Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years’ War

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I. INTRODUCTION

The Seven Years’ War (1756–1763), known in North America as the French and Indian War, was the first truly global conflict ever waged. Fought in Europe and in the colonies, and spreading to the shores of five continents, the war ultimately confirmed the global dominance of the British Empire on land and at sea. The object of the struggle between France and Britain was initially a limited one aimed at the defense of their respective North American territories. The conflict’s momentum grew with such speed and force, however, that by 1758 it had become a war with few limits. For Britain and France it was a struggle to demolish the enemy as a colonial and imperial power.1

One of the key strategies the warring parties employed was the destruction of enemy commerce, for each belligerent hoped to cripple its opponent by strangling its access to the resources that enabled it to wage war.2

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1. The war was fought in Africa, Asia, Europe, North America, and South America. Britain and Prussia were allied against France, Spain, and Austria. For a discussion of the development of the war’s aims, see JULIAN S. CORBETT, BRITAIN IN THE SEVEN YEARS’ WAR 10-29, 336-50 (1992).

2. For a discussion of the development of Britain’s “blue water” strategy, whereby naval domination would be used to destroy the enemy’s economy, see JOHN BREWER, THE SINEWS OF POWER:
The success of this strategy depended on the victor’s ability to dominate the seas through an exercise of naval power so assertive and energetic as to give rise to a variety of questions of legal right. As historian Julian Corbett writes, “[h]owever completely we may command it, [the sea] is not ours; we cannot exclude neutrals from it; we cannot possess it; we cannot subsist upon it.” In order for Britain to dominate the seas, it was forced to engage with these realities in a direct, pragmatic, and constructive way. This engagement occurred on two fronts: on the world’s seas and in Britain’s prize courts.

Britain’s struggle to dominate the seas precipitated a revolution in prize doctrine. This revolution in turn effected a realignment in natural law theory that brought the law of nations closer to a conception of legal positivism than ever had been attained before. But why did these legal and intellectual changes occur in the context of prize disputes, of all places? The answer to this question resides in part in the singular character of prize disputes. Standing at the intersection of state policy and international law, prize disputes stem from questions of the wartime rights of neutrals and belligerents alike. Moreover, prize courts were institutionally well suited for dealing with such questions because prize court judges were closely linked with (or even doubled as) Britain’s foreign-policy makers.

Out of the legal disputes between British privateers and Dutch merchants, two new doctrines developed—one in embryonic form and the other fully crystallized. These rules were the Doctrine of Continuous Voyage and the Rule of the War of 1756, respectively. The former legitimized trade according to its intent as well as its content, stipulating that a sea voyage including several intermediate stops could be considered a single, continuous voyage between its original and final destinations. The latter doctrine held that a neutral could not engage in a trade during time of war that had been closed to it in time of peace. The rule made it exceedingly difficult for the neutral to undertake, on behalf of the enemy, wartime trading activities the enemy could not perform itself. Cumulatively, these principles affirmed that the needs of the belligerent must override the trading benefits of privileged neutrality.

This doctrinal shift constituted a defining moment in the historical development of international law. It marked the departure, albeit incremental, from the natural law tradition that had found its most systematic and

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3. For an account of Britain’s struggle with these questions during the sixteenth and seventeenth centuries, see DAVID ARMITAGE, THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE 100-24 (2000).
4. 1 CORBETT, supra note 1, at 308.
5. The term “prize” is derived from the French prise, which denotes a taking or capture. OXFORD ENGLISH DICTIONARY (2nd ed. 1989).
6. The international law scholar Herbert Whittaker Briggs writes that the “doctrine of continuous voyage has been defined as an application of the general rule of law dolus non purgatur circuitu—that a person is not permitted to do by indirection what he is forbidden to do directly.” HERBERT WHITTAKER BRIGGS, THE DOCTRINE OF CONTINUOUS VOYAGE 11 (1926). Hence in time of war, stops that a ship makes in neutral ports before visiting an enemy port may be deemed intermediate stops rather than independent voyages. They are stops made en route to an enemy port in a single continuous voyage. JAMES GANTENBEIN, THE DOCTRINE OF CONTINUOUS VOYAGE PARTICULARLY AS APPLIED TO CONTRABAND AND BLOCKADE 1-3 (1929).
compendious articulation in the legal writings of Hugo Grotius to the positivism that dominates international legal discourse to this day. The Grotian conception of natural law was premised on the idea that man could, by acting in accordance with his natural capacity for reason, deduce certain universal laws binding upon all mankind. These natural laws governed the conduct not only of men but of states, imposing on them certain obligations of just conduct in war. It was upon this philosophical foundation that Grotius developed a system of neutral rights shot through with themes of natural justice, a system that one of his own countrymen would challenge a century later. That challenger was Cornelius van Bynkershoek—lawyer, writer, and president of the Supreme Court of the Netherlands.

Bynkershoek’s sparse ethical framework rendered the just war concept that had been central to Grotius’ conception of the rights of war and peace irrelevant to the wartime conduct of the neutral. He instead developed a framework of international law so normatively impoverished that it bore closer resemblance to the legal positivism that emerged in the late eighteenth century than to the natural law tradition in which Bynkershoek was himself trained.

The years between 1756 and 1759 constitute the chronological core of this analysis, for they were pivotal in the development of neutral rights doctrine during the Seven Years’ War. These years witnessed a diplomatic crisis between the Dutch Republic and Britain over the former’s status as a neutral nation and a neutral trader during the war. Bound by a 1678 treaty of alliance, the Dutch Republic was obligated to deliver military aid to Britain, if not to enter the war directly. As its own naval and political strength waned during the first half of the eighteenth century, however, the Republic opted to do neither. Tension between the two governments reached the boiling point in 1756, when Dutch merchants accepted an invitation from France to assume the French monopoly on Caribbean trade.

Dutch merchants began defying British blockades of French colonial ports, thereby undertaking on behalf of the French a trade in goods that Britain was fighting to suppress. Adding insult to injury, Britain was bound by a 1674
treaty to uphold the protection of Dutch trading rights under the doctrine of "free ships, free goods." This doctrine stipulated that goods belonging or destined to a belligerent, but carried aboard a neutral ship, were to be considered part of a licit trade and therefore not susceptible to capture and condemnation as prize. This turn of events bought the Dutch a commercial advantage at high cost to British wartime strategy. To the British, this blow was particularly injurious, for the Dutch were not only reneging on the terms of the 1678 alliance but were also helping the enemy carry out a trade that Britain was struggling to crush.

In order to understand the significance of the doctrinal revolution that emerged from this diplomatic and military crisis, this Essay will examine the language of wartime rights as expressed in court records and official correspondence of the period. Particular attention will be paid to the manner and context in which statesmen, jurists, and pamphleteers invoked the law of nations. Political pamphlets published during the war are invaluable to this endeavor, for they shed light on contemporary understandings of wartime rights, having been written to persuade both decision-makers and the general public.

The period between the two world wars of the twentieth century produced a spate of articles and monographs on the history of admiralty law and belligerent rights, largely in response to legal questions arising from World War I. However, the history of British prize law and neutral rights doctrine remains largely uncharted water, so to speak. Part of the problem is historiographical: record-keeping in the British courts of admiralty was not formalized until Lord Stowell took the bench in 1798. In addition, the extant High Court of Admiralty records for the period with which this Essay is concerned were not organized by the London Public Record Office until fairly recently. Richard Pares' volume on colonial blockade and neutral rights remains the definitive work on the history of prize law during the mid-eighteenth century. Pares' scholarship is unassailable, but this Essay will fill some gaps in his work.

To this end, this Essay will demonstrate how British prize courts effected a doctrinal revolution that reflected Bynkershoek's assertion that it is not the neutral's "duty to sit in judgment between his friends who may be fighting each other, and to grant or deny anything to either belligerent through
considerations of the relative degree of justice." It will first explain why British prize courts became the venue in which this philosophical realignment took place, and how contemporary readings of Grotius and Bynkershoek contributed to this change. The Essay will then explain how the British discourse on Dutch treaty rights, molded in large part by military and diplomatic exigencies, became a crucible for the viability of the free ships, free goods doctrine. Finally, it will examine how the doctrines modifying free ships, free goods emerged in the prize courts, redefining the scope of Dutch neutral rights and the trajectory of neutral rights theory in Europe as a whole. What will emerge is not only a historical narrative that recounts the genesis of a particular set of legal norms, but also a case study illustrating how one international legal norm may yield to another in response to wartime exigencies.

II. THE SEVEN YEARS' WAR AND NEUTRAL RIGHTS

Naval historian Alfred Thayer Mahan wrote that "[t]o sap the prosperity upon which war depends for its energy is a measure as truly military as is killing a man whose army maintains war in the field." Although penned more than a century after the Seven Years' War ended, this observation helps explain Britain's determination to strangle French access to colonial trade during the conflict. Much of France's wealth, not to mention many of its raw goods, derived from commerce with its West Indies colonies. In order to cut France off from the material sources of its power, Britain imposed blockades on French colonial ports and actively intercepted and captured French trading vessels at sea. This Section will first explain how the Dutch, self-proclaimed neutrals during the war, became an obstacle to Britain's attempts to strangle French trade. It will then go on to show how the British prize courts became the venue in which Britain attempted to remove this obstacle, and, finally, how public discourse surrounding the conduct of the Dutch brought the writings of Grotius and Bynkershoek to the forefront of legal debate.

A. Waging a Commercial War

Policing French maritime trade routes the world over required an enormous exertion of British naval might. Britain not only deployed the Royal Navy in this endeavor but also employed the assistance of privateers—privately owned ships licensed by the Crown to intercept and capture belligerent ships and goods on the high seas. Upon seizing a suspect French vessel, the captor would bring its captive to the nearest British port in which a vice-admiralty court existed to adjudicate the case. The court would condemn as prize any ship found to have been engaging in an illicit trade, and the ship

17. 2 CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO 61 (James Brown Scott ed., Tenney Frank trans., 1930) (1737).
20. PARES, supra note 16, at 1-17.
and its cargo might be sold at an auction by order of the court.\textsuperscript{21} Proceeds of the sale would return to the Crown, and a portion would be disbursed to the captain and crew of the privateer that had effected the capture. This system rendered privateering both an effective strategy by which to wage commercial war and a lucrative enterprise for the privateer.\textsuperscript{22}

In order to circumvent British blockades, France invited foreign merchant ships to carry the French colonial trade on its behalf. During peacetime, France had allowed French-flagged ships to carry goods only within its empire; but now, with French colonial ports blocked and the French merchant marine targeted by British naval and privateer ships on the high seas, France could no longer maintain its monopoly on shipping. Instead, it opened the French colonial trade to neutral powers, particularly the Dutch, who had a large merchant marine\textsuperscript{23} and enjoyed privileged neutrality under the 1674 treaty with Britain.\textsuperscript{24} Under Article VIII of the treaty, all goods found on Dutch ships would "be accounted clear and free, although the whole lading, or any part thereof, by just title of propriety, shall belong to the enemies of his Majesty."\textsuperscript{25}

Thus bound by the 1674 Anglo-Dutch treaty to uphold the doctrine of free ships, free goods,\textsuperscript{26} Britain found its ability to wage war against French commerce severely compromised. Invoking the protection of free ships, free goods, the Dutch began to do on behalf of France what they could no longer do for themselves: navigate the trade routes of the French Empire. In so doing, however, the Dutch were undertaking a private trade in goods that had very public consequences.\textsuperscript{27} Joseph Yorke, the British ambassador to The Hague,\textsuperscript{28} chastised three deputies of Amsterdam for "the Injustice of profiting off Our Situation," reminding them of "the Impossibility of obtaining Peace for Europe, if even Our Friends, under a Pretence of Neutrality carried on all the Trade of our Enemies."\textsuperscript{29}

\textsuperscript{21} For a description of prize proceedings in British courts of vice-admiralty during the eighteenth century, see 4 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 234-37 (1938).

