously and bear the burdens of war more willingly under the influence of personal interest . . ."¹⁸⁸ Thus, invoking the secondary law of nations, Grotius concludes there is no duty to return spoils even if it turns out the public war was unjust; "For what I have once rightfully acquired cannot possibly cease to be mine, save by my own act."¹⁸⁹

This line of reasoning, relying as it does on the secondary law of nations, could not by definition apply to private war waged on the high

184. *Id.* at 84.

185. *Id.* at 119.

186. "Let no one seize possession of that which has been taken into the possession of another." *Id.* at 13.

187. *Id.* at 121. In the *Prolegomena*, the secondary law of nations is set forth in Principle (Rule) VIII: "Whatever all states have indicated to be their will, that is law in regard to all of them." *Id.* at 26.

188. *Id.* This could serve as a further example of Grotius' approval of the human beings' quest for profit.

189. *Id.* at 122.

seas. On the high seas, as Grotius had earlier pointed out, private individuals found themselves outside the jurisdiction of any state, and were thereby returned to something like the state of nature, which existed prior to the formation of states, and so prior to the secondary law of nations, which was grounded in state agreement. On the high seas, private war was governed only by the law of nature including the prohibition against taking property already in the possession of another. What then of private war belligerents? Could their seizure of prize be subject to subsequent challenge? In the case of private war says Grotius, “war does not in itself suffice to [transfer title] . . . without the additional factor of a truly just cause.”¹⁹⁰ It would thus appear that at least in the case of private war, the question of indeterminacy would re-emerge. Grotius’ response to this final quandary is eminently logical. He begins by returning to the distinction between temporary and continuous necessity. As we have seen, Grotius’ argument is that private war is legitimate only in the case of necessity when no recourse to judicial adjudication is available. In cases of temporary necessity, civil law is only in temporary abeyance, and since civil adjudication quickly becomes available, there is no automatic transfer of title. In the case of continuous necessity, on the other hand, the situation is markedly different. In such cases, individuals, as if removed from civil society, revert back to their natural rights and are entitled to become judge and executor in their own cause. In other words, they are the sole judge of the justice of their cause and their decision is non-reviewable. In such an instance, says Grotius, “one belligerent, acting for himself in the capacity of judge, acquires forthwith the goods seized as a pledge from the other belligerent. Nor will the former incur, at some later date when recourse to a judge becomes possible, any obligation to make restitution.”¹⁹¹ For, according to Grotius, that would be tantamount to reopening a case because of a change of facts after adjudication. Since the oceans are places outside civil jurisdiction, prize seized by private individuals pursuant to a claim of just private war, are permanently lost to their previous owners.

One final concern, raised by Aquinas’ third condition defining just war, was quickly resolved. If just war required not only “just” cause but a “right intention,” what would happen when (as one might suspect was not infrequently the case) the primary motive for a given seizure of prize was the acquisition of enemy goods rather than the execution of one’s rights? Could such a distortion at the level of right intention affect the character of the goods seized? For Grotius the answer was unambiguous.

190. *Id.* at 135.

191. *Id.* at 136.

While “it is a vicious practice to aim at gain through spoils as one’s principal goal . . .”¹⁹² says Grotius, it is nonetheless a matter of conscience not susceptible to proof and must therefore be disregarded. “Furthermore,” adds Grotius, “even in the court of conscience, he who wages war for an unjust purpose is indeed convicted of sin, but he rightfully retains the spoils.”¹⁹³ The buyer of goods seized as prize in the seas of the East Indies could rest secure.

Grotius’ interest in prize law as a mechanism of exchange had one further ramification, which, while not immediately apparent in *De Iure Praedae*, is of central importance in the contemporaneous *Commentarius in Theses XI*. In this short treatise Grotius’ stated purpose is to provide a legal justification for the Dutch rebellion.¹⁹⁴ As we might have expected, the topic naturally brings Grotius back to the subject of just war and the nature of sovereignty. As we saw him doing in *De Iure Praedae*, Grotius here rehearses the idea that sovereignty is not necessarily unified in a single absolute prince, but that to the contrary, “[t]he marks of sovereignty may be divided among several parties”¹⁹⁵ as of course he contends they were in the case of the province of Holland. In the *Commentarius*, Grotius develops the theme of the marks of sovereignty in greater detail. Since each mark of sovereignty is self-contained, all marks of sovereignty are inherently equal. There can be no superior mark of sovereignty that trumps the others, for the definition of a mark requires that no one may rescind it by virtue of a higher right.¹⁹⁶ Moreover, a mark of sovereignty is presented by Grotius as equivalent to a right; defensible within the framework of the just war doctrine. And each mark of sovereignty carries with it a natural right for its execution:

Hence, there exists some natural right to exercise this mark . . . And, since the mark [of sovereignty] is naturally linked to the means that tend towards the end of that mark, there is no natural reason why the right to apply these means should rest with another person than the one who has the mark [of sovereignty], just as each person has the natural right to defend himself.¹⁹⁷

From this proposition Grotius is able to conclude that: “He who holds some mark of sovereignty has the right to wage war in defence of that

192. *Id.* at 128.

