

## The Integrative Christian Jurisprudence of John Selden

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John Selden (1584-1654) was a legal historian of the first rank and master of the Society of Antiquaries, the leading English historical society of his day. He was an accomplished natural law philosopher who drew classical, biblical, Jewish, and other sources into an arresting account of the nature of law and its roots in divine and human commands. And he was an ardent defender of constitutional law-making by the King in Parliament, but with legislation always limited by the enumerated rights and liberties of all Englishmen. “Liberty Above All Things” was the motto that graced the title pages of his books – albeit written in Greek, “*peri pantos ten eleutherian*.” John Milton called Selden “the chief of learned men reputed in this Land.”<sup>2</sup> Lord Clarendon regarded him as a scholar of “stupendous Learning in all Kinds, and in all Languages.”<sup>3</sup>

Selden is better known today for the famous Selden Society of legal history than for his own legal writings. Indeed, the Society’s first president, F.W. Maitland, thought Selden’s “cumbrous” writings might disqualify him from such recognition.<sup>4</sup> Selden’s three-volume *Opera Omnia*<sup>5</sup> is an intimidating mass of 44 titles, several of them written in a ponderous and pedantic Latin style, with pages stuffed full of Hebrew, Greek, Arabic, and other foreign passages, and with endless citations, parentheticals, and digressions interrupting his arguments and narratives. Early English translations saved some of his works from obscurity. Selden’s legendary erudition made even his most difficult Latin texts a must-read for later jurists who came upon legal problems that he had addressed. But Selden was in desperate need of a good editor. Happily, his elegant, witty, and sardonic *Table Talk*, oft reprinted, kept his distinguished name alive. But, unlike other great Christian jurists collected in this volume, only a few studies had been devoted to Selden’s legal work, before the very recent publication of a brilliant two-volume study by Gerald Toomer.<sup>6</sup>

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<sup>1</sup> This chapter incorporates several edited paragraphs from Harold J. Berman, “The Origins of Historical Jurisprudence: Coke, Selden, Hale,” *Yale Law Journal* 103 (1994): 1651 and draws on conversations the two authors shared during their 25 years of association. Most of the writing is new but aims to reflect both authors’ views about Selden. Berman died in 2007; Witte is his literary executor.

<sup>2</sup> John Milton, *Areopagitica*, John W. Hales ed. (Oxford: Clarendon Press 1886), 16.

<sup>3</sup> Edward Hyde Clarendon, *The Life of Edward, Earl of Clarendon* (Oxford: Clarendon Press, 1759), 16.

<sup>4</sup> See discussion in Sir John Baker, “John Selden and English Legal History,” in id., *Collected Papers on English Legal History*, 3 vols. (Cambridge University Press, 2013), 2:755, 755-758.

<sup>5</sup> John Selden, *Opera Omnia*, 3 vols., ed. David Wilkins (London: T. Wood, 1726) [hereafter *Opera*].

<sup>6</sup> G.J. Toomer, *John Selden: A Life in Scholarship*, 2 vols. (Oxford: Oxford University Press, 2009).

## Biographical and Bibliographical

Selden was born in 1584 into an Anglican family in Salvington, Sussex, and baptized on December 30, 1584. His father was a part-time musician in the Chichester Cathedral, and young John was educated at the local grammar school attached to the cathedral. In 1600, he enrolled at Oxford, but left before graduation in 1602 to commence legal studies at Clifford Inn. In 1604, he joined the Inner Temple, and in 1612 was called to the bar. He counted among his early friends the distinguished historians William Camden and Sir Robert Bruce Cotton, whose massive law library proved invaluable to Selden. While he kept a modest legal practice, and served with ample profit as steward to the family of Earl Henry Grey, Selden's main passion in this early period was historical writing. In the 1610s, he wrote his first major tracts -- a history of trial by combat,<sup>7</sup> three histories of early England and its common law,<sup>8</sup> annotations on a poetic book on geography<sup>9</sup> and on the works of John Fortescue and Ralph de Hengham,<sup>10</sup> and a history of false gods in the Bible.<sup>11</sup> His major early works were two massive tomes, one on the history of *Titles of Honor* (1614),<sup>12</sup> the second on *The History of Tythes* (1617).<sup>13</sup>

The *History of Tythes* proved controversial because it questioned "whether by God's immediate moral law" a churchman has a "right to tythes in equal degree as a layman" has a right to property -- or whether tithing is part and product only of "human positive law."<sup>14</sup> Surveying the topic from the earliest biblical sources on, Selden concluded that tithe-paying was ultimately voluntary not obligatory, customary not natural, and legislatively-prescribed not divinely-ordained. To the extent, the law of tithes came from the church's own canon law, he deemed it self-serving. To the extent, it came from the state, it could be repealed, for "the practiced common law hath never given way herein to the canons" of the church.<sup>15</sup> This argument was deeply troubling to church officials, for Selden was questioning a longstanding and valuable source of revenue for the church and its clergy, already bereft of a good deal of its property seized during the Tudor Reformation. It was also troubling to state officials, since critics

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<sup>7</sup> *The Duello or Single Combat* (1610), in Opera, III.1:51-84.

<sup>8</sup> *Analecta Anglobritannica* (1608; pub. 1615), in Opera, II.2:861-960; *Janus Anglorum Facies Altera*, in Opera, II.2:961-1032; *England's Epinomis* (1610), in Opera, III.1:4-46; see further Nathaniel Bacon, *Historicall Discourse on the Uniformity of the Government of England ... Collected from Some Manuscript Notes of John Selden* (London: Matthew Walbanke, 1647).

<sup>9</sup> *Illustrations to Poly-Olbion*, in Opera, III.2:1728-1878.

<sup>10</sup> Opera III.2:1881-1928.

<sup>11</sup> *De Diis Syris* (1617), 2d ed. (1629), in Opera, II.1:202-407.

<sup>12</sup> 1<sup>st</sup> edition (1614) excerpts in Opera, III.1:927-1058, 2d edition (1631), III.1:85-926, with a 3d edition separately printed as *Titles of Honor By the Late Famous and Learned Antiquary John Selden* (London: E. Tyler and R. Holt, 1682; fasc. ed., Clark, NJ: The Lawbook Exchange, 2006). See also his *Privilege of the Baronage*, written in 1621, but not published until 1642, in Opera III.2:1472-1586. See Toomer, 1:126-168.

<sup>13</sup> In Opera III.2:1065-1344; see also John Selden, *The Historie of Tithes*, repr. fasc. ed. (New York/Amsterdam: Da Capo Press, 1969). See Toomer, 1:257-310.

<sup>14</sup> Selden, *The Historie of Tythes*, I.6-7.

<sup>15</sup> *Ibid.*, I.9.

wondered if what other traditional divine rights claims he would attack – perhaps even the divine right of the king? Selden’s book was censored, and he was summoned to appear before various lords in the High Commission and Privy Council, and ultimately before King James himself to answer for his book. Protesting that it was simply the historical record that led to these inconvenient truths about tithes, not his own bias or brief, he ultimately issued a public apology for publishing the book, but he retracted none of its contents.