\textsuperscript{22} Privateering was so lucrative that during the Seven Years' War, sailors in the Royal Navy were known to desert the service in order to join the crews of privateer vessels. 7 LAWRENCE HENRY GIPSON, BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION 70 (1949).

\textsuperscript{23} 8 GIPSON, supra note 19, at 72-73.

\textsuperscript{24} Treaty of 1674, supra note 12, art. 8.

\textsuperscript{25} Id.

\textsuperscript{26} This doctrine held that non-contraband enemy goods aboard a neutral ship were to be considered free and thus not subject to confiscation. The doctrine was activated on a treaty-by-treaty basis during the seventeenth century as a means of circumventing the prevailing doctrine of \textit{robe}, a rule established by Francis I which held that "la robe d'ennemy confisque celle d'amy." SIR GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 269-71 (1928). An elegant English translation of the phrase is impossible. Richard Pares explains that "[b]y the doctrine of \textit{Robe}, neutral property, whether it was a neutral cargo in an enemy ship or a neutral ship carrying enemy goods, or even neutral goods in a neutral ship part of whose cargo was enemy property—all alike might be forfeited." PARES, supra note 16, at 165-66. In this way the belligerent status of a ship or its cargo might contaminate neutral property.

\textsuperscript{27} CARL J. KULSRUD, MARITIME NEUTRALITY TO 1780: A HISTORY OF THE MAIN PRINCIPLES GOVERNING NEUTRALITY AND BELLIGERENCY TO 1780, at 69-71 (1936).

\textsuperscript{28} 8 GIPSON, supra note 19, at 7.

\textsuperscript{29} Letter from Joseph Yorke, British Ambassador to The Hague, to Richard Holdemesse, Secretary of State (Dec. 15, 1758) (on file with the London Public Record Office (PRO), State Papers, Holland, 84/482).
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It fell to the British prize courts to determine whether this newly opened trade was indeed lawful. Their answer, in turn, set the standard for acceptable neutral conduct. The courts had first grappled with this problem during the War of Austrian Succession (1741-1748) in a series of cases that laid the groundwork for the Rule of the War of 1756. During the War of Austrian Succession, the British Navy, aided by privateers, was able to defend commerce and wage war while a large merchant fleet carried on British trade. By 1756, however, half a century of war had thinned the French naval and merchant fleets to the extent that the country could no longer carry on a robust trade using its own ships. While France needed neutral ships to undertake its colonial trade on its behalf, British ships could keep the empire's navigation self-sufficient.

B. The Role of the Prize Courts

Britain's prize courts felt the growing pains of British sea power acutely. During the Seven Years' War, the Dutch grudgingly conceded to those courts jurisdiction over cases involving their ships only because diplomatic alternatives were unavailable. Rather than confront standing treaties head-on, it was more politic to allow judicial processes to resolve what diplomacy could not. Theoretically, the law of nations and treaty law should have supplied a stable and predictable backdrop against which prize disputes could be resolved, regardless of the state to which the court belonged. In actuality, though, the application of different doctrines of neutral trading rights from jurisdiction to jurisdiction hindered the development of a system of law capable of transcending national lines. Thus while a British lawyer might content himself to write that British prize courts were “not less the Courts of the Captured, than of the Captor,” the Dutch States General argued that the problem of prize cases “should not depend on the opinion of a judge, but should be settled according to the mutual consent of the two powers.”

The conflicting views of prize litigation held by the Dutch and the British stemmed in part from the curious nature of prize disputes themselves. From a legal standpoint, prize cases are a mixed breed: a captured trading
vessel and its cargo may be both private and public in character at once. As private property, the ship and its cargo may belong to private individuals. Yet as part of international trade, the same ship and cargo participate in an activity with public implications. The benefits derived from this property are likewise twofold. The private owner may be the direct beneficiary of trading or carrying the goods, but national commerce benefits from the trade as well. During wartime, this split personality has profound legal implications, as trade in certain types of private property may be forbidden according to its public consequences. The destruction of enemy trade may therefore become the primary strategy of war.

What made harmonizing prize doctrines across borders particularly difficult for Britain was the unique way in which it conducted its wars. During the War of Austrian Succession and the Seven Years’ War, Britain hired individuals—privateers—to execute naval policy on a larger scale than ever before by any other country. In return for their service, privateers were entitled to a large share of the proceeds from the ship’s condemnation as prize. Hence, some of the responsibilities of waging public war were devolved to private individuals. The presence of private persons as litigants in prize cases further complicated the nature of the suits. Four sets of interests were involved in most prize disputes: two private litigants claiming ownership of the vessel or cargo on trial, and their two respective governments trying to uphold national rights in war.

Since the majority of British prize cases arising during the Seven Years’ War involved private individuals as claimants, the British Admiralty began seeing these cases as private property disputes that happened to overlap with questions of state policy. If it were simply a question of intercepting enemy cargo for defensive purposes, prize appeals could probably have found ultimate resolution through political or diplomatic bargaining because the stakes of disputes would have been primarily political and military. However, the court had to take into account an entirely different set of rights—those of the privateers. The stakes of capture were personal and financial as well as political and military, for British privateers represented the interests of the state only insofar as those interests enabled them to profit.

Throughout the early years of the war, British Secretary of State Holdernessse and Joseph Yorke, ambassador to The Hague received letters and delegations from the Dutch Republic, requesting the Crown’s assistance in securing the provisional release of captured ships pending appeal, for while Dutch representatives assured the Crown “that they [had] entire confidence in the judgement of the Lords . . . they [could not] have the same confidence in the inferior courts.” Without fail, the government’s emphatic response was

36. NORMAN BENTWICH, THE LAW OF PRIVATE PROPERTY IN WAR 87 (1907).
37. The entire notion of contraband hinges on this idea. Trade in any goods that would increase the strength of the enemy may be declared unlawful in wartime. See FREDERIC THOMAS PRATT, LAW OF CONTRABAND OF WAR 17-55 (1856).
38. PARES, supra note 16, at 1-76.
39. Protocole presented by the deputies of the States General, presented to Richard, Earl of Holdernessse, Secretary of State (May 18, 1759) (on file with London PRO, State Papers, Holland, 84/484) (“Qu’ils ont une Confiance entière dans le Jugement des Lords . . . ils ne peuvent avoir la même Confiance dans les Cours inferieures.”).
that such intervention in judicial procedure would compromise the integrity of the British constitution. As Holderness wrote, “His Majesty cannot alter the Methods prescribed by the Laws of His Kingdoms & by Treaty.”\footnote{Letter from Richard, Earl of Holderness, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Feb. 9, 1759) (on file with London PRO, State Papers, Holland, 84/483). Marriott less ceremoniously reminded the Dutch that “[i]n Despotic Governments, as in Turkey, Judicial Proceedings are short and precipitate, because they are arbitrary.” \textit{Marriott}, supra note 34, at 34.}

Even if he wanted to,

\begin{quote}
the King [could not], of His own Authority, give up Ships or Cargoes, that by a Decision in the Court of Admiralty [might] become the property of the Captor, who [had] also a Right to insist upon a regular Trial . . . . Nor [was] it in the Breast of the Crown to determine Points relating to Captures, otherwise than through the Channel of His Courts of Justice; And it [was] by their Adjudication only, that the Truth of the Allegations, on either Side, [could] be duly ascertained.\footnote{Letter from Richard, Earl of Holderness, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Dec. 13, 1758) (on file with London PRO, State Papers, Holland, 84/482).} 
\end{quote}

Not only did the structure of the British constitution proscribe Crown intervention in judicial procedure, but the process of prize adjudication was established by the very same Anglo-Dutch treaty that had established the free ships, free goods doctrine.\footnote{Treaty of 1674, \textit{supra} note 12, art. 8.} Hence the two sovereign nations had endorsed the principles and procedures employed in prize courts when the relevant treaties were signed. Put bluntly, it was too late for the Dutch to complain about a judicial process they had previously approved.

Richard Lee’s 1759 \textit{Treatise of Captures in War} describes the judicial procedure established by the 1674 Anglo-Dutch treaty. Generously referred to as a translator of Bynkershoek,\footnote{\textit{Arthur Nussbaum}, A \textit{Concise History of the Law of Nations} 147-48 (1950).} (less generously as “an inferior hack writer of the Seven Years War”\footnote{\textit{Pares}, \textit{supra} note 16, at 155. Lee omitted Bynkershoek’s introduction, concealing the true author’s identity and passing the work off as his own. Only in 1803, when \textit{Quaestionum juris publici} was re-translated into English, was the true author’s identity revealed. \textit{Id.}}), Lee closely patterns his treatise after the first book of Bynkershoek’s \textit{Quaestionum juris publici}. The textual variations that do occur are striking, often speaking to contemporary problems. For example, Lee’s chapter \textit{Of the Method of Trying Prizes Taken in War} is conspicuously absent from Bynkershoek. In it, Lee tells the reader that “by the Maritime Law of all Nations, universally and immemorially received,” prize cases must be heard in “a regular judicial Proceeding, wherein both Parties may be heard, and Condemned thereupon as Prize, in a Court of Admiralty judging by the Law of Nations and Treaties.”\footnote{\textit{Lee}, \textit{supra} note 45, at 240-41; Treaty of 1674, \textit{supra} note 12, arts. 14-16.} The court is to belong to the captor state,\footnote{\textit{Lee}, \textit{supra} note 45, at 239; Treaty of 1674, \textit{supra} note 12, arts. 11-12.} and the burden of proof will rest upon the captive.\footnote{\textit{Lee}, \textit{supra} note 45, at 241; Treaty of 1674, \textit{supra} note 12, art. 7.} Each country will uphold the decision of the other’s courts, and neither will tolerate abuses by its own privateers.

In the event of an appeal, the treaty of 1674 required that the king “cause a review and examination thereof to be made in the assembly of the states general in his council, that it may appear whether the orders and precautions
prescribed in this treaty have been observed." This provision accurately reflects the original nature of the Lords Commissioners of Prize Appeals, for they were simply privy councilors charged with the responsibility of hearing prize cases in wartime. As members of an executive body with close ties to the king, and as architects of state policy, the Lords Commissioners were in a position to negotiate the release of ships. They also wielded the ultimate right to interpret treaties on a case-by-case basis. At some point in time, however, the Lords Commissioners began to see themselves not as an ad hoc committee of the Privy Council but as judicial officers presiding over an independent court of law. Thus by 1759, Lee referred to them as “a superior Court of Review, consisting of the most considerable Persons,” and admiralty lawyer James Marriott berated Dutch merchants seeking extrajudicial intervention on their behalf.

This institutional change also helps account for the role the prize courts played in realizing the philosophical realignment that occurred during the Seven Years’ War with respect to neutral rights. Once the Crown was marginalized from actively defining wartime rights, neutral rights would henceforth be defined by members of the Prize Court of Appeals. Therefore, it is partly in the courts of law that the origins of the two doctrines that set this realignment in motion may be found. The system of neutral rights that the prize courts would ultimately champion found its first formulation in the writings of Bynkershoek, and it was to those writings that judges referred in rendering their decisions in prize cases of the Seven Years’ War. It is therefore useful to offer a sketch of the system of neutral rights that Bynkershoek proposed in his 1737 *Quaestionum juris publici*, the text that became a focal point of the debate on the scope of neutral trading rights during the war.