193. *Id.* at 129.

194. BORSCHBERG, *supra* note 39, at 169–91. Borschberg dates the writing of the *Commentarius in Theses XI* to 1603–1608 and finds that there is insufficient evidence to show whether it was a precursor or a spin-off of *De Iure Praedae*. *Id.* at 193–99.

195. *Id.* at 225.

196. *Id.*

197. *Id.* at 237 (alterations in original).

mark [of sovereignty], even [if this be conducted] against a party which holds another mark.”¹⁹⁸

In line with this reasoning, the Dutch revolt could be characterized as a just war whereby the Dutch nation merely rose in defense of its mark of sovereignty seeking thereby to execute its right against the Spanish usurper. But the Dutch had not only defended their right, the United Provinces had sought to dispossess Philip II of his concurrent marks of sovereignty, to dispossess Philip and to acquire and retain those marks of sovereignty in themselves. In other words, Grotius still needed to identify a mechanism by which to justify the Dutch appropriation of Philip II’s marks of sovereignty, for the Dutch were not fighting an ongoing war against Spain to retain their ancient privileges, they were seeking to oust their prince. By what right could Philip be divested of his legitimate marks of sovereignty and by what mechanism could these rights be permanently acquired by the United Provinces? Once again, prize law came to the rescue. Grotius’ line of reasoning had placed the conflict waged between entities holding marks of sovereignty within the framework of just war. The Dutch, engaged in a just war to defend their mark of sovereignty against the usurper, were in the same posture as an individual waging private war on the seas or as a state engaged in public war against an enemy nation.¹⁹⁹ The marks of sovereignty, treated conceptually as rights or property belonging to the usurping enemy, are simply seized by the defending party in the execution of their rights. By the operation of prize law, “title” to the goods is then transferred automatically and is no longer subject to divestiture. Basing his argument on prize law, Grotius can then assert: “*Whoever undertakes a just war in defence of a mark of sovereignty which lies within his competence also acquires the other marks.*”²⁰⁰

Despite the dramatic application of prize law that Grotius deploys in the *Commentarius*, his analysis of its function as a mechanism of exchange lacks some of the nuances it acquires in *De Iure Praedae*. For instance, in the *Commentarius*, Grotius appears to claim that the legal

198. *Id.* (alterations in original).

199.

“[T]he state has the power within itself, if wronged by another state, to pass judgment concerning the wrong suffered.” This according to Vitoria, *De Iure Belli*, number 19, the origin of just war. The state, however, does not possess this right by superiority, since the two states are equal; hence, it possesses this right by necessity which holds sway in all cases where neither party is superior.

Id. at 247.

200. *Id.* at 259 (emphasis in original).

“permanent acquisition” of goods in war is purely the result of the secondary law of nations,²⁰¹ whereas in *De Iure Praedae*, Grotius turns to the secondary law of nations only to address the particular problem of goods taken in the course of a war that later turns out to be unjust.²⁰² Be that as it may, the significance of Grotius’ use of prize law to justify Dutch “seizure” of sovereignty in the *Commentarius* is that it highlights its vital function in *De Iure Praedae*. That sovereignty itself might be one of the “goods” exchanged in war gives a different complex to Grotius’ otherwise somewhat puzzling insistence on presenting just war as a mechanism of exchange. That “title” to goods seized from the enemy should transfer in a permanent form was of greater consequence than might have first appeared. On the legitimacy of prize law hung not only the wealth of the United Provinces but her future as a sovereign nation. The legitimacy of “property” rather than the legitimacy of violence had become the concern of the nascent international law of war.

V. CONCLUSION

Conventional views of international law have traditionally approached war and trade as categorically distinct forms of international relations. Consequently, it is assumed that public international law (including the law of war) and international trade law are distinct fields, each with its own separate history and trajectory. Furthermore, while war has come to be considered a great evil, trade is most commonly viewed as a good. Indeed, a broad range of theories from liberal internationalism to neo-conservatism share the belief that the end of war will be achieved in part through the full liberalization of international trade, while international institutions such as the European Union are founded on the conviction that the scourge of war can be put to rest only through an institutionalization of the liberal values of democracy and free markets. In any case, it is generally agreed that the goal of public international law should be to constrain war, while the goal of international trade law should be to enable international commerce.