Both his *History of Tythes*, and this early brush with the authorities pulled Selden away from his writing desk into politics.<sup>16</sup> He took part in the escalating clash between King James I and Parliament about the freedom of speech in the making of laws. Traditions going back to the thirteenth century gave members of Parliament license to speak freely, frankly, and forcefully within the confidence of their chambers in order to offer their best counsel to the Crown and to craft the best legislation. Thus when the King suspended Parliament for a time and then tried to shut off debate when Parliament was called, the members rose up in indignant protest. The Commons sought Selden’s help in defending their rights, the Lords in defending their privileges.<sup>17</sup> In 1621, Sir Edward Coke and other House members called upon Selden to dig out the medieval sources that supported their famous Protestation of 1621. Here they declared “that the liberties, franchises, privileges, and jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and ... every member of the house hath, and of right ought to have, freedom of speech to propound, treat, reason, and bring to conclusion.”<sup>18</sup> This document and Coke’s epic speech in the Commons against the King, landed Coke, Selden, and others in the Tower. After Selden was released, Sir Francis Bacon sought his counsel on the privileges of the Lords, and he obliged him, drawing on his *Title of Honors*.

In 1623 and again in 1626, Selden was elected to Parliament. But he achieved greater fame for his role as counsel in the famous *Five Knights’ Case* in 1627. Denied revenue by Parliament, King Charles had resorted to compulsory loans imposed on those who would normally be taxed. Those few who refused to “loan” the money were imprisoned. Representing one of the imprisoned knights, Selden argued that to imprison a person without giving a specific reason violated Chapter 29 of Magna Carta, which Selden rendered as: “No freeman shall be imprisoned without due process of law.” The Magna Carta actually referred to “... by law of the land” (*per legem terrae*), but Selden adduced various medieval authorities that had Chapter 29 as a guarantee of “due process of law.”<sup>19</sup> Selden rebutted the Attorney General’s contention that “law of the land” meant “the law of the state” which now required the loans and ordered the arrest. Selden retorted: “We read of no law of state” in the Magna Carta or in its later

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<sup>16</sup> Paul Christianson, *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610-1635* (Toronto: University of Toronto Press, 1996), 87-196.

<sup>17</sup> Timothy Brook, *Mr. Selden’s Map of China* (New York: Bloomsbury Press, 2013), 33.

<sup>18</sup> In Carl B. Stephenson and Frederick G. Marcham, *Sources of English Constitutional History* (New York: Harper and Bros., 1937), \_\_\_.

<sup>19</sup> On the evolution of Magna Carta’s rights and liberties, see Robin Griffith-Jones and Mark Hill, eds., *Magna Carta, Religion, and the Rule of Law* (Cambridge: Cambridge University Press, 2015).

interpretations. The “law of the land” means “the common law, the principal and general law,” which enjoys “a way of excellency” that is, supremacy. “[T]hough each of the other laws which are admitted into this kingdom by custom or act of parliament may justly be called ‘a law of the land,’ yet none of them can have the preeminence to be styled ‘the law of the land’.”<sup>20</sup> And the “constant and settled common laws of this kingdom” make clear that the king or his delegates simply cannot force a man to make a loan or imprison him without a stated just cause. The law of the day must accord with the traditional common law of the land.<sup>21</sup>

Selden lost the case, but it underscored his evolving understanding of the binding quality of the common law tradition. It also impressed on him the importance of enumerating the rights and liberties of all subjects of the realm -- not just those of the Parliamentarians who represented these subjects, and not just through general clauses like “due process of law.” Selden thus joined Coke and others again in 1628 in crafting the famous Petition of Right, which gathered “the diverse rights and liberties” of Englishmen in and beyond the Magna Carta, and assembled them as a clear check against illegitimate exercises of authority, including those of the king himself. Parliament pressed this document on a very reluctant King Charles in exchange for their consent to new taxes to support his unpopular wars. The Petition called for no taxation without “the good will” and “common consent” of the Parliament; no forced loans from the people; no taking of a man’s life or liberty “but by the lawful judgment of his peers, or by the law of the land”; no taking of a man’s land, no imprisonment, and no disinheritance without “due process of law”; no suspension of the writ of habeas corpus; no forced quartering of soldiers or mariners in private homes; no criminal prosecution or punishment without a clear statute; and no use of martial law save in true emergencies.<sup>22</sup> The Petition of Right would eventually become an important step in enumerating “the rights and liberties of Englishmen” based on natural law and the common law, as well as in developing the doctrine of “judicial review.”<sup>23</sup> But it got nowhere in its day, despite Coke and Selden’s strenuous arguments in support of it. In response, the King suspended Parliament and had Selden, Coke, and seven others consigned to the Tower. This time Selden served for two years, part of the time without his books, which for him was the graver penalty.

Selden’s deep involvement in Parliamentary politics in the 1620s slowed his pen, but he produced two short works on the history of intestacy and testamentary

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<sup>20</sup> Robert C. Johnson et al., eds., *Commons Debates 1628*, 4 vols. (New Haven, CT: Yale University Press, 1977), 2:530.

<sup>21</sup> *The Five Knights' Case*, in Thomas B. Howell, et al., *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, 34 vols. (London: T. Hansard, 1809-1828), 3:17.

<sup>22</sup> In Stephenson and Marcham, *Sources*, 450-453.

<sup>23</sup> See R.H. Helmholz, “Bonham’s Case, Judicial Review, and the Law of Nature,” *Journal of Legal Analysis* 1 (2009): 325-354; John Witte, Jr., “Towards a New Magna Carta for Early Modern England,” in Griffith-Jones and Hill, eds., *Magna Carta*, 109-135.

jurisdiction,<sup>24</sup> an annotated work on early medieval English courts,<sup>25</sup> and another on an ancient art collection.<sup>26</sup> His most important work in this period was his *Mare Clausum* (literally *The Closed Sea*).<sup>27</sup> He had started this work in 1618, but he published an expanded edition at the king's insistence in 1635, probably in exchange for Selden's conditional release from the Tower in 1631 and the final lifting of bail four years later. This ample tome was Selden's answer to Dutch jurist Hugo Grotius's erudite tract on *Mare Liberum* (literally *The Open Sea*). It aimed to prove the King of England's claim to dominion over the seas surrounding England and their resources, not least over the abundant fish that the Dutch were netting within sight of shore but without royal taxation. The book created a clash of great legal minds, with both Grotius and Selden mining deeply the conflicting Greek and Roman law precedents and their interpretations by medieval and early modern jurists. This was Selden's deepest study of ancient Roman law, before his later-life *Notes on Fleta* that traced Roman law influences on the common law.<sup>28</sup> In *Mare Clausum*, Grotius proved himself equal to Grotius in his command of Roman law and civilian jurisprudence. Though he respected Grotius deeply, he thought the weight of ancient authority favored private and public property claims over the land and the surrounding sea, including claims by the king. He showed how scores of ancient peoples, and many scores more of historical Englishmen had claimed dominion over the surrounding seas. He also pressed biblical arguments well beyond Grotius' -- interpreting a score of Old Testament texts about property, which he read with close attention to their interpretation by the Talmudic Rabbis.<sup>29</sup>

This was not Selden's first venture into Jewish law, but in the later 1630s until his death in 1654, this topic became a central preoccupation. Selden saw Jewish law as a sophisticated but neglected legal resource, ultimately on the scale and authority of Roman law and even the English common law. Jewish law had the added advantage of being rooted in divine legislation recorded in the Bible, and promulgated for a people who were the ancient ancestors of modern-day Christians. It could and should be studied with profit in an established Christian commonwealth, Selden thought. He thus published works on Jewish inheritance law and priestly inheritance,<sup>30</sup> a lengthy work on the Jewish calendar,<sup>31</sup> plus three massive tomes: one *On Natural Law and on the Law of Nations According to the Teachings of the Jews* (1640),<sup>32</sup> a second *On the Hebrew*

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<sup>24</sup> Opera, III.2:1663-1685.