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50. The transformation of the Lords Commissioners from a conciliar body to a judicial one has yet to be explained. Pares touches upon the question in an examination of the changing membership of the appellate prize court. PARES, *supra* note 16, at 102-08.

51. Lee, *supra* note 45, at 241. It is worth noting that Lee dedicated the treatise to John Carteret, Earl of Granville and president of the Privy Council, “whose consummate skill in affairs of this matter [i.e., wartime captures]; whose peculiar station render[ed] him, at this critical conjuncture, the proper umpire in all disputes related to them; and whose rank and dignity; penetrating judgment; impartial justice, and uncommon humanity, lay a just claim to the patronage of such a performance.” Id. at A1-A2. As president of the Privy Council, Granville was required to preside over the Prize Court of Appeals. PARES, *supra* note 16, at 105. By the Seven Years' War, he was an old hand with regard to prize cases, having served as a Commissioner of Appeals in the War of Austrian Succession. Id. at 93-94. It is also worth noting Granville’s opinion about the destruction of commerce as a wartime strategy. At the very outset of the war, a meeting was held by Secretary of State Newcastle’s ministers to determine how to proceed against France on the seas. At the meeting, Granville, a politician who, “but for his despotic temperament and incorrigible love of drink, his contemporaries believed to be worthy to rank with the greatest statesmen,” derided the policy of the destruction of commerce as tantamount to “vexing your neighbours for a little muck.” Id. at 61. For Granville’s views on neutral trade with belligerents in wartime, see PARES, *supra* note 16, at 183-84.

52. Marriott wrote that the British ministers had “shewn at once their Justice, and their Patience, the one, in searching out, and delivering over Offenders to the civil Power, and the other, in hearing with Attention the repeated, importunate, and unreasonable Complaints of those who have forgot, that the sovereign Power itself in Britain is subject to the Laws.” JAMES MARRIOTT, A LETTER TO THE DUTCH MERCHANTS IN BRITAIN 27 (1759).
C. Bynkershoek on Neutrality

Before examining the legal frameworks that Grotius and Bynkershoek developed, a word on the reception of their ideas is in order. While it may be tempting to the modern reader to dismiss the writings of these jurists as historical or philosophical curiosities, that temptation necessarily subsides when the texts are instead considered in the context of eighteenth-century legal practice. In their lifetimes, Grotius and Bynkershoek were first and foremost lawyers and jurists—technical practitioners who had, in their own day, written in direct response to prize disputes. Consequently, their legal works do not read like purely philosophical tracts but rather like the legal compendia their authors intended to write. Penned for use by the legal practitioner, Grotius' *De jure belli ac pacis* (1625) and Bynkershoek’s *Quaestionum iuris publici* (1737) were treated by lawyers and by courts as authoritative sources of law. As the British Admiralty grappled with the legal fallout of the Seven Years’ War, judges, lawyers, and statesmen alike found in Grotius and Bynkershoek their juridical lodestars and relied on their works in formulating legal arguments and judicial decisions.

In *Quaestionum juris publici*, Bynkershoek wrote that “war is by its very nature so general that it cannot be waged within set limits.” It must be pursued on the assumption that the enemy deserves to be destroyed—he is a criminal in the belligerent’s estimation and must be punished accordingly. Given the scale on which the great powers waged the Seven Years’ War, this expansive view of war must have had a certain resonance for readers of Bynkershoek in the mid-eighteenth century. Unlike Grotius before him, Bynkershoek did not offer a conception of just war fought by morally just means; any means employed in waging a war to “defend or recover one’s own” (*jus suum*) was just to Bynkershoek. Since “the reason that justifies war justifies every method of destroying the enemy,” nearly all means conducing to victory were lawful to him.

55. This historical fact demonstrates, in the first instance, how intellectually fertile prize cases were for the cultivation of ideas about international right, and, in the second instance, how persistent the problems of right to which prize cases gave rise would be. Grotius wrote his *De indicis* between 1604 and 1605, at the age of twenty-one, as a defense of the Dutch East India Company’s forcible attempts to open Portuguese-dominated trade routes in the Indian Ocean and Indonesian Archipelago. See Finch, supra note 14, at xii-xv; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* 79-82 (1999); C.G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, in *Hugo Grotius and International Relations* 95, 103-04 (Hedley Bull et al. eds., 1990).


53. Id. at 15.

56. Id. at 16-17. While Grotius will not allow such measures as poison or assassination in war, 1 GROTIUS, *supra* note 7, at 651-56, Bynkershoek does. “We make war,” he writes, “because we think that our enemy, by the injury done us, has merited the destruction of himself and his people.” That said, “does it matter what means we employ to accomplish it?” The only wartime measure that Bynkershoek categorically prohibits is perfidy, on the grounds that once a compact has been made between belligerents, they are no longer enemies. Their legal status changes and the rules governing their conduct towards one another must change accordingly. 1 BYNKERSHOEK, *supra* note 17, at 16.
the enemy might not be generous, generosity in war was dispensable to Bynkershoek. Justice, on the other hand, was not.\footnote{58}

In times of war, Bynkershoek explained, normal social obligations break down; the respect due to property rights in peace gives way to the belligerent's right to destroy his enemy by any and all means necessary. Among these lawful means is the seizure of enemy property, for "such goods are a part of the hostile power, [and] can be of use to them and hence harmful to us."\footnote{59} Grotius likewise justified the seizure of enemy property from non-enemy parties; he did so, however, through a conception of necessity firmly rooted in natural law. Indeed, to Grotius, "necessity is the first law of nature."\footnote{60} From it springs the very institution of private property.

Grotius wrote that in the state of nature, men held all things in common. In this way, they were able to use the natural world as need required. However, some things (e.g., food, clothing, or shelter) could not be possessed in common, for one person's use of them rendered use by another person impossible. Herein lay the seeds of private property rights.\footnote{61} By occupying property through physical attachment, an individual could stake his claim to exclusive ownership.\footnote{62} Grotius insisted that these private property rights were instituted not to supplant common ownership but with the "intention to depart as little as possible from natural equity"\footnote{63} for the "law of property was established to imitate nature."\footnote{64} As a result, men could revert to their right to use whatever was necessary to preserve their own lives in accordance with the original community of property, even if that property was owned by someone else. For, wrote Grotius, the "first right . . . that, since the establishment of private ownership, still remains over from the old community of property, is that which we have called the right of necessity."\footnote{65}

Bynkershoek challenged the Grotian view head-on: "This I can not at all approve, namely, Grotius' argument . . . about the withdrawal from [the] original community and about the ways of acquiring ownership."\footnote{66} Bynkershoek agreed that physical occupation was the means by which humanity instituted private property, but he disagreed on the relevant motive. It was not necessity that led to the development of private property but utility,

\footnote{58} Hence Bynkershoek's assertion that while justice allows a state to have a greater army and better weapons than its enemy, generosity does not. 2 BYNKERSHOEK, supra note 17, at 17.

\footnote{59} Id. at 31.

\footnote{60} 1 GROTUIS, supra note 14, at 73.


\footnote{62} For a discussion of the Grotian view of private property, see STEPHEN BUCKLE, NATURAL LAW AND PRIVATE PROPERTY 1-52 (1991). Buckle examines the development of the idea of property in Grotius' writings, taking into account the thinkers who influenced him, including Seneca, Cicero, and Aquinas.

\footnote{63} 1 GROTIOUS, supra note 7, at 193.

\footnote{64} GROTIOUS, supra note 61, at 25.

\footnote{65} Grotius qualifies this right, explaining that before men may act on it, they must first make certain that this radical measure cannot be avoided through an appeal to civil authorities or to the owner of the property. Furthermore, a man cannot be dispossessed of his property if he has equal need of it, and, whenever possible, the property seized should be restored. Id. at 194-95.

\footnote{66} CORNELIUS VAN BYNKERSHOEK, DE DOMINIO MARIS DISSERTATIO 37 (Ralph Van Deman Magoffin trans., Oxford Univ. Press 1923) (1744).
a measure of the usefulness of an object in proportion to its desirability. Necessity, Bynkershoek wrote, need not have anything to do with the utility of an object, as is evidenced by human greed. Regardless of whether “necessary or useful, [men] would attach themselves . . . by natural occupation, that is, by corporal seizure of the things they desired; for by mere intent a single man could easily gobble up even the whole world.” Hence man’s passions are checked, at least in part, by his simple inability to own what he does not physically occupy.67

These disparate assumptions shaped each writer’s conception of neutral rights, for insofar as war plunges men into the state of nature, human nature determines what sort of conduct is acceptable in war. To Grotius, man’s inherent natural desire for peaceable society68 entitled him—even obligated him—to sit in judgment of the belligerents, doing nothing to disadvantage the just side and nothing to advantage the unjust one. To Bynkershoek, however, man’s natural self-interest dictated the opposite conclusion. Men are neither obligated nor even empowered by the laws of nature to take sides in war. Instead, the neutral’s duty in war is to be a friend to both belligerents without influencing the relative strength of either.

Grotius reconciled the rights of the belligerent with the duties of the neutral by requiring both parties to converge on the question of justice. However, because Bynkershoek held that the justice of neither cause should be of interest to the neutral unless its own life and possessions are directly threatened, he constructed a system of neutral rights that anticipated an inevitable clash between neutral and belligerent rights. Bynkershoek considered all parties justified in protecting their lives and property in war; consequently, the neutral is as entitled to uphold its commercial interests as the belligerent is to seize contraband from neutral ships.69 Neutral and belligerent must reach an accommodation through a mutual acknowledgment of the legitimacy of one another’s rights. Thus while Bynkershoek argued that a belligerent may seize enemy contraband on the high seas aboard a neutral ship, the belligerent is not entitled to seize the ship itself or do any harm to the neutral. His right to encroach upon the rightful property of another is coextensive only with their state of enmity, which, in the case of the neutral trader, is represented by the enemy goods traded.

67. Id. at 38.
68. 1 GROTIUS, supra note 7, at 11-13.
69. This conflict of two equally legitimate claims of right is reminiscent of a passage in Hobbes’ Leviathan concerning the right of every man to refuse to die himself or to kill any other man upon the command of the sovereign. “Upon this ground, a man that is commanded as a Souldier to fight against the enemy, though his Soveraign have Right enough to punish his refusall with death, may nevertheless in many cases refuse, without Injustice.” THOMAS HOBBES, LEVIATHAN 151 (Richard Tuck ed., Cambridge Univ. Press 1997) (1651). The relationship between Hobbes and Grotius has been discussed masterfully by Tuck in a number of works. See Tuck, supra note 53; Richard Tuck, Grotius, Carneades and Hobbes, in GROTIUS, PUFENDORF AND MODERN NATURAL LAW 43 (Knud Haakonssen ed., 1999). Although a study of neutrality in Hobbes would be a fruitful intellectual enterprise, it is beyond the scope of the present Essay. Because the prize courts considered the juridical writings of Grotius and Bynkershoek legally authoritative, this Essay will focus exclusively on their influence as documented in the case records of the Seven Years’ War. Although it is quite plausible that political philosophers such as Hobbes helped shape the thinking of legal practitioners, jurists were more frequently cited in courts of law.
Grotius used a composite standard to determine the legitimacy of wartime trading rights, taking into consideration the necessity of the belligerent's situation and the nature of the property traded. He identified three types of goods supplied during war: goods that are useful only in war (e.g., weapons); goods that are of no use in war (e.g., luxury items); and, finally, goods that are useful both in war and peace (e.g., naval stores). With respect to the last category, Grotius recommended that the law use particular wartime exigencies to determine whether such goods can be confiscated on grounds of necessity. He wrote that if a belligerent is unable to protect himself "without intercepting the goods which are being sent to the enemy, necessity . . . will give [him] a right to intercept such goods, but with the obligation to make restitution." Thus Grotius would support the confiscation only of enemy goods that compromise the belligerent's ability to vanquish his enemy.