In this article, I have sought to challenge some conventional assumptions about the distinct trajectories of war and trade in the history of international law by exposing the pervasive function played by commerce in Hugo Grotius’ early legal treatise *De Iure Praedae* (The Law of Prize and Booty). In this important work, written by a major figure at the ori-

201. *Id.* at 261. Grotius refers to the law of permanent acquisition as “a recent innovation in the law of nations.” *Id.*

202. *See supra* text accompanying notes 175–77. This difference suggests that the *Commentarius* was written prior to the chapters of *De Iure Praedae* devoted to prize law.

gin of international law, war and international commerce have become indissolubly entwined. *De Iure Praedae* is an ambitious work in which Grotius maps out an original theory of justice, improvises a new doctrine of the freedom of the sea, and composes a first version of his influential theory of the law of war. Grotius' innovations in each of these areas, my analysis suggests, can be understood as driven by the objective of producing a new international law that recognizes international commerce as a critical concern of the European nations and is receptive and attentive to the private character of commercial activity overseas. The result is a theory of justice in which natural law seems particularly well-attuned to the character of virtuous commercial man, who serves the welfare of mankind as a corollary of pursuing his rightful profit. It is a doctrine of the freedom of the seas that supports a defensible right to engage in commerce (already implicit in the theory of justice) and, by claiming the seas as a space outside of state jurisdiction, provides the grounds for private just war between merchants. And finally, the result is a more expansive and permissive law of war, one which embraces the concept that interference with the right to engage in trade is an injury sufficient to justify just war; introduces the category of private war, a category for all intents and purposes specifically tailored to supply legitimacy to prize-taking by merchant vessels; justifies treating all enemy goods as just prize; and redefines prize law as a mechanism of quieting title of enemy goods seized in war regardless of whether these were seized in the course of just or unjust war.

The context of Grotius' *De Iure Praedae* was the violent encounter of European merchants vying with one another for trading opportunities in the East Indies early in the seventeenth century. It was an encounter which, I argue, was generative of international law because it confronted legal theorists with a new form of conflict, one explicitly concerning commercial competition among members of "civilized" nations rather than the domination of "uncivilized" peoples, and one which manifested itself in the form of a violent confrontation between private merchants pursuing private economic interests in regions far distant from Europe. Nonetheless, the point is not simply to argue that international law's trajectory served the interests of trade from its earliest inception, though this is made abundantly clear in my reading of Grotius' *De Iure Praedae*. Instead, what I have hoped to show through the detailed reading of Grotius' text is that commerce inhabits every inflection of the text and that, in the end, commerce serves the interest of war as much as war serves the interests of commerce. The function of commerce in Grotius' text is not only economic. Commerce is a way of thinking about the human being and God's creation. It is inherent in the design of nature.

Commerce is the activity of private individuals, yet also a corporate practice. It becomes an expression of national identity and is presented as the nation's vocation. The national interest, the nation's well-being and even the nation's liberty are imagined as dependent on the success of commerce as much as they are on war. To defend the right of commerce is not only to defend the interest of private capital, but to defend the nation and to be on the side of nature and God's plan. It becomes reasonable to argue that the sovereign should go to war in defense of commercial interests. Yet, the introduction of commerce as a valid justification for war requires a new way of thinking about the relationship between the sovereign and war, and between the sovereign and commerce, for commerce that must be defended is the domain of private individuals and corporations. Both commerce and war were transformed by the encounter of European merchants in the East Indies in the seventeenth century; commerce became more like war while war became more like commerce. Commerce served as a justification for war and was used as a weapon in war. War became a means of acquiring goods in the pursuit of commerce.

Beyond showing that one cannot easily separate the history of international law from the history of international trade, my reading of Grotius' work offers a caution to those who have become convinced that the end to war can be achieved through trade liberalization. Grotius did not simply hold a positive view of commerce and do his utmost to transform international law to further the interests of commercial actors. The view of commerce that informs the whole work is a version of the "doctrine of the providential function of commerce." According to this "doctrine," international commerce is not merely divinely endorsed, but is actually brought into being by God's will as part of God's beneficent design to bring mankind back to harmony and friendship. In other words, Grotius adopted a view which is consistent with the popular idea that trade brings peace in its wake. Yet, despite his conviction, Grotius produced a series of legal doctrines that gave greater scope to war on behalf of trade. Furthermore, he crafted legal arguments that made it possible to view war itself as a commercial activity. As the seventeenth century unfolded, conflict between European merchants in the East Indies escalated. Prize-taking became a significant economic activity in the region. Eventually, of course, the East Indies also came under the scourge of colonization. Rather than harmony and friendship, commerce proved a vehicle of war and enmity.