<sup>25</sup> Opera, II.2:1588-1685.

<sup>26</sup> Opera, II.2:1439-1586.

<sup>27</sup> Opera, II.2:1179-1414, later translated as *Of the Dominion or Ownership of the Sea*, trans. Marchamont Nedham (London: William Du-Gard, 1652; fasc. ed., New York: Arno, 1972). See Toomer 1:388-437.

<sup>28</sup> Opera II.2:034-1120; reprinted with facing translation as *Ioannis Seldeni Ad Fletam Dissertatio*, trans. and ed. David Ogg, repr. ed. (Holmes Beach, FL: Wm. W. Gaunt and Sons, Inc., 1986).

<sup>29</sup> Opera, II.2:1195-1203, 1250-1258, interpreting Genesis 1:29; 10:19; Numbers 34; Deuteronomy 34:2; Job 38:10-11; Psalms 72:8, 89:25, 95:4-5, 115:16; Proverbs 8:29; Ezekiel 26:16, 27:9, 34, 28:2, Isaiah 23:4; I Esdras 4:2; II Esdras 7:3-4. See further Jonathan Ziskind, "International Law and Ancient Sources: Grotius and Selden," *The Review of Politics* 35 (1973): 537-559; Brook, *Mr. Selden's Map*, 19-44.

<sup>30</sup> Opera II.1:i-xviii, 1-200; I.1:x-xiv.

<sup>31</sup> *De Anno Civili* (1644), Opera I.1:1-63.

<sup>32</sup> *De jure naturali & gentium, iuxta disciplinam Ebraeorum* (1640), Opera I.1:64-757.

*Wife* (1646),<sup>33</sup> and a three-volume work *On The Sanhedrins and the Juridical Offices of the Hebrews* (1650-1655).<sup>34</sup> In all these works he drew on the Pentateuch and Mishnah in Hebrew and the Talmuds in Aramaic, but relied most heavily on the medieval Jewish sage, Moses Maimonides. In his later works, he also drew in Karaite and Kabbalist sources, and cited parallel provisions in Muslim law and various Arabic and Oriental sources.<sup>35</sup> No English jurist to date had worked so hard to incorporate Jewish law into his jurisprudence. With Jews still formally expelled from England – the Jewish Emancipation Act would come only in 1833 -- Selden was probably the most learned Hebraist of the land. Indeed, Jason Rosenblatt recently dubbed this learned Gentile: “Renaissance England’s Chief Rabbi.”<sup>36</sup>

In striking contrast to his appreciative treatment of the Jewish legal tradition, alongside the common law and civil law traditions, Selden was dismissive of the Catholic canon law tradition, especially the medieval canon law. Selden was not anti-Catholic; he was one of the few Parliamentarians to argue for the legal toleration of Catholics, which would be withheld until the Catholic Emancipation Act of 1829.<sup>37</sup> Moreover, Selden appreciated the learning of the medieval scholastics and the medieval canonists’ adaptations and extensions of Roman law, and he recognized the authority of the canons when they were reflected in secular legislation or when they were issued by church councils convened by the Crown. His real concern, typical of early Protestants, was with “papal usurpation” of secular jurisdiction, which he called “an intolerable wrong.”<sup>38</sup> He inveighed against the medieval papacy’s “pretense” of “universal authority” in Western Christendom which he regarded as an affront to the prerogatives and freedoms of Crown, Church, Commonwealth, commoner, and conscience alike.<sup>39</sup> The king can legislate for the church, but the church cannot legislate for the king, the commonwealth, or even itself, he said. “There is no such thing as spiritual jurisdiction.” “A bishop as a bishop, had never any ecclesiastical jurisdiction.” “[A]ll jurisdiction is temporal, and in no church.”<sup>40</sup>

Selden’s insistence that even spiritual or ecclesiastical laws had to be issued or authorized by the King in Parliament also made him dismissive of Presbyterianism. The topic came to dominate discussions during the Interregnum in the 1640s and 50s. Selden had reluctantly accepted election to the Long Parliament, and even more reluctantly agreed to participate as a Parliamentary delegate to the Westminster

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<sup>33</sup> Opera II.1:529-860; translated as *John Selden on Jewish Marriage Law: The Uxor Hebraica*, trans. and comm. Jonathan Ziskind (Leiden: E.J. Brill, 1991).

<sup>34</sup> Opera I.2:758-1892.

<sup>35</sup> See Toomer, 2:595-691.

<sup>36</sup> Jason P. Rosenblatt, *Renaissance England’s Chief Rabbi John Selden* (Oxford: Oxford University Press, 2006).

<sup>37</sup> See sources in Toomer, 2:574-575.

<sup>38</sup> Opera, III.2:1861.

<sup>39</sup> *Ibid.* See further David Sandler Berkowitz, *John Selden’s Formative Years: Politics and Society in Early Seventeenth-Century England* (Washington, DC: Folger Books, 1988), 73.

<sup>40</sup> John Selden, *Table Talk 1689*, ed. Edward Arber (London: Alex Murray and Son, 1868; repr. ed. Philadelphia: Albert Saifer, 1972) [hereafter TT], “Bishops Before Parliament” and “Bishops in the Parliament.”