Bynkershoek was troubled by this proposition, wondering precisely who would judge the necessity of confiscating such property. It seemed self-evident to him that the belligerent alone would be able to judge accurately whether certain types of commerce threaten its security. Since "all laws prohibit men from sitting as judges in their own case except in so far as custom, the prince of tyrants, permits it," it was in custom that he sought an answer. After examining standing treaties and established practice, Bynkershoek concluded that, according to custom, a neutral may, with the exception of contraband, "carry anything to [belligerents] with impunity." However, this right came at a cost. While Grotius required that the captor pay the freightage for enemy property confiscated aboard neutral vessels, Bynkershoek would hear nothing of it. The ship’s master, he wrote, "took the enemy goods on board at his own risk, knowing that they could be taken and accordingly brought into the port of the captor. He will, therefore, have no cause for complaint if the vessel is released empty."

Bynkershoek’s permissive framework for belligerent rights is matched by a correspondingly broad system of neutral rights. This system differs from the Grotian view in that Bynkershoek’s conceptions of right are not underpinned by a normative force sufficiently compelling to justify neutral conduct that might have a bearing on the war’s outcome. Bynkershoek answered Grotius’ proposition that the neutral must do nothing to aid the side whose cause is unjust by reminding the reader that a neutral, as a friend to

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70. 1 GROTrUS, supra note 7, at 602.
71. 1 BYNKERSHOEK, supra note 17, at 66.
72. Id. at 67.
73. Id. at 67.
74. Id. at 88-89.
75. Bynkershoek’s laws of war derive from the sole principle that all measures employed in attempting to destroy the enemy are lawful. Any proscriptions that Bynkershoek explicitly establishes are deduced from this single rule. For example, the belligerent’s right to confiscate all enemy property and execute all enemies necessitates the cessation of commerce between nations at war. Bynkershoek asks:

Of what value are commercial rights if, as is clearly the case, the goods of the enemy that are brought in or that are found in the country are confiscate[d]? But so long as the right of slaying an enemy obtains, would you approve that men might go to the enemy’s country with merchandise only to have some enemy cut them down in the midst of the trading?

Id. at 29.
both belligerents, “is not acting the part of a friend in ruining or in injuring in any manner the cause of his friend” by delivering goods to either belligerent.\textsuperscript{76} The neutral is not in a position to assess the justice of either side’s cause and must behave accordingly, undertaking no action that might benefit or prejudice either belligerent. Given the role the Dutch Republic would assume during the Seven Years’ War, it is little wonder that Bynkershoek’s morally sparse framework for neutrality was well received by British judges, politicians, and lawyers seeking to rationalize a change in policy toward Dutch neutrality.\textsuperscript{77}

When the Dutch Republic accepted the French invitation to participate in the previously closed French colonial trade, it brought into question an almost hundred-year tradition of privileged trading rights under the free ships, free goods doctrine. Because the success of Britain’s war against France depended in large part on the ability of the former to suppress the enemy’s trade in goods essential to supplying the war effort, Dutch participation quite directly challenged Britain’s strategy. The treaty of 1674 authorized British prize courts to determine whether violations of its provisions had occurred,\textsuperscript{78} situating the courts at the heart of the Anglo-Dutch controversy over wartime trading rights and, indeed, Dutch neutrality in the war itself. With respect to the latter issue, the prize courts had to determine which of two conceptions of neutrality would carry the day: the Grotian conception, according to which the neutral’s abstention from open hostilities in wartime did not impinge upon its natural duty to aid the just side, or the Bynkershoekian conception, on which the neutral’s duty was to do nothing to help or hinder either side.

### III. Treaty Rights and Dutch Neutral Trade

On January 2, 1759, a hopeful Joseph Yorke, British ambassador to The Hague, wrote to the Earl of Holdemesse:

> By my last Letter, I had the Honor to give Your Lordship an Account of what had past between me, and the Deputies of Amsterdam, as well as with the Ministers of the Admiralties, to whom I have indenevoured to prove in the fullest manner, as contained in Your Lordship’s Instruction, the Right, His Majesty has to annul the Treaty of 1674, from the Failure on the part of the States General, in the Execution of the Treaties subsisting between the Two Nations, and in order to open the Eyes of the Publick, as much as possible upon this Subject, I have had translated and published the best Pamphlets which have been written and published in England upon this occasion . . . .\textsuperscript{79}

After three years of private negotiation and public debate, a delegation of Dutch officials confided to Yorke that they were prepared to make good on overtures to relinquish formally their claim to the French colonial trade under

\textsuperscript{76} \textit{Id. at} 72.
\textsuperscript{77} Bynkershoek’s influence on British jurisprudence cast a long shadow. Arthur Browne, an MP and professor of civil law at the University of Dublin, patterned his work on prize law after “[a] plan not dissimilar to that of the celebrated Bynkershoek, who, seemingly deterred by the view of the same vast ocean, though with incomparably greater powers to encounter it, selected for consideration only those \textit{quaestiones publici juris} which are most frequently agitated.”\textit{ 2 Browne, supra} note 33, at 244.
\textsuperscript{78} Treaty of 1674, \textit{supra} note 12, arts 11-12.
the 1674 Treaty of Navigation and Commerce. By now Dutch trade was feeling the impact of increasingly aggressive captures; a large part of the country's merchant fleet was moored in British ports pending the trial of its cargos. Maritime insurance rates were soaring to prohibitive heights as Dutch ships, often insured by British companies, became moving targets for privateers while in transit to or from North America. Promising as the concession was for future diplomatic accommodation, any renegotiation of Dutch trading rights would inevitably confront fierce opposition from what Yorke termed "a whole Country of Merchants and Advocates." It was in anticipation of this impending clash that the ambassador commissioned the translations. This Section will examine the views held by two leading British pamphleteers on the 1674 treaty, noting the manner in which the authors engaged with the Dutch tradition of neutral rights theory. It will explain the relevance of these pamphlets to the diplomatic negotiations underway between Britain and the Dutch Republic, and will demonstrate how diplomats ultimately passed on the problem of reckoning with the 1674 treaty to British prize courts.

A. James Marriott's Case of the Dutch Ships Considered

Although the archival sources do not name the pamphlets that Yorke considered the best, James Marriott's The Case of the Dutch Ships Considered seems a likely choice. First published in 1758, the pamphlet was so well received in Britain that it was re-published three times over the course of the next year alone. It was published once again in 1778, the same year Marriott was appointed judge of the High Court of Admiralty. In this pamphlet, Marriott, an advocate at Doctor's Commons, presented a legal case to counter Dutch claims, translating questions of the commercial rights of neutrals into questions of property rights, and approaching treaties between states as though they were contracts between individuals.

The core of Marriott's argument is a principle affirmed by "Writers . . . of every Country, and of the highest Authority, and by the common Usage of all Nations": every belligerent may seize and expropriate enemy property...
The Seven Years' War

wherever it may be found. An early articulation of this principle occurred in the _Consolato del Mare_, perhaps the "common Usage of all Nations" to which Marriott was referring. The _Consolato_ was an early compendium of European maritime custom that had long provided the basis for prize provisions in commercial treaties. Not until the late seventeenth century did commercial treaties begin to diverge from the _Consolato's_ view of belligerent property rights by including free ships, free goods clauses. The treaty of 1674 represented one such divergence. Marriott therefore turns to it in order to assess the legitimacy of the Dutch claim to free ships, free goods with respect to the French colonial trade.

Marriott interprets the treaty article by article. As he writes, the signatories become contracting parties and the treaty terms contractual obligations. The analogy is not original. After all, to Grotius, what were treaties but "public contracts," differing from those of private persons only in that treaties could "be made only by the right of a higher or lower authority of government"? Marriott likewise applies the same interpretive criteria to compacts between states as to compacts between individuals, measuring the validity of the treaty provisions in accordance with civil law contract procedure. Within the civil law tradition, the validity of a contract was contingent upon (1) whether it was concluded by "free and intentional consent"; (2) whether it involved the participation of at least two parties; (3) the intention as to its object; (4) the mutuality of its provisions; and (5) the specification of the terms on which its provisions were to be fulfilled. Relying on the substantive principles of Justinian's _Digest_ and invoking the philosophical authority of Grotius, Marriott embarks upon his argument.

From the standpoint of civil law, "free and intentional consent" could be given to a contract only when the parties were recognized as legally eligible and competent to sign, and when their consent was granted in the absence of force or fear. Consent had to be granted bona fide—that is, in such a manner as to demonstrate a genuine intention to fulfill the terms of the agreement. A contract signed with the intention of defrauding the other contracting party or a third party would be invalid. Since the two treaty parties fulfilled these requirements, the problem was clearly one of construction. The only remaining standards were based not on the legal status of the signatories but on the content and context of the treaty itself. Therefore, to understand the scope of the free ships, free goods clause, Marriott held that the interpreter must determine three things: the object of the treaty, the terms on which its provisions are to be enjoyed, and the course of action it prescribes.

87. **Marriott, supra** note 34, at 2.
88. For a discussion of the _Consolato_, see **Nussbaum, supra** note 43, at 31-32.
89. **Kulsrud, supra** note 27, at 14-16, 153-55.
90. **Marriott, supra** note 34, at 4. Marriott writes that the "whole Argument . . . is rested entire[sic.] upon the Words of the Treaty of December 1, 1674." _Id._
91. _Id._ at 436-41.
92. 1 Grotius, _supra_ note 7, at 391.
93. 2 Patrick Colquhoun, _A Summary of the Roman Civil Law_ 436 (1851).
95. _Id._ at 439-40; **Marriott, supra** note 34, at 12.
The object of the treaty, as the very title indicates, was navigation and commerce. However, the source of current controversy was to which areas of navigation and commerce the treaty applied. Marriott first turns his attention to Articles I and II. Article I allowed the Dutch to navigate and trade freely, unmolested by British ships, even if that commerce was carried out with an enemy of Britain. This privilege extended in war as well as in peace. Article II, however, stated that, with the exception of contraband, "such Freedom shall extend to all Commodities which might be carried in time of Peace." Because it was forbidden for all but French ships to engage in the empire's colonial trade during peacetime, it was forbidden for the Dutch to engage in it during war. Thus Dutch trade with the French colonies was actually prohibited by the treaty.

Marriott proceeds to argue that Article VIII, the free ships, free goods clause, should be interpreted with these provisions in mind. Article VIII held that any non-contraband goods belonging to the enemy of Britain found aboard a Dutch ship were considered free. Yet it also stated that this provision must be read "according to the Meaning and Direction of the foregoing Articles." Thus, if read in context, the free ships, free goods doctrine was applicable only to those trades lawful in both war and peace. This interpretation recognized the difference between allowing the Dutch to trade with the enemy and for the enemy. At issue was not whether a neutral could trade in non-contraband goods with the enemy, but whether a neutral could undertake trade that had been limited exclusively to enemy ships before the outbreak of war.