Assembly of Divines that met intermittently from 1643-1652 to debate reforms in liturgy, discipline, and church government. Selden argued strenuously but fruitlessly against the effort to abolish the royally-appointed Anglican episcopacy in favor of a democratically-elected Presbyterian system of church government. Part of his concern was that it was bishops, not presbyters, who were prescribed for the New Testament church and had served continuously in the history of the church until then. The Westminster Assemblymen's attempts to justify this new form of Presbyterian government using the Bible and the "*jus divinum*," Selden argued, was "a satire" akin to a penniless drunk "fumbling in his pockets" to pay his bar tab. Moreover, without royal appointment or even Parliamentary approval or supervision, "Presbyters have the greatest power of any clergy in the world, and gull the laity most" for once appointed "they govern as they please."<sup>41</sup>

Selden was called "an Erastian" in church-state relations. He was, at least in so far as he wanted the state to control the polity, property, and personnel of the church, and he opposed the appointment of bishops in the House of Lords. "Clerics let loose to govern by laws are a menace to public order," he wrote. They serve the public better if "they tend to their appointed offices of word and sacrament." And again in answering the question "whether is the church or the Scripture judge of religion?" he answered: "In truth, neither, but the state."<sup>42</sup>

Unlike other great seventeenth-century Christian legal and political thinkers, from Hugo Grotius to John Locke, Selden left no commentaries or sermons on the Bible nor formal tracts on Christian theology. He did pepper his writings with all manner of Biblical citations and discussions, particularly from the Hebrew Bible and Apocrypha. He also quoted freely from the major patristic and scholastic sources, and sundry Catholics and Protestants of his day. But he was largely content to work at the edges of theology – "treading unexplored soil and drinking from new springs," as he put it, most notably Jewish law.<sup>43</sup> His longest theological work was a rather sterile history of all the false gods mentioned in the Old Testament, which got no better in a second edition.<sup>44</sup> On the order of King James I, in 1618, he offered a short speculation on how the Bible came to use "666" as the mark of the Beast<sup>45</sup> and a short squib praising Genevan reformer John Calvin both for his theology and legal humanism.<sup>46</sup> And he offered the King a long tedious essay on how the December 25 came to be treated as *The Birth-Day of our Savior*.<sup>47</sup> Though Selden regularly used the Bible and historical theological

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<sup>41</sup> Ibid., "Presbytery"; see also Toomer, 2:569-575.

<sup>42</sup> TT, "Religion." See also Sir Eric Fletcher, *John Selden 1584-1654* (London: Bernard Quaritch, 1969), 12-15; Reid Barbour, *John Selden: Measures of the Holy Commonwealth in Seventeenth-Century England* (Toronto: University of Toronto Press, 2003), 3-22, 243-294.

<sup>43</sup> Title page of *De Iure Naturali*.

<sup>44</sup> *De Diis Syris* supra.

<sup>45</sup> Opera, III.2:1403-1404.

<sup>46</sup> Opera, III.2:1403-1404.

<sup>47</sup> Opera, III.2:1405-1450.

texts as sources for his legal and historical studies, formal theology and conventional biblical commentary were not for him.

Selden was a man of simple and steady Christian piety, even though he was contemptuous of pretentious churchmen and impatient with theological disputes. “Religion is like the fashion,” he wrote; “one man wears his doublet slash’d, another lac’d, another plain; but every man has a doublet. So every man his religion. We differ about the trimming. Men say they are of the same religion for quietness sake; but if the matter were well examin’d, you would scarce find three any where of the same religion in all points.”<sup>48</sup> And about the vaunted doctrine of the Trinity he wrote sarcastically: “The second person is made of a piece of bread by the Papist, the third person is made of his own frenzy, malice, ignorance, and folly by the Roundhead. One the baker makes, the other the cobbler; and betwixt those two, I think the First Person is sufficiently abused.”<sup>49</sup> His *Table Talk* is filled with such jibes against theological niceties and fruitless dogmas as he saw them.

Nonetheless, Matthew Hale called Selden “a resolved serious Christian,” who counted Archbishops Laud and Ussher, and John Donne among his friends. He was by all accounts faithful and upright, disciplined and punctual, pious and earnest, generous to friends, often reserved in private, but eloquent and forceful when given the floor.<sup>50</sup> He was a life-long bachelor, though he evidently did wander sexually, and spent so much time with the widow of his client Earl Henry Grey that tongues began to wag about a private marriage.<sup>51</sup> But Selden said rather little about his interior domestic, moral, or spiritual life. He was a life-long Anglican, finding this a comfortable via media between Catholicism “whose many ordinances and opinions appeared contrary to divine authority,” and various Protestants who “rashly explained the holy Scriptures by the sole efforts of their own understanding [and] are occasionally found to disturb the peace of Christendom by ridiculous and impious innovations.”<sup>52</sup> Selden liked the settled doctrine, liturgy, and traditions of the Church of England and the settled Anglican episcopacy and polity under royal control. On his deathbed, Selden confessed to Archbishop Ussher “that he had his Study full of Books and Papers of most subjects in the world; yet at that time he could not recollect any passage out of the infinite Books and Manuscripts he was the Master of, wherein he could Rest his Soul, save out of the Holy Scripture, wherein the most remarkable passage that lay most upon his spirit was Titus 2:11-14: ‘For the grace of God has appeared that offers salvation to all people. It teaches us to say ‘No’ to ungodliness and worldly passions, and to live self-controlled, upright and

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<sup>48</sup> TT, “Religion.”

<sup>49</sup> TT, “Trinity.”

<sup>50</sup> Richard Baxter, *Additional Notes on the Life and Death of Sir Matthew Hale* (London: Richard Janeway, 1682), 40.

<sup>51</sup> Selden would likely have kept this quiet. As he wrote in his *Table Talk*: “Of all actions of a man’s life, his marriage does least concern other people, yet of all actions of our life, ‘tis most meddled with by other people. Marriage is nothing but a civil contract, ‘tis true ‘tis an ordinance of God: so is every other contract, God commands me to keep it when I have made it.” TT, “Marriage”.

<sup>52</sup> Quoted by John Aikin, *The Lives of John Selden, Esq. and Archbishop Usher* (London: Mathews and Leigh, 1812), 166; see further on his religion, *ibid.*, 161-170; Barbour, *John Selden*, 54-58.

godly lives in this present age, while we wait for the blessed hope—the appearing of the glory of our great God and Savior, Jesus Christ, who gave himself for us to redeem us from all wickedness and to purify for himself a people that are his very own, eager to do what is good.”<sup>53</sup>

### Selden’s Integrative Historical Jurisprudence

Sir John Baker once wrote that “the guiding logic of the lawyer is different from that of the historian. What the lawyer wants is authority, and the newer the better; what the historian wants is evidence, and the older the better.... Selden was both a lawyer and a historian. But he differed from most of his contemporaries in not confusing the two logics.”<sup>54</sup> What held these two logics together in Selden’s mind was his deep appreciation for both “nomos and narrative,”<sup>55</sup> both canon and interpretation, both the texts of antiquity and the traditions of interpretation and application they inspired. His method of legal history, in effect, combined the *sola Scriptura* method of Protestant theology with the legal humanism of Continental jurists. First one must go “back to the sources” and only after discerning the original text and its original meaning, can one responsibly assess the layers of interpretation that time and tradition have attached to that text or one’s imagination or inspiration might impute to it, especially as a judge or an advocate.<sup>56</sup>

Selden the legal historian thus insisted on a return to authentic legal sources, ideally unprinted manuscripts in their original languages and forms -- the older the better. “My thirst compelled me always to seek the fountains, and by that, if means grant it, judge the river’s nature.”<sup>57</sup> Particularly for ancient texts, authentication was critical, Selden insisted, and it was the historian’s task to put the sources to “a kind of trial.”<sup>58</sup> Find “the authorities of best choice,” he wrote, by comparing various ancient manuscripts, sifting through them for transcription and printing errors, and various “confusions of time and action.” Sniff out forgeries, and self-serving interpolations. Look for later sources to corroborate earlier texts. Learn ancient languages so you can read the texts in and on their own terms. Parse etymology, so you can be sensitive to shifting meanings in terms. Be careful not to impose contemporary meanings on identical earlier terms. Understand the context of the text, too, and study the politics, religion, science, poetry, art, coinage, architecture of the day to help illuminate its

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<sup>53</sup> TT, Preface, p. 8.

<sup>54</sup> Baker, *Collected Papers*, 2:761, 763, citing F.W. Maitland, *Why the History of English Law is Not Written* (Cambridge: Cambridge University Press, 1888).

<sup>55</sup> Robert M. Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed., Martha Minow et al. (Ann Arbor, MI: University of Michigan Press, 1992), 95-172.

<sup>56</sup> TT, “Bible/Scripture”; see also Berkowitz, *Selden’s Formative Years*, 42, 72-73.

<sup>57</sup> Opera III.2:1751, 1786.

<sup>58</sup> Opera III.2:1359.

original meaning. Only through this empirical scientific method can the legal historian gradually come to an “historical deduction of our ancient laws.”<sup>59</sup>

Here was one reason for Selden’s “cumbrous” habit of piling on all manner of ancient authorities and citations in support of his every proposition, and for looking at these old texts through all kinds of different lenses and sources. Selden wanted, so much as possible, to tell the historical truth.<sup>60</sup> The legal historian’s task, he wrote, is “to know and to tell those things which are true.”<sup>61</sup> It is “to relate, not to discuss opinions [or] to give a verdict of what he relates.”<sup>62</sup>

But that was only the first step. Selden also warned against idle antiquarianism: “the too studious affectation of bare and sterile antiquity, which is nothing else but to be exceeding[ly] busy about nothing.”<sup>63</sup> The real job of the legal historian, he insisted, is to harvest “the fruitful and precious” and “useful part” of this history “which gives necessary light to the present, in matter of state, law, history, and understanding of good authors.” “Light to the practice and doubts of the present.” “Light, that is clear and necessary.”<sup>64</sup> Indeed, for both the historian and the lawyer, “there is nothing [that] more conduces to right judgment than the careful examination of the constitutions and customs, their received interpretations, and their force, in the state and age of which any civil disquisition is raised. For they are the very compass to direct all judicial proceedings; and of singular use also in whatsoever is deliberative.”<sup>65</sup>

The “fruitful and precious and useful part of history,” includes earlier laws and legal writings that have now been replaced, Selden insisted.

For though, on account of their antiquity and many subsequent legal changes, these writings have not an inherent authority such as would suffice by itself in judicial decisions or opinions of counsel, they yet contain many things either still valid or not completely abrogated, especially in questions of tenure, felony, inheritance, contract, conveyancing, and other everyday matters. They may contain many things which reveal ancient laws and customs prior to these changes. Clearly therefore, in both abstract and recent cases, they provide not only a literary embellishment, but a confirmation on which the interpretation of the law may

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<sup>59</sup> Opera, III.2:1729-1731; see also Harold D. Hazeltine, “Selden as Legal Historian: A Comment in Criticism and Appreciation,” *Harvard Law Review* 24 (1910): 105, 114-118; Berkowitz, *Selden’s Formative Years*, 44-46.

<sup>60</sup> See Christianson, *Discourse*, 197-211.

<sup>61</sup> From *Uxor Hebraica*, using translation in Hazeltine, “Selden,” 111.

<sup>62</sup> Opera, III.2:1362. See further Opera III.1:572; Opera III.2:1372, 1455; John Selden, *The English Janus*, in R. Wescot, ed., *Tracts Written by John Selden* (London, 1683; repr. ed., 2006), a2.

<sup>63</sup> Opera III.1:105; see also TT, “Learning.”

<sup>64</sup> Opera, III.1:105-106.

<sup>65</sup> Selden, *Titles of Honor*, b3v-b4r.

depend.... Even an abrogated law, not to mention an altered or revived one, provides the new law with its fullest authority and best interpretation if the reason for the abrogation, change, or renewal be carefully considered. Without such preliminary survey, the lawyer cannot form an accurate judgment.<sup>66</sup>

Every law has a spirit, end, or purpose for which it was enacted or has come into being, Selden argued, and understanding earlier laws helps to discern and apply that law new law. To illustrate this point, Selden showed how the earlier *Theodosian Code* aided the interpretation of Justinian's *Corpus Iuris Civilis*, how reading Burchard and Ivo and other early canonists helped in understanding the *Decretum* and *Decretales*, and how ancient Roman law helped illuminate the shape and substance of the Continental *ius commune* as well as the English common law.<sup>67</sup> These earlier laws were all part of a tradition, of an ongoing and developing legal system, Selden argued. The legal historian's task is to discover and narrate this development -- however circuitous and digressive it might need to be -- from the earliest sources to the present day.

Selden had a strong sense of legal tradition, and he stressed the development, growth, adaptation and perpetual reformation of each legal tradition. He focused especially on the English common law tradition, with its basic constitutional institutions and principles, such as government by assemblies of notables and judicial responsibility to law, as well as its basic private law doctrines of marriage, tort, contract, and property. Much like churches and their doctrines, he said, states and their laws gradually change over time -- usually doctrine by doctrine, case by case, statute by statute, but sometimes also by momentous new legal documents like the Magna Carta or momentous political events like the Roman invasion, the Norman Conquest, or the Tudor Reformation of England.<sup>68</sup> These produced decisive breaks in the evolution of English law, "watersheds in the river" of the common law tradition, as Selden called them. He recognized, for example, that the Norman Conquest introduced new feudal laws and the establishment of separate church courts into England, and that the twelfth-century revival of Roman law and Greek philosophy had a profound effect on all learning. Indeed in this period, "physics, moral philosophy, logic, medicine, and mathematics began almost simultaneously to shine out like stars that had long been obscured, and so likewise canon law and theology."<sup>69</sup>

Selden saw in this living history of a legal tradition—especially that of England—a long-range process of gradual improvement, even gesturing toward the "providential view of history" that had become fashionable among some English churchmen of his

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<sup>66</sup> Selden, *Ad Fletam Dissertatio*, 5-9.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Opera* III.2:1751.