Marriott's next argument renders all these points practically irrelevant. He writes that the treaty of 1674 "extends no farther in its Obligation than to the general State of Commerce in existence, and view at the time of contracting"—that is, rebus sic stantibus. Because trade with the French colonies was closed in peacetime and in wartime—when the treaty was concluded—the signatories could not possibly have intended it to be the object of the treaty. To include the French colonial trade within the scope of the agreement is, to Marriott, simply anachronistic. He writes that, understood within the historical context of the treaty, colonial trade was created "ex post facto, [and] cannot be opened . . . to the Subjects of Holland . . . so as [to allow them] to carry it on by virtue of the Engagements subsisting between Britain and Holland . . . prior not only to the Existence, but even probable existence of this [trade]."

Marriott returns to the counterclaim "that by the Treaty of December 1/11, 1674, was meant a Right to trade with the Enemy in every Place and in every Manner, possible, which it shall be in the Enemy's Inclination to allow in time of War." He responds that this argument allows the enemy to

96. MARRIOTT, supra note 34 (quoting and translating the Treaty of 1674, supra note 12, art. 2) (emphasis in original).
97. MARRIOTT, supra note 34, at 9 (quoting and translating the Treaty of 1674, supra note 12, art. 8).
98. MARRIOTT, supra note 34, at 11.
99 Id. at 13.
100. Id. at 14 (emphasis in original).
become a third party to the obligation, as it can dictate retroactively the scope of the agreement by opening or closing commerce at will. Apart from being potentially self-destructive, such a compact is not valid according to the legal concept of mutuality of obligation. In order for a contract to be valid, there must be reciprocal benefits, each party contracting for no one's benefit but its own. 101 Under these circumstances, France would be introduced to the agreement as a shadow beneficiary without ever having to sign the treaty.

Marriott also argues that the opening of French colonial trade to the Dutch can be viewed as a compact in and of itself. This compact, however, is invalid because through it the French benefit from defrauding Britain. He writes that no nation may enjoy a benefit through a fraud committed by another on its behalf. Since the Dutch have been undertaking a trade for the French, a trade not sanctioned by the treaty of 1674, such trade is tantamount to fraud. The Dutch have thus become an instrument of French commerce by acting "to the Detriment and Destruction . . . ex fraude, and, ex posteriori" of the British. 102 They have violated the mutuality of the treaty by importing into it the interests of the French.

Underpinning all these claims was the problem of the mode of the contract—the manner in which its provisions were to be fulfilled. The terms of the 1678 Treaty of Alliance compelled each party to give aid unconditionally to the other in time of need. 103 Marriott writes that this promise did not leave room for the Dutch to "judge of the Foundation for requiring" aid, 104 but rather categorically required them to deliver aid. Since the States General neither delivered aid nor intended to offer it to Britain, they violated the terms of the Anglo-Dutch alliance. As a result, whatever rights the Dutch could claim under the treaty of 1674—itself now contingent upon fulfillment of these obligations—have been forfeited because "the Non-performance of part of an Alliance, is a Dissolution of the Whole, whatever are the Reasons." 105

Here Marriott refers the reader to Grotius' claim that "[i]f one party has violated a treaty of alliance, the other will be able to withdraw from it; for the individual terms of an alliance have the force of conditions." 106 Marriott’s appropriation of this argument in the case of the Dutch merchants reflects one of the most significant contributions that natural law theory made to the development of civil contract law: the idea that each compact involves a tacit agreement whose abrogation will restore the contracting parties to their relationship prior to the obligation. If a promise is broken, all subsisting compacts can be rendered null and void. Thus, in addition to being mutual, the force of the obligation becomes conditional. 107

101. See Colquhoun, supra note 93, at 443.
102. Marriott, supra note 34, at 12 (citations omitted).
104. Marriott, supra note 34, at 28.
105. Id. at 29 (citations omitted).
106. 1 Grotius, supra note 7, at 405.
Marriott is at his most lucid and commanding when he follows closely the principles of contract law. It is only when he invokes "the common Principles of the Law of Nature and Nations" that his arguments become opaque. Yet even at their most elusive, these latter claims are only ancillary to a concrete legal argument on treaty construction. As Pares points out, British lawyers, like political theorists of the period, could not agree on the origins and nature of the law of nations. Treaties, however, became a means of extrapolating by negation the dictates of natural law: if a particular country enjoyed a right or privilege exclusively by treaty, it meant that other nations did not enjoy that right by the laws of nature and of nations. Treaty rights were thus seen as positive constructs built upon a foundation of natural law. Remove these rights layer by layer, and eventually one would be left with a core of irreducible principles constituting the law of nations. Marriott left the task of mining this irreducible core of natural right to Charles Jenkinson.

B. Charles Jenkinson's Discourse

Charles Jenkinson, later Lord Liverpool, was aligned politically with William Pitt in advocating a commercial war on France and seeking not "a way round the Treaty of 1674 . . . [but] a way through it" by having it declared void. In his 1759 pamphlet, Discourse on the Conduct of the Government of Great-Britain, in Respect to Neutral Nations, During the Present War, Jenkinson attempts to combine the philosophical foundations of Grotian natural law with the substantive principles of Bynkershoek's conception of neutral rights. Jenkinson himself acknowledges this eclecticism, noting at the outset of his pamphlet that he will first "produce the Testimony of that learned Native of Delft [Grotius], who wrote so nobly on the Freedom of Navigation to serve his ungrateful Country" and "add that of Bynkershoek, a Native also of Holland . . . [who] wrote principally for the Use of the Courts and States of the United Provinces [of The Netherlands]."

Jenkinson examines the rights of neutrals to trade in wartime from the standpoint of both treaty rights and natural law. He ultimately agrees with Marriott, concluding that the commercial treaty, as confirmed by a treaty of alliance,

ought to be considered in the Nature of a Bargain; The Conditions of which are always supposed to be equal, at least in the Opinion of those, who make it; He therefore, who breaks his part of the Contract, destroys the Equality or Justice of it, and forfeits all pretence to those Benefits, which the other Party had stipulated in his favour.\footnote{113}{It is important to note that the correct citation is \textit{Discourse on the Conduct of the Government of Great-Britain, in Respect to Neutral Nations, During the Present War 9} (Dublin, Halton Bradley 1759).}
Jenkinson writes that, as amendments to natural law, treaties are capable of perfecting, "by their Prudence, what Nature hath left imperfect." Human society, he notes, was founded through man's natural sociability. Bound together by "the softer Ties of Natural Affection," men united for their mutual benefit and relinquished to their governments the rights they had enjoyed while living in the state of nature. First and foremost among these, Jenkinson asserts, was the right to defend themselves and their property against attack. It was through this transfer of right that each nation became an amplification of the individual, "subject to the same Passions and Animosities, as the Individuals, of which [it was] composed." While the laws of the state control the passions of its members, no analogous institution exists to control the passions of entire nations. Individual states are therefore equivalent to individual people living in the state of nature: both live under the rule of natural law.

Because the state could wield as natural right only those powers that its members had transferred to it, treaties were "superadded . . . [by] Communities . . . for their mutual Benefit," affirming natural law or guaranteeing what it did not explicitly grant. This view of treaties was very much in keeping with Grotius' assertion that there are two sorts of treaties: "some establish the same rights as the law of nature, while others add something thereto." Treaties, along with custom and use among nations, comprise a separate body of laws with origins in natural right and human sociability—the law of nations. To Jenkinson, treaties are not, as Marriott argues, simply contracts among nations; they are a means of fulfilling the requirements of natural law in order to protect man's natural rights.

If free ships, free goods was a treaty right "superadded" to a natural right, the question remained of what wartime conduct was permissible for a neutral under the laws of nature. Here Jenkinson turns once again to the individual-state analogy. If an individual living in the state of nature finds his person or property under attack, he has every right under natural law to defend them against his attacker. A third individual professing to take no side in the dispute may not aid either party, for by aiding one side he diminishes the other's ability to defend himself. In denying either disputant his natural right to self-defense, the third party ceases to be neutral and becomes an enemy. This observation also holds true among states. By supplying aid to a belligerent, a neutral country encroaches upon the other belligerent's right to defend himself. Therefore,

[i]t is the Duty . . . of those, who are not concerned in the Dispute, to be extremely attentive to their Conduct, that they may not thereby contribute to render the Contest unequal: As far as Man is concerned, it is Force alone, on which the Decision depends; to add therefore by any means to the Power of one Party, is, manifest injustice to the

114. Id. at 55.
115. Id.
116. Id. at 7.
117. Id. at 3.
118. Id. at 6.
119. 1 GROTIUS, supra note 7, at 393.
120. JENKINSON, supra note 112, at 6-7.
Jenkinson’s views are not novel; they are, by his own admission, applications of old ideas to new circumstances. The Grotian perspective on natural law is underpinned by a pervasive sense of moral obligation that, although minimal, casts a long shadow. Man’s natural rights are derived from four laws of nature: each individual may defend his own life; he may acquire and defend his own property; he may not injure his fellow man; and he may not arbitrarily seize the property of another.

Grotius states that rights may become “a moral quality of a person, making it possible to have or do something lawfully.” A war fought in defense of one’s natural right is a just war. Far from being required to abstain from moral judgment, according to Grotius, “it is the duty of those who keep out of a war to do nothing whereby he who supports a wicked cause may be rendered more powerful, or whereby the movements of him who wages a just war may be hampered.” To Bynkershoek, however, “the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgement between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice.” It is the latter view of neutrality that Jenkinson advocates.

Jenkinson synthesizes the views of Grotius and Bynkershoek, writing that “the softer Ties of Natural Affection among [nations] have little Effect, and no coercive Bands of Power exist to regulate and controll [sic.] their Passions; it is the Virtue of Governments alone, on which the general Prosperity depends, and Treaties have no better Sanction, than what that Virtue can give them.” Treaties were instituted to preserve the equity that nature established among men but that men’s passions tended to subvert. Jenkinson writes that men possess a natural right to enjoy commerce with any country in war or peace, so long as trade is undertaken on their own account and in their own goods. This sort of equitable trade, however, is often subverted “amid the Irregularities of War.” Treaties are therefore concluded to confirm man’s natural rights to trade, but they also occasionally create privileges not guaranteed by nature. The Anglo-Dutch treaty of 1674 did both. In allowing each country to enjoy non-contraband transactions with the enemy of the other, the treaty upheld their natural right to trade. In this

121. Id. at 3.
122. Id. at 9.
124. For a discussion of Grotius' views on natural rights, see Tuck, supra note 69, at 85. Tuck also discusses the manner in which Grotius developed an ethical theory based on human self-interest. Id. at 43-61.
125. 1 GROTIUS, supra note 7, at 35.
126. Id. at 52-53.
127. Id. at 786.
128. 1 BYNKERSHOEK, supra note 17, at 61.
129. JENKINSON, supra note 112, at 55.
130. Id. at 25-26.
131. Treaty of 1674, supra note 12, arts. 1-2 (affirming the freedom of navigation and commerce and establishing free ships, free goods doctrine).
sense, the treaty offered an “Affirmance of an old Rule.”132 Yet in allowing both countries to carry enemy property freely under the free ships, free goods doctrine, the treaty created a new privilege as an “Exception” to natural law.133