<sup>69</sup> Selden, *Ad Fletam Dissertatio*, \_\_\_.

day.<sup>70</sup> Moreover, he attached to the historical development of English law a normative significance. For example, he traced a development of the Germanic *wapentakes* described by Tacitus into the *witans* of the Anglo-Saxons, which in the thirteenth century became the parliaments of England. And he found in that development principles applicable to parliamentary government in his own time. He treated the ancient Briton, Saxon, and Norman periods of English history as three distinct phases of a single historical development, whose common elements were successively refined. Although most of the ancient laws were superseded, their fundamental structure not only survived but underwent improvement.<sup>71</sup>

Selden's historical jurisprudence was more than a philosophy of English law alone, however. All sophisticated legal systems, he wrote, are to be understood as historical and developmental in character. In a remarkable passage, he set forth his historical theory of law in the following terms:

[A]ll laws in general are originally equally ancient. All were grounded upon nature . . . and nature being the same in all [nations], the beginning of all laws must be the same . . . . [T]his beginning of laws . . . remained always [what] they were at first, saving that additions and interpretations in succeeding ages increased, and somewhat altered them, by making a *determinatio juris naturalis* [a specification of natural law], which is nothing but the civil law of any nation. For although the law of nature be truly said [to be] immutable, yet it is as true that it is limitable, and limited law of nature is the law now used in every state. All the same may be affirmed of our *British* laws, or *English*, or other whatsoever. But the diverse opinions of interpreters proceeding from the weakness of man's reason, and the several conveniences of diverse states, have made those limitations, which the law of nature hath suffered, very different. And hence is it that those customs which have come all out of one fountain, *nature*, thus vary from and cross one another in several commonwealths. . . . Diverse nations, as diverse men, have their diverse collections and inferences; and so make their diverse laws to grow to what they are, out of one and the same root. Infinite laws we have now that were not thought on a thousand years since. Then were many [laws] that a thousand years before had no being, and less time forward always produced diverse new [laws]; the beginning of all here being in the first peopling of the land, when men by nature being civil creatures grew to

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<sup>70</sup> See sources in Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Grand Rapids, MI: Wm. B. Eerdmans, 1993), 105-109.

<sup>71</sup> Paul Christianson, "John Selden and the Ancient Constitution, ca.1610-18," *Proceedings of the American Philosophical Society* 128 (1984): 271, 276. See further Ziskind, "John Selden," 30-33.

plant a common society. This rationally considered, might end that obvious question of those which would say something against the laws of *England* if they could. 'Tis their trivial demand. *When and how began your common laws?* Questionless it is fittest answered by affirming, when and in like kind as the laws of all other States, that is, *When there was first a state in that land which the common law now governs*: Then were natural laws limited for the convenience of civil society here, and those limitations have been from thence, increased, altered, interpreted, and brought to what now they are; although . . . now, in regard of their first being, they are not otherwise than the ship that by often mending had no piece of the first materials, or as the house that's so often repaired *ut nihil ex pristina materia supersit* [that nothing remains of the original material], which yet, by the civil law, is to be accounted the same still. . . . Little then follows in point of honor or excellency specially to be attributed to the laws of a nation in general, by an argument thus drawn from difference of antiquity, which in substance is alike in all. Neither are laws thus to be compared. Those which best fit the state wherein they are, clearly deserve the name of the best laws.<sup>72</sup>

Here Selden laid the foundation of an integrative historical jurisprudence that also drew in natural law theory and legal positivism. He postulated as an immutable law of nature that men are civil creatures, who, when they first people a land, “plant a common society.” In succeeding ages, however, they add to, interpret, and “limit” by statute the natural law according to “the several conveniences,” that is, the particular wants and needs, “of diverse States.” The relative quality of the positive law of a people, therefore, including the common law of England, must be judged not by its superior antiquity, since all systems of law are equally ancient, but by the extent to which it “best fits” the wants and needs of the particular people. At the same time, the diverse customs of diverse peoples, which are the source of their respective systems of civil law, though rooted in a common human nature, are subject to a continuous organic process of change, by which natural law is specified and altered. Thus the relative quality of the law of a people must be judged also by the extent to which it remains faithful to its past.

Selden used the famous analogy of a ship that leaves the harbor on a trip around the world, and returns many years later with none of its original parts or original crew. It is still the same ship -- so long as all the new parts work and so long as the ship still serves its ultimate end, viz. sailing safely. So, too, Selden believed, a nation's or people's legal tradition that has adapted and changed over centuries of legal development so that it has none of its original laws are in force, is still the same legal tradition – so long as the new laws have been properly promulgated and implemented

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<sup>72</sup> Opera, III.1:1891-92.

and so long as they, like the laws that they replaced, serve the ultimate legal ends of justice, order, and peace.

### **Selden's Integration of Natural Law Theory and Legal Positivism**

As this last lengthy quotation reveals, Selden traced the ultimate source of all human or "civil law" back to a "natural law." In his earlier writings, Selden left the "natural law" rather vaguely defined, often running together the terms "divine, morall, or natural Law"<sup>73</sup> the "law of God,"<sup>74</sup> "the holy law," the "universal law," the "primitive law," and what St. Paul had called "the law written on hearts of all men."<sup>75</sup> But in his 1640 title, *On Natural Law*, and in his later writings on Jewish law, Selden set out his theory of law more systematically, and in way that effectively integrated the teachings of natural law and legal positivism.

In a nutshell, Selden argued that the ultimate source of all law lies in God's commandments which God has "posited" or set down for the entire human race. In turn, the legitimate authorities of each nation and people, acting as God's vice-regents, posit civil laws for their subjects. These civil laws adopt the ultimate principles of natural law, adapt them to the needs and circumstances of their time, and adjust them in a process of perpetual reformation and replenishment that are the hallmarks of every legal tradition. Over time, each of these human civil or positive law traditions becomes and expresses its own "limited form of natural law."

Selden described this "command theory" of natural law in various ways. In his *Table Talk*, he wrote:

I cannot fancy to myself what the law of nature means, but the law of God. How should I know, I ought not to steal, I ought not to commit adultery, unless someone has told me so? Surely, 'tis because I have been told so. 'Tis not because I think I ought not to do them, nor because you think I ought not; if so, our minds might change; whence then comes the restraint? From a higher power; nothing else can bind: I cannot bind myself, for I may untie myself again; nor an equal cannot bind me, for we may untie one another: It must be a superior power, even God almighty.<sup>76</sup>

In *On Natural Law*, he wrote that "the Author and Most Holy Name, who created nature at the time the human race was created, established the notion that the human race must be instructed, administered, and ordered."<sup>77</sup> And in *The Hebrew Wife*, he wrote:

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<sup>73</sup> Selden, *The Historie of Tithes*, VII.6.

<sup>74</sup> Selden, *Mare Clausum*, I.6.

<sup>75</sup> *Ibid.*, I.7.

<sup>76</sup> TT, "Law of Nature."

<sup>77</sup> Using translation in Jonathan R. Ziskind, "Introduction" to Selden, *Uxor Hebraica*, 11.