Jenkinson’s analysis of the Anglo-Dutch treaty of 1674 corresponds with Grotius’ explanation of treaties that “add something beyond the rights based on the law of nature.”134 To Jenkinson, treaties become a sort of living compact among individual nations, upholding their natural rights but also conferring upon them privileges not guaranteed by natural law. Citing Grotius, Jenkinson writes that because treaties are contracts, these positive amendments to natural law can be enjoyed only upon the fulfillment of a signatory state’s obligations. Having violated the terms of their alliance with Britain, the Dutch must be stripped of their privileges under the treaty of 1674.135

C. Stalled Diplomacy

The mutuality of the 1674 and 1678 treaties had been a sticking point in Anglo-Dutch relations from the very start of the Seven Years’ War. The Dutch argued that as long as British privateers harassed their ships, they would neither enter the war nor deliver aid as the terms of their alliance required. Why should they enable Britain to wage war, only to become one of its casualties?136 The British replied that this trade was unlawful to begin with, violating the ancient laws of France,137 treaty rights, and the law of nations.138 Yet neither country was prepared to renegotiate the terms of the treaties through formal diplomatic channels. The Dutch could not be certain that negotiations would work in their favor. If Britain did choose to make good on its threats to nullify the 1674 treaty for failure to fulfill the terms of the Anglo-Dutch alliance, the Republic stood to lose protection for its lucrative continental trade under free ships, free goods. Virtually any Dutch trading vessel would become vulnerable to capture, as all enemy cargo, contraband or not, would become confiscable. Not only would Dutch ships traveling to and from North America become moving targets for privateers, but ships sailing

132. JENKINSON, supra note 112, at 27. In this spirit, the treaty of 1674 affirmed the parties’ freedom of navigation and trade in the time of peace. Treaty of 1674, supra note 12, art. 1.
133. JENKINSON, supra note 112, at 27; Treaty of 1674, supra note 12, art. 8.
134. 1 GROTIUS, supra note 7, at 394.
135. JENKINSON, supra note 112, at 37.
137. MARRIOTT, supra note 52, at 4.
138. The tone of these claims is encapsulated in an exchange between Hendrik Hop, a Dutch representative in London, and Secretary of State Holdernesse that occurred in September 1756. Hop approached the secretary of state demanding the release of several ships captured by a British man of war, the Rochester. The States General had previously issued a memorial pursuant to this case, but Britain had yet to make a reply. Holdernesse told Hop that he would have to continue waiting, for “it could not . . . but appear extraordinary to the King, to find the States so very importunate for an answer . . . when they seemed in no Haste to give One to That [which Yorke] had presented, reclaiming the defensive alliances equally in Force with the Treaty of 1674.” Letter from Richard, Earl of Holdernesse, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Sept. 8, 1756) (on file with London PRO, State Papers, Holland, 84/475).
between continental ports would fall prey as well. At the same time, Britain feared alienating the Republic altogether, thereby driving it to even closer relations with France. Rather than repudiate the treaty and render a tense situation explosive, Britain grew increasingly reluctant to act upon assertions that the treaty was indeed forfeit. In his letter to Ambassador Yorke dated November 28, 1758, Holdernesse refers to his correspondence of 1756, writing:

[Y]ou will remember, that the Turn of my Dispatches of that Year was, to shew to you, that all the treaties, subsisting between His Majesty and the States, were equally binding to the Contracting Parties, and that His Majesty had as much Right to reclain the Execution of the Treaty of 1678 and the subsequent defensive Engagements entered into by the two Nations, as the Dutch have to that of 1674. And that, as the Execution of mutual Engagements must be reciprocal, His Majesty would have a right to annul the Treaty of 1674 if the Conditions of the other Treaties subsisting with His Majesty are not fulfilled by the States [General].

The Secretary of State expressed his frustration with Dutch insistence upon the full execution of the treaty of 1674 while remaining “totally silent as to their other Engagements with His Majesty.” He wrote that, nonetheless, “His Majesty is still willing to try whether Negotiation can yet adjust these Matters; being utterly averse to suffering things to come to Extremity, if It can be avoided.” This concern would persist throughout Anglo-Dutch discussions on the treaty of 1674. In fact, to Yorke it may have seemed at times that he was poised at the very edge of extremity, and that all hopes of an amicable conclusion might be dashed against the rocks. Thus while the Crown asserted that it had the right to declare the treaty void, it wielded this legal power as a threat rather than a promise. There were times when the government used it more gingerly than others. During the early weeks of 1759, for instance, the British government assumed a conciliatory tone toward the Dutch. Yorke continued asserting the king’s right to nullify the treaty of 1674—this time “humbly” —while trying to negotiate a settlement with deputies of the States General. Yorke’s credibility, meanwhile, was being undermined by the prolonged detention of several Dutch ships that, he wrote to Holdernesse, “are the burthen of all my

139. In 1755, when debates raged over the position the Dutch Republic should assume in the impending war, one Dutch official issued a lengthy memorandum urging the government to fulfill its promise under the 1678 Treaty of Alliance and send 6000 men to Britain. He warned his countrymen that if they did not fulfill this promise, Britain might, by the law of nations, revoke the terms of the 1674 treaty. CARTER, supra note 11, at 44-49.


141. Letter from Richard, Earl of Holdernesse, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Nov. 28, 1758) (on file with London PRO, State Papers, Holland, 84/482).

142. Id.

143. Id.

144. In fact, Holdernesse issued separate and secret orders to Yorke, commanding him to inform the Princess Gouvernante that it was “necessary to assert His Majesty’s Right to annul the Treaty of 1674 but His Majesty only means to assert it, without intending to carry it into Execution, if it can be avoided.” Id.

Conversations, and the utter Ruin of their Credit, the Consequence as [the Dutch negotiators] pretend of their not being restored." Furthermore, the French ambassador to the Dutch Republic was trying to drive a wedge between the Dutch and the British by reminding Dutch ministers and any "other Persons in this Government, who [would] listen to Him with more Complaisance" that French "Troops were at their Service, in case any Power in Europe, in revenge for [Dutch] Neutrality, attempted any Thing to their Prejudice."

Apprehensive that Britain would alienate the Dutch and undermine the possibility of reaching a negotiated solution, Yorke wrote to Holdernesse:

Yet by 1759 it had become clear that arguments alone would not suffice in redefining the rights of the Dutch to trade as neutrals. While neither side would broach the question formally through diplomatic channels, informal discussions were proving no more constructive. Instead, these rights had to be defined on a case-by-case basis in the courts of admiralty. For as anxiety mounted in Britain about a possible French invasion, the Dutch Republic knew it could not deliver the forces required of it under the alliance of 1678 if called upon by the British for a third time. Since it was not prepared to force Britain into making good on its threats to nullify Dutch protection under free ships, free goods altogether, the Republic retreated from its vehement stance and deferred to the judgments of the British Admiralty. The treaty of 1674, outdated and ill-adapted to Anglo-Dutch relations of the mid-eighteenth century, was never renegotiated, nor were its ambiguities ever formally resolved. As a treaty, it was obsolete; as a bargaining chip, it would prove indispensable.

In examining the legal strategies proposed by Marriott and Jenkinson, this Section suggests that the pamphleteers' decision to invoke the legal authority of Grotius and Bynkershoek was based not only on the inherent juridical authority of the respective writers but also on a desire to persuade the Dutch audience of the error of its ways. As Jenkinson himself wrote, "what makes his [Bynkershoek's] Opinion at this Time of great Importance, is, that he wrote principally for the Use of the Courts and States of the United Provinces [of The Netherlands], and generally confirms what he advances, by their Judgments and Resolutions." The pamphleteers' reliance on the Dutch legal tradition might thereby render their arguments a particularly compelling

146. Id.
147. Id.
148. Id.
149. By 1759, France had placed 40,000 men along the coasts of the British Channel in the hopes of diverting Britain's attention from its North American campaigns to the defense of its own borders. 1 CORBETT, supra note 1, at 4-5.
150. JENKINSON, supra note 112, at 9-10.
way for Yorke "to open the Eyes of the [Dutch] Publick." There is a certain irony, then, in the fact that the Dutch ultimately chose to defer resolution of their legal conflict with Britain to British courts that, in turn, relied on doctrines championed by Dutch jurists in rendering their decisions.

IV. THE NEW DOCTRINES

Because neither government was able to renegotiate the terms of the treaty of 1674, the British set out to give the scope of free ships, free goods as narrow a construction as possible. The doctrine's applicability to enemy ports in Europe was not disputed; its applicability to colonial ports, however, was hotly contested. This Section will examine the manner in which public officials, judges, and lawyers asserted that the treaty privileges could not, in good faith, be extended to the colonies. It will present a snapshot of the concept of good faith in international law during the mid-eighteenth century and will account for the role of this principle in effecting the doctrinal revolution of the Seven Years' War. Finally, it will trace the emergence of the Rule of the War of 1756 and the Doctrine of Continuous Voyage through an analysis of relevant case law.

A. Good Faith and the Doctrinal Revolution

The concept of good faith as it pertains to conduct among nations had, by the mid-eighteenth century, crystallized in two ways. The concept was seen as a corollary to the Roman law rule of *pacta sunt servanda*, the notion that agreements must be kept. In this respect, good faith served as the binding force of any agreement, whether a contract between individuals or a treaty between nations. Good faith could also apply to the manner in which people carried out the terms of their agreements. In this capacity, good faith required contracting parties to comply with a moral standard of equitable behavior.

Recall that by the seventeenth century, it was generally accepted that a nation at war was entitled to seize the property of its enemy wherever it might be found. In upholding free ships, free goods, the Anglo-Dutch treaty of 1674 established a qualified exception to that rule. The treaty also established the standards against which the good faith of British or Dutch traders could be measured. In order to enter the territorial waters of either country, a ship had to show a sea-brief (passport) containing the name of the ship and the name and nationality of its owner. In order to enter an enemy port, the ship also had to show its bills of lading (coquets), documents authorized by customs officers at the vessel's port of departure explaining the contents of its cargo. If the ship's bills of lading demonstrated that it was carrying contraband, the ship could be landed and searched by officers of the admiralty. Under no

circumstances was the captor’s crew to open, move, or inspect the cargo at sea.\(^{154}\)

Richard Lee wrote that if a neutral took enemy goods aboard his ship and claimed they were his own, he was "certainly guilty of a breach of the friendship between Us . . . for though the neutral power [might] justly be allowed to trade with the enemy, under certain restrictions; yet it cannot possibly be conceived to be lawful to trade for him under sanction of their name."\(^{155}\) Trading for the enemy was a violation of good faith, the true test of neutrality. In this way, the lawfulness of neutral trade came to be defined not only by its content but also by its intent. As this Section will demonstrate, neutral trade could, in content and destination, appear to be lawful according to the letter of the treaty of 1674—it could, for example, consist of non-contraband enemy goods destined for a continental port. Neutral trade could also, however, violate the requirement of good faith in that it might undertake for the enemy what the enemy could not execute for itself—it could, for example, consist of non-contraband enemy goods being carried indirectly from an enemy colony that had been closed to the neutral in peacetime, or worse, be carried out under the cover of false documents.