“What we call natural law is simply what the Author of nature himself by his most sacred will ordained and impressed at creation upon the human heart and has been a law that has been regularly and continuously observed as immutable by all posterity.”<sup>78</sup> Selden believed that ancient Greeks and Romans, Jews and Christians “Pagans, Mahometans, and others of that sort, as well modern as ancient” were all subject to this divinely-commanded natural law, and that rationally attuned and “morally better” people could ultimately discern its contents.<sup>79</sup> But he resisted the typical view of his day that the common law of nations (the *ius gentium*) was tantamount to the natural law (*ius naturale*) itself – given the variant applications of reason to a wide range of legal circumstances.<sup>80</sup>

All other laws, Selden called “civil laws,” “human laws,” or “positive laws.” He included in this category the Mosaic laws of the Bible and the later royal legislation and rabbinic interpretations of the Jews and their applications by the Sanhedrin; he called all these “the civil law of the ancient Hebrews.”<sup>81</sup> “God at the first gave laws to all mankind, but afterwards he gave peculiar laws to the Jews, which they were only to observe,” he wrote. “Just as we have the common law of England,” which only we observe, so they had their Jewish law, which only they observed.<sup>82</sup>

Compared to all other positive legal systems, however, the Jewish legal tradition was unique in that the 613 civil laws of the Torah were directly commanded by God for his chosen people. Moreover, the record of the promulgation of these civil laws was set out in the same opening books of the Bible that also recorded God’s commandments of the natural law to all humanity. That makes these biblical laws and the biblical narratives surrounding their promulgation eminently “useful for ascertaining the content and meaning of the natural law.”<sup>83</sup> But, Selden hastened to say, this does not mean that these Mosaic or rabbinical laws bind modern-day Christians, as some theologians and bishops insist when they “run to the [biblical] text for something done amongst the Jews that nothing concerns England.”<sup>84</sup> “Laws belonging to the land of Israel ... are those which are received by the Jews, touch the observance of the sabbatical year, oblations of fruits, the Levitical custom of tithing and others of that kind. For by the law of God, they will not yield those things should be observed out of the Israelitish dominions.”<sup>85</sup> Selden largely eschewed the conventional Christian division of Mosaic laws into “ceremonial laws” that were binding only on Jews, “juridical laws” that were useful prototypes for all peoples, and “moral laws” that were universally binding. In his view, all Jewish law set out in the Mosaic law was just that – Jewish law, not Christian law and not English law.

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<sup>78</sup> Selden, *Uxor Hebraica*, 1-2.

<sup>79</sup> Selden, *Mare Clausum*, 1.7.

<sup>80</sup> Selden, *De Jure Naturali*, 1.7.

<sup>81</sup> On title page of Selden, *Uxor Hebraica*.

<sup>82</sup> TT, “Jews.”

<sup>83</sup> Ziskind, “Introduction,” 13.

<sup>84</sup> TT, “Bishops in the Parliament.”

<sup>85</sup> Selden, *Mare Clausum*, 1.6.

There was a fine line, however, between the “natural law” that God commanded for all people, and the “civil law” that God commanded only for his chosen people of Israel. Selden drew that line between the natural laws that God gave to Adam, Noah, and their descendants, and the civil laws that God gave to Moses at Sinai, which later Jewish judges, kings, priests, and rabbis expanded and expounded. Following Maimonides, Selden called this pre-Mosaic natural law, the “Noahide law,” which he distilled into the same seven major natural law principles that Maimonides had used to structure his *Mishneh Torah*. The first six principles, Selden said, “were enjoined upon Adam, the first parent, and were perennial obligations” of the whole human race that God’s covenant with Noah after the Flood later confirmed.<sup>86</sup> These principles were: (1) not to commit idolatry; (2) not to blaspheme God’s name; (3) to establish courts of justice; (4) not to kill unjustly; (5) not to have illicit sex; and (6) not to steal. All these can be seen in the Book of Genesis that describes the interactions between God and various ancient patriarchs, said Selden, and these biblical stories had parallels in other ancient literature about the origins of law and humanity. To this Selden added (7) not to eat flesh from a living animal, which was a prohibition that came from God’s covenant with Noah that was explicitly extended to “every living creature.”<sup>87</sup> This last prohibition, too, he said, had echoes in other ancient literature. These were the seven universal natural laws that governed all human beings, said Selden; they stood as the font of all human laws that flowed from them.<sup>88</sup>

In Selden’s view, these universal natural laws were “given to the human race at its very creation, and every rational soul was then naturally endowed with a faculty by which those things that had been ordained, and which were always to be observed, were revealed and made manifest, like principles or theorems in demonstrative matters, to every man whose mind was not depraved, who was not corrupted, and who intuited rightly and diligently enough.”<sup>89</sup> For Selden, these natural laws were “self-evident” to anyone with the capacity to see and understand them. “Just as when the light is clear and is shining in the opposite direction, objects which are suitably placed are perceptible by an eye which is not diseased or badly positioned ... so illuminated by the aid of the *intellectus agens*, a human mind or intellect which is not depraved and which intuits diligently is informed of these commands which are to be observed by decree of the father of nature, and indeed of other objects of the intellect (that is to say, of truth and falsehood, as well as good and evil).”<sup>90</sup> For Selden this “*intellectus agens*” was either God himself, whose image each person bears, or an “ultimate intelligence” that serves as the “agent” (*agens*) of God – perhaps an angel or the Holy Spirit. Medieval and early modern philosophers debated fiercely whether this faculty *intellectus agens* was part of the human soul, human reason, or another human faculty. Selden thought this ultimately a sterile debate. His main point was this: what gave natural law binding

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<sup>86</sup> Selden, *De Jure Naturali*, 1.8, using translation in J.P. Sommerville, “John Selden, The Law of Nature, and the Origins of Government,” *Historical Journal* 27 (1984): 437-447, at 439.

<sup>87</sup> Genesis 9:4, 10.

<sup>88</sup> Selden, *De Jure Naturali*, 1.5-9; see Toomer, 2:493-505

<sup>89</sup> Selden, *De Jure Naturali*, 1.9.

<sup>90</sup> *Ibid.* with discussion in Sommerville, “John Selden,” 440-441.

authority for humans was that it was commanded by God, it was posited for the governance of all persons and peoples.<sup>91</sup>

For Selden, natural law could not be reduced to the dictates of right reason, the promptings of conscience, the vagaries of equity, or the inclinations of common sense alone.<sup>92</sup> Nor could it be equated with the natural patterns and practices of animals, or even the common practices of human civilizations. And it certainly could not be imagined if one accepted Grotius' "impious hypothesis" that the law of nature would exist "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him."<sup>93</sup> For Selden, natural law was impossible without God the law-giver. It was God's commands that brought natural law into being. And just and proper human lawmaking, in turn, was impossible without these prior natural law commands.<sup>94</sup> The just human legislator's commands were ultimately echoes of the divine commands that brought human laws into being. As St. Paul had written: "For there is no power but of God. The powers that be are ordained by God." The Psalmist put it even more strikingly: "God standeth in the congregation of the mighty; he judgeth among the gods." And he says to kings, though they are mortal: "Ye are gods" on the earth, who command and rule on God's in imitation and implementation of God's commands.<sup>95</sup>

Selden's theory of natural law was neither typical of other Christian theories of his day, nor prototypical of the theories of later Enlightenment liberalism. In particular, Selden departed from most Protestants of his day who saw the Ten Commandments as the most important source and summary of natural law and of the natural rights and duties that attached thereto. The First Table of the Decalogue, many Protestants argued, governed the relations between God and humanity – setting out duties not to worship false gods or idols or to take God's name in vain and to observe the Sabbath Day and keep it holy. The Second Table of the Decalogue governed the relations among people – requiring them to honor their parents, not to kill, not to commit adultery, not to steal, not to bear false witness, and not to covet. Some Protestants, like Christopher Goodman and Theodore Beza, had further translated these Two Tables of religious and civil duties toward God and neighbor into reciprocal religious and civil rights. Others, like Johann Oldendorp and Johannes Althusius, had used the Ten Commandments as a framework for creating new systematic accounts of secular law in place of the seven sacraments used to systematize the canon law.<sup>96</sup>

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<sup>91</sup> Ibid.; Toomer, 2:502-504; Johann P. Sommerville, "Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory," in Victoria Kahn and Lorna Hutson, eds., *Rhetoric and Law in Early Modern Europe* (New Haven, CT: Yale University Press, 2001), 318-44.