Good faith among nations was, and still is, considered part of any public friendship. Indeed, as if delivering a benediction, Grotius concludes *De jure belli ac pacis* by writing that "all friendships [should] be safeguarded with the greatest devotion and good faith."\(^{156}\) Accordingly, a neutral could prove his good faith by doing nothing to support an unjust cause or to impede a just one. If the neutral felt the relative justice of each cause was ambiguous, he might aid each side in equal measures.\(^{157}\) The neutral might also conclude a treaty with either belligerent upon the outbreak of war, affirming his friendship but declaring his abstention from the conflict. This declaration, writes Grotius, would be in keeping with Livy’s opinion on neutrality: ‘‘Let them [neutrals] desire peace with either side, as befits friends; let them not intervene in the war.’’\(^{158}\)

Bynkershoek, who cites the very same passage from Livy, sees a contradiction in the Grotian position. How can a neutral not intervene in the war if he is aiding either or both sides directly or indirectly? Richard Lee, translating Bynkershoek, explains: ‘‘[I]n what shape soever we assist one Party whereby he has any Advantage over the other in the war, we interpose in the War, which is inconsistent with Friendship.’’\(^{159}\) Bynkershoek argues that in order to act in good faith, the neutral must calculate his wartime conduct with two considerations in mind: first, that his friend’s enemy is his friend;

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154. Treaty of 1674, *supra* note 12, arts. 7-8. Bills of lading served three legal functions: (1) as an acknowledgment of a receipt of goods; (2) as evidence of a contract by a shipowner for the transport of goods; and (3) as a means of establishing property in goods. W.P. BENNET, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* 5-8, 16 (1914). The forms for British and Dutch bills of lading are appended to the Treaty of 1674, *supra* note 12, at 279-80.

155. This assertion is an original one, as it does not occur in Bynkershoek’s text. LEE, *supra* note 45, at 142.

156. 1 GROTIUS, *supra* note 7, at 862.

157. Id. at 786.

158. 1 GROTIUS, *supra* note 7, at 787.

159. LEE, *supra* note 45, at 140; see also 1 BYNKERSHOEK, *supra* note 17, at 62.
and second, that his friend is the enemy of his friend. The neutral must therefore moderate his interaction with one friend according to the possible consequences it may have on the other. Bynkershoek goes on to criticize the Grotian view of neutrality, writing that “I cannot agree with the opinion of many writers on public law who hold that we may and ought to aid the friend whose cause appears to us the best and most just . . . . When neither friend has made any engagement with us why should princes, absolutely independent, stand or fall by our judgement?” The justness of either cause is to be of no consequence to the neutral, whose first and foremost obligation in war is to preserve his friendship with both belligerents without compromising the war efforts of either.

In addition to governing conduct among non-belligerent nations, good faith is critical to the enforcement of treaties among them. Bynkershoek writes that “If you destroy good faith, you destroy all intercourse between princes, for intercourse depends expressly upon treaties; you even destroy international law, which has its origin in tacitly accepted and presupposed agreements founded upon reason and usage.” Because the civil laws that compel people to uphold their compacts do not hold sway among nations, good faith is the moral force binding states to their promises. Good faith provides the philosophical touchstone shared by Bynkershoek and Grotius.

Bynkershoek argues that it is all well and good to say that one has a rightful claim under the laws of nature, but of what use is this argument to someone who does not believe or even care that laws of nature exist? Bynkershoek writes:

We must therefore attack the question with blunter weapons. When [civil] law has prescribed certain methods of acquiring ownership, we must observe these since no state can subsist without laws, and very expediency, the mother . . . of justice and equity, commands us to observe the laws. Even expediency obliges the several princes to keep their word, even though there are no laws between them, for you cannot conceive of empires without sovereigns, nor of sovereigns without compacts, nor of compacts without good faith.

The distinction Grotius draws between the volitional law of nations and the laws of nature as applied to the conduct of individual nations is irrelevant to Bynkershoek, for neither is of any value without good faith. Bynkershoek presents an alternative view of the law of nations, a view that identifies it as a single body of positive law founded on reason and custom, determined by what is expedient, and binding only according to the good faith of its authors and subjects.

Bynkershoek’s view of the role of good faith in the law of nations and civil law is very much in keeping with the later Roman law tradition, itself heavily influenced by Stoic philosophy. In Roman law, two bodies of law—

160. Bynkershoek, supra note 17, at 62.
161. Id. at 190.
162. Id. at 191.
163. Id. at 192.
164. For an analysis of the conspicuous lack of natural law theory in Bynkershoek’s Quaestionum juris publici in comparison to his earlier works, see Akashi, supra note 8, at 29-33. See also id. at 50-51 for a discussion of good faith as the binding force of the ius gentium.
the *ius gentium* and the *ius civile*—existed alongside one another. The *ius
civile* was binding only upon Roman citizens. The *ius gentium*, on the other
hand, was binding upon all men.  

Originally perceived as a product of man’s
natural capacity for reason, it constituted a body of law common to all
humankind—hence Bynkershoek’s assertion that we must “examine the
dictates of reason, whose authority is so great in defining the law of
nations.” To Grotius, the non-volitional law of nations—natural law—is
also defined by reason insofar as reason is part of human nature. Grotius
imbued this law with moral weight, writing that “[t]he law of nature is a
dictate of right reason, which points out that an act, according as it is or is not
in conformity with rational nature, has in it a quality of moral baseness or
moral necessity.”

In the *Quaestionum*, Bynkershoek warns the reader that to disregard
good faith in public agreements is to travel the slippery slope to Machiavellian
polities, for that “master of iniquity in his *Principe* teaches that treachery is
lawful for princes, saying that any and every method of securing the safety of
the state is honourable provided only it makes a pretence at being honourable.”

Charles Jenkinson defines the importance of good faith in
upholding treaties in similar terms:

Those scandalous Maxims of policy, which have brought Disgrace both on the Name
and Profession [of statecraft], took their Rise from the Conduct of the little Principalities of
Italy . . . and their refined Shifts and Evasions formed into Systems by the Able Doctors
of their Councils, have composed that Science, which the World hath called Politics, a
Science of Fraud and Deceit . . . as if there could be no Morality among Nations, and that
Mankind, being formed into Civil Societies, and collectively considered, were set free
from all Rules of Honour and Virtue.

Bynkershoek writes that this doctrine has been “long since exploded,” having been replaced by the idea that each contract implicitly contains a
clause holding that its provisions are valid only *rebus sic stantibus*. In this
way, writes Bynkershoek, a compact may be deemed invalid “(1) if a new
condition has arisen suitable for reopening discussion; (2) if circumstances
have come to a pass that one cannot take action; (3) if the reasons that
promoted the alliance have ceased to exist; [or] (4) if the needs of the state or
expedience demand a different course.” He writes that, by following this
discipline, “you would hardly save yourself from Machiavellianism, if you
would slink off to these dens of treachery with the itching soul of a
prince.”

He cites Queen Elizabeth’s conduct with respect to a 1585 treaty whose terms
she had broken. The States General issued an admonition against

166. 1 BYNKERSHOEK, supra note 17, at 20.
167. 1 GROOTIUS, supra note 7, at 38-39.
168. 1 BYNKERSHOEK, supra note 17, at 190.
169. JENKINSON, supra note 112, at 24.
170. 1 BYNKERSHOEK, supra note 17, at 190.
171. Id. at 190.
172. Id. at 190.
173. In the Treaty of Nonsuch of September 4, 1585, Britain agreed to deploy substantial
military forces to the Low Countries in order to defend the Dutch from Spanish conquest. As security for
this expensive undertaking, the Dutch agreed to invite two British men to sit in the Dutch States General
and help oversee the vulnerable country’s finances. By 1594, Queen Elizabeth was selling off Crown
Elizabeth’s conduct, to which Bynkershoek tells us the British government "made the most absurd answer, saying that the contracts of princes rested only upon a pledge, and that they were not binding if they resulted in detriment to the state."\textsuperscript{174}

James Marriott, however, relies upon the principle of \textit{rebus sic stantibus} in determining whether the free ships, free goods doctrine still applied to the Dutch under the treaty of 1674. A commercial treaty, he writes, "which is very different in its Objects, and its Consequences, from a Treaty of Peace, extends no farther in its Obligation than to the general State of Commerce in existence, and view at the time of contracting."\textsuperscript{175} He too refers to Elizabeth’s reply to the States General in 1595, this time as an example of the legitimacy of the doctrine of \textit{rebus sic stantibus}. In order to understand the wording of a treaty, he explains, one must understand the intention of its authors; to understand their intention, one must know the circumstances under which they concluded the compact. It therefore follows that in order to understand whether the wording of the treaty of 1674 included the French colonial trade, one must know whether the authors intended it to be included within the scope of the free ships, free goods provision. In order to understand their intention, one must find out whether it was possible for the colonial trade to be included in the treaty given the "general State of Commerce in existence and view at the time of contracting."\textsuperscript{176} Because trade with the French colonies was closed to the Dutch in peacetime and in war when the treaty was concluded, Marriott writes, it cannot be assumed that the contracting parties intended to include such trade within the treaty’s scope.\textsuperscript{177} The British government adopted precisely this position in addressing claims by the Dutch Republic that its subjects at home and in the colonies "should be treated in regard to this navigation and commerce on the same footing as the most-favored nations" and that its trade should be left "free and without hindrance."\textsuperscript{178}

\section*{B. The Rule of the War of 1756}

The groundwork for a limited interpretation of the 1674 treaty had been laid during the War of Austrian Succession in a series of prize cases,\textsuperscript{179} the
first of which was the *Eindraght*, decided on June 19, 1744.\footnote{180} The Lords Commissioners for Prize Appeals ordered the restoration of the Dutch ship and its cargo, captured en route from Rotterdam to Nantes, to its owners. Although the ship’s captain had produced all the documentation required of him under the treaty of 1674 when stopped by a British privateer, the ship had nevertheless been captured on the suspicion that it was carrying contraband goods. The court ruled that under the treaty, suspicion alone was not sufficient grounds on which to capture a neutral ship: “His Majesty’s Orders are very strong that this Treaty may be religiously observed.”\footnote{181} Since the captain of the Dutch ship had complied with the treaty provisions, the court ruled that his ship could not be lawfully detained, much less condemned as prize. In delivering its decision, the court noted that “[t]his is the first Cause in this War upon the Treaty [of] 1674.”\footnote{182} It would not be the last. In this ruling, the court set the standard for the close construction of the 1674 Anglo-Dutch Treaty of Commerce and Navigation.

In a letter of January 8, 1746, civil lawyer George Lee\footnote{183} answered a question concerning the strict interpretation of the treaty of 1674.\footnote{184} French and Spanish ships had begun obtaining Dutch passes in order to trade between ports in the French colonies, claiming protection under the treaty’s free ships, free goods provision. The ships would hire a Dutch master, set sail under Dutch colors, and carry false bills of lading, all the while claiming that the vessels were destined for Holland. Yet “many of these Dutch masters [were] not natives of Holland but French, Irish and of other nations made Burghers by the States of Holland and their crews for the greatest part [were] French.”\footnote{185} Although these ships could technically supply all the documentation required by the Treaty of 1674, the question remained whether they were engaging in legitimate trade. Lee replied that they were not, and that a British privateer could lawfully seize a ship trading under these conditions “notwithstanding the Treaty of 1674.”\footnote{186} Enemy cargo found aboard the ship would be condemned, but the ship itself, if owned by Dutchmen, would be restored to its owners. Lee explains that transporting enemy goods “from one port to another of the enemy is not priviledged [sic.] by the said Treaty of 1674 and cannot protect the enemy’s goods.”\footnote{187} He was completely silent, however, on the legitimacy of protecting what was essentially a French trade with Dutch papers.

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The author hopes they will shed some light on the manner in which the problem of interpreting the 1674 treaty led to the development of the two doctrines treated herein.