<sup>92</sup> Selden, *De Jure Naturali*, 1.3-4; TT, "Equity" and "Conscience."

<sup>93</sup> See Hugo Grotius, *De Iure Belli ac Pacis Libri Tres*, trans. F.W. Kelsey (Oxford: Clarendon Press, 1925), Prol. 11.

<sup>94</sup> Selden, *De Jure Naturali*, 1.5-8; see also Toomer 497-501; Sommerville, "John Selden," 447

<sup>95</sup> Selden, *De Jure Naturali*, 1.8; see also Barbour, *John Selden*, 217-236.

<sup>96</sup> See John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 121-168; id., *The Reformation of Rights: Law, Religion,*

Selden saw the Ten Commandments as just another *ur* text of Jewish civil law, which was built on natural law, but not a restatement of natural law itself. The Ten Commandments embodied the principles of natural law for the ancient Jews, much in the same way that the Twelve Tables did for the Romans, or the Magna Carta did for medieval Englishmen. None of these ancient sources could or should be viewed as tantamount to the natural law itself. Obviously, five of the Noahide principles that Selden lifted up – prohibiting idolatry, blasphemy, homicide, theft, and illicit sex – had parallels in the Ten Commandments. But the Noahide law went further in Selden’s view, in commanding the establishment of courts of justice to implement the laws that God and his vice-regents had commanded for the people. And it went further in protecting animals and nature. Moreover, the Noahide law said nothing at all about the Decalogue’s five commandments about observing the Sabbath, honoring one’s parents, bearing false witness, or coveting one’s neighbor and his household. Particularly Selden’s idea that Sabbath day observance was not a natural right and duty, rankled the establishment of his day to no end.

Not only did Selden’s natural law theory start with the seven pre-Mosaic principles given to Adam and Noah, rather than the Ten Commandments given to Moses. He also interpreted and elaborated these natural law principles quite differently from standard jurisprudence, catechesis, or moral instruction in his day. The conventional Protestant method of interpreting, say, the Commandment against adultery started with further biblical teachings and examples from both Testaments (not least the parallel commandments to honor one’s parents and not covet the neighbor’s wife, maidservant or household). It would then consult the early Church Fathers and Christianized Roman law, then the medieval *ius commune*, then the laws and customs of one’s day before making a final judgment of what specifically was prohibited and permitted by this natural law command. And the accumulation of these interpretation into various rules would eventually form a Christian jurisprudence of sex, marriage, and family life.<sup>97</sup>

The prohibition against illicit sex was one of Selden’s Noahide natural law principles, too. But in discerning its meaning, Selden looked first and foremost to all the conflicting rabbinic interpretations of this principle, since this ancient people had access not only to God-given natural law, but also God-given civil law. He also sometimes looked for interesting parallels and divergences in sundry other classical, Christian, Muslim, Oriental, “pagan” and any other relevant sources. In his *On Natural Law*, he devoted separate chapters to exegeting each of the seven natural law principles in this way. In his *The Hebrew Wife*, he did the same thing on the natural principles of sexuality alone. This method led Selden to postulate all manner of natural law teachings about sex, marriage and family life, some of them quite congenial to the establishment of his day, some of them scandalous, such as permissive polygamy,

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*and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 102-133, 156-181.

<sup>97</sup> See, e.g., John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage, and Family Life in John Calvin’s Geneva*, 2 vols. (Grand Rapids, MI: Wm. B. Eerdmans, 2006, 2016).

divorce and remarriage, cross-dressing and bisexuality, among many other topics.<sup>98</sup> Unlike other natural law theorists, however, Selden did not take it upon himself to “prove” the exact content of each of his seven natural law principles by close reasoning or to “demonstrate” it by comparative examples. He was instead largely content to describe the precepts, procedures, and practices that the long Jewish tradition offered, with occasional comparative examples thrown in.<sup>99</sup>

Later Enlightenment philosophers like Samuel von Pufendorf frowned on this method: “Selden does not deduce natural law from any principle or hypothesis for which the evidence is acknowledged by all nations, or which they could be brought to acknowledge by arguments drawn from the light of reason,” Pufendorf complained. “He only expounds what Hebrew scholars thought; he does not sufficiently examine whether their opinion accords with sound reason.”<sup>100</sup> But Selden was operating primarily as an historian, not as a philosopher or advocate in describing the principles of this Jewish “natural law” in action. He was laying out what he thought was a valuable but understudied Jewish law on various legal topics that fellow jurists could be read alongside the more familiar legal sources of the Western tradition. But whether a person or people might find in this Jewish jurisprudence more biblical, rational, or useful teachings was not for him to decide or prescribe. Their veracity or utility would become self-evident to any person or people who followed their own *intellectus agens*.

## Conclusions

John Selden integrated the three classic schools of jurisprudence -- natural law theory, legal positivism, and historical jurisprudence.<sup>101</sup> He defined natural law as a set of fundamental legal principles commanded by God for the creation of a just legal order. He defined positive laws as those rules and procedures created by a just legislature in accordance with both the principles of natural law and the needs of the particular community. And he defined legal history as the account of each community’s legal tradition, which gives expression to natural law and provides limitations on the laws of any given sovereign, even the king himself. While fellow English jurists like Edward Coke had parallel theories of historical jurisprudence, and others like Matthew Hale had parallel theories of natural law, it was Selden who held all three of these schools in an interesting and original balance.

Selden did not create an expansive Christian jurisprudence, but he did build on a robust theology of God – God the creator, who set nature in order and motion in accordance with natural laws; God the law-giver who commands all human creatures to follow the principles of natural law and natural rights; God the judge who called his

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<sup>98</sup> See Selden, *De Jure Naturali*, bk. V and expanded in *Uxor Hebracia*, with discussion in Rosenblatt, *Chief Rabbi*, 54-73; Toomer 2:534-544.

<sup>99</sup> Sommerville, “Selden, Grotius, and the Seventeenth-Century Intellectual Revolution,” 336-38.

<sup>100</sup> Quoted by *ibid.*, 336.

<sup>101</sup> See Harold J. Berman, “Toward an Integrative Jurisprudence,” *California Law Review* 76 (1988): 779 and discussion in Howard O. Hunter, ed., *The Integrative Jurisprudence of Harold J. Berman* (Boulder, CO: Westview Press, 1996).

people to “establish courts of justice” for the protection of justice and mercy in each community; God the covenant-keeper who called his chosen people of Israel to follow the particular commands of the Torah; and God the *intellectus agens* who guides each good person to self-evident truths, and guides each great legal tradition, most notably the common law, to ever greater approximation of divine justice.