180. Information collected from an admiralty report on the *Eindraght. Case of the Eindraght* (June 19, 1744) (on file with London PRO, High Court of Admiralty, 30/875/14).

181. *Id.*

182. *Id.*


185. *Id.*

186. *Id.*

187. *Id.*
This problem arose during the Seven Years’ War, when the adoption of ships underwent a different permutation. Now France, again an enemy of the British, was once more inviting Dutch ships to participate in a trade formerly closed to all but French ships. The prize courts had to decide whether these Dutch ships thereby forfeited their protection under the treaty of 1674.\textsuperscript{188} Did Dutch ships, by undertaking what had once been an exclusively French trade, cease to be Dutch? Had they acquired the character of French enemy ships?

The case of a Dutch ship, aptly named the America, settled these questions. Dealing with the first condemnation of a Dutch ship in the Seven Years’ War, the case established the Rule of the War of 1756. The America delivered a cargo of French-owned goods to Santo Domingo, a French possession, where it took on a cargo of colonial goods. While en route to Europe, the ship was intercepted by a British privateer. The master immediately began throwing the ship’s papers overboard, destroying the bills of lading in order to conceal the cargo from the privateers. When brought to appeal, the Lords Commissioners condemned both the ship and its cargo as lawful prize on the grounds that the vessel had assumed the character of a French ship. Employed by French merchants, trading with a French colony, and carrying French papers, the ship was no longer bona fide Dutch in character but French. The case established the legal principle that no neutral could participate during wartime in a trade closed to him in time of peace.\textsuperscript{189} It also marked the acceptance by Dutch traders of British adjudication as a legitimate means of defining trading rights during war. As Ambassador Yorke wrote, “[e]very Body is in such hopes that the Differences between the Two Nations will be speedily adjusted, and I must do Justice to the Trading Towns of this Country, that notwithstanding their Clamors, they have universally Approved the Sentence pronounced against the Ship America, by the Lords Commissioners of Appeals.”\textsuperscript{190}

The trade undertaken by the Dutch on behalf of French colonies in the West Indies was of particular concern to British officials. One letter by Holdernesse condemned the Dutch assumption of trade in Martinique and Santo Domingo ever since France “opened her American ports to Nations who profess Neutrality in the present War.”\textsuperscript{191} The Dutch colonies of St. Eustatius and Curaçao, little more than “barren settlements” in peacetime, were suddenly transformed into “grand magazines for the Produce of Martinico and St. Domingo” as “vast fleets [were] now sailing continually from those insignificant Ports laden with Enemy’s Property”\textsuperscript{192} — this despite the Admiralty’s condemnation of trade with French colonies from the very outset of the war.

A letter written in the early days of the war by the king’s advocate, George Hay, reflects this state of affairs. An advocate representing the case of

\textsuperscript{188} PARES, supra note 16, at 196-97.
\textsuperscript{189} PARES, supra note 16, at 197-98, 201-02; see also O.H. Mootham, The Doctrine of Continuous Voyage, 1756-1815, 8 BRIT. Y. B. INT’L. L. 63, 63-67 (1927).
\textsuperscript{190} Letter from Joseph Yorke, British Ambassador to The Hague, to Richard Holdemesse, Secretary of State (May 8, 1759) (on file with London PRO, State Papers, Holland, 84/484).
\textsuperscript{191} Letter from Richard Holdemesse, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Feb. 9, 1759) (on file with London PRO, State Papers, Holland, 84/483).
\textsuperscript{192} Id.
a certain James Colladon asked Hay for advice on points of law. He wished to know whether “any persons besides the subjects of France [could] trade to Martinico without its being deemed a contraband trade” and whether his client, a Genevan, might be allowed to trade there. Hay firmly replied that, in general, no one but French subjects might trade with Martinique. Hence the Rule of the War of 1756 prevented neutral powers from undertaking activities in time of war that had been illicit in time of peace. In essence, it ensured that the trading rights enjoyed in peacetime were identical to those enjoyed in time of war.

C. The Doctrine of Continuous Voyage

In his 1759 Letter to the Dutch Merchants in Britain, James Marriott described the illicit colonial trade discussed by Hay and Colladon. Dutch merchants would load their ships with goods on the continent and set sail for their colonies in the West Indies. There they would consign the cargo to an agent who would, in turn, consign the goods to French barques that had sailed into the harbor or come ashore. The French boats would take aboard continental goods in exchange for colonial goods such as “Coffees, Sugar, Indigo”—“the growth of the French Islands, and which are well known, never to have been the Growth of the barren Soil of those Islands which are inhabited by Dutch Subjects.” These goods would be brought back to continental ports under colorable Dutch papers, but they were often actually transported on French account. Dutch ships would claim to be destined for the Dutch West Indies but would sail on to French islands, where they would pick up colonial goods. They would then sail back to Dutch colonies and complete their voyage back to the continent. The whole process was known as “transshipping,” and as a result of it, Marriott wrote that “the Properties of Dutchmen and Frenchmen have become as inseparably blended as their National Characters, in the American World, have long been equivocal.”

The same principle that gave rise to the Rule of the War of 1756 would also give rise to the Doctrine of Continuous Voyage, the legal doctrine through which transshipping was suppressed. Through transshipping, the neutral might avoid acknowledging any intermediate stops he made in French colonies while trading between the Dutch West Indies and the continent. A Dutch captain might destroy bills of lading issued in French colonial ports and retain only those issued in neutral ports, presenting the latter when stopped by a British ship for inspection. Such practices were not exclusively Dutch, as evidenced by the earliest application of the Doctrine of Continuous Voyage.
In 1756, a British privateer captured the Spanish ship *Jesus Maria Joseph*. The ship had taken on a cargo at Corunna, a Spanish port, which had been transferred from a French ship that had sailed into the harbor. The Spanish vessel was captured en route to San Sebastian, another Spanish port, whence it was to set sail for France.198

The Prize Court of Appeals upheld the lower court’s condemnation of the cargo as lawful prize on the grounds that the entire transportation “from the French island to Corunna, from Corunna to San Sebastian, and thence to a port of Old France” could be considered as a single transportation of enemy goods aboard a neutral ship, regardless of the transshipping.199 In delivering his opinion on the case, Lord Hardwicke conceded that although Spain might enjoy treaty protection under the free ships, free goods doctrine,200 the purpose of such treaties was “to leave the neutral with the same advantages, no better and no worse off in war than in peace.”201 Since Spain could not carry French colonial goods in peacetime, it could not carry them in war, either directly or indirectly from French colonies.

The practice of transshipping seemed to support Holderness’s assertion that to profess one’s neutrality and to behave in a manner befitting a neutral were two entirely different things.202 In the same letter, the Secretary of State noted that “whatever shall be *bona fide*, Dutch property, & be conveyed from the Dutch settlements to Europe in Dutch bottoms, will be unmolested, [yet] at the same time . . . the Dutch for their own sake, must take proper measures to verify clearly & distinctly, who are *bona fide* the owners of their American vessels.”203 In a subsequent letter, he remarked that the only way the Dutch could prove their good faith was by submitting for examination the documents required of Dutch and British merchants alike by the treaty of 1674. He understood that this examination was a delicate issue,204 but if the Dutch were to enjoy the treaty privilege of free ships, free goods, they had to uphold their treaty obligations as well. Besides, he wrote, “honest and fair traders have nothing to apprehend from it, and as to those who carry on the illicit trade, it is fit, they should be detected and punished.”205

198. For a more detailed account of the case, see PARES, supra note 16, at 217-21.
200. The Anglo-Spanish treaty of 1667 upheld the principle that unfree ships make unfree goods, but it was silent on the question of whether Spain would enjoy protection under free ships, free goods. This question had yet to be resolved by the Seven Years’ War. PARES, supra note 16, at 175-76. British officials tended to approach Spanish captures with kid gloves so as not to antagonize Spain. They sometimes unofficially pressured privateers to release Spanish ships they captured. PARES, supra note 16, at 285-89. It is therefore understandable that Dutch merchants hoped Britain might take the same pains on their behalf.
201. *Id.* at 220.
202. Letter from Richard Holderness, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Feb. 9, 1759) (on file with London PRO, State Papers, Holland, 84/483).
203. *Id.*
204. In a letter to Yorke, Holderness told the Ambassador that negotiations on this issue would constitute “the most delicate part of your commission” and advised him not to raise the matter unless it, “of itself, [should] come upon the carpet.” Letter from Richard Holderness, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (Nov. 28, 1758) (on file with London PRO, State Papers, Holland, 84/482).
205. Letter from Richard Holderness, Secretary of State, to Joseph Yorke, British Ambassador to The Hague (May 18, 1759) (on file with London PRO, State Papers, Holland, 84/484).
As Holdernesse pointed out, Britain could find out whether a Dutch ship was in fact trading in good faith only by intercepting it at sea and subjecting it to examination. Given the abusive treatment they often received at the hands of privateers, it is little surprise that the Dutch should have questioned the British claim to the right to search their ships on the high seas. Charles Jenkinson approaches this problem from the standpoint of sovereign rights. Having already explained the origins of a belligerent’s right by the laws of nature to seize enemy property, he goes on to explore the neutral’s right to protect it. Jenkinson concedes that it is unlawful for a belligerent to seek out enemy property within neutral dominion, for here “the trial, which the law of nations gives is, as it were, superseded.” Within the boundaries of neutral territory, the law of nations must yield to the civil laws of the state. Far from coexisting in the state of nature as sovereign nations do, individual subjects within civil society have conferred upon their government the power of dominion over themselves. Dominion, Jenkinson writes, “gives a right of enacting laws, of establishing new jurisdictions, and of making all (whether its own subjects or those of other countries) submit to these, who come within the pale of its power.” Thus the right to protect enemy property is coterminous with the bounds of the neutral’s dominion. But since the neutral cannot hold dominion over the seas, Jenkinson states, his right of protecting enemy property cannot extend to the seas either. Regardless of nationality, origin, or destination, a ship on the high seas is traveling on “the public road of the universe, the law of which is the law of nations, and all that pass thereon are subject to it, without either privilege or exemption.”

The case of the Dutch ship De Fortuyn illustrates this argument. The ship sailed for Cape François in French Santo Domingo carrying a French license to trade there. After it dropped anchor in Monte Christi, a Spanish port on Hispaniola, three British privateers captured the ship. They brought De Fortuyn to Jamaica for trial despite the protestations of the Spanish governor of the island, who boarded the ship and demanded its release. A colonial vice-admiralty court condemned both ship and cargo as good prize on the ground that the ship was covering French trade. The owners of the ship appealed the court’s decision, and on June 12, 1760, the Lords of Appeals overturned the lower court’s ruling. They agreed that the ship and cargo were indeed confiscable. However, because the ship had been taken within Spanish jurisdiction and in a port belonging to the king of Spain, “within reach of his cannon and under his protection,” the court ordered the ship and cargo returned to the claimant or the full value of both restored.

When Britain found itself confronting a crisis of Dutch trading rights during the Seven Years’ War, an array of juridical concepts were available to the prize courts, enabling them to initiate doctrinal change. The principles

206. JENKINSON, supra note 112, at 7.
207. Id. at 7.
208. Id. at 8.
209. Bynkershoek explains the principle informing this rule in De dominio maris. Because dominion is coextensive with the ability to occupy something, “the power of the land properly ends where the force of arms ends. Therefore, the sea can be considered subject as far as the range of cannon extends.” BYNKERSHOEK, supra note 66, at 44.
210. A record of this case is reproduced in MARSDEN, supra note 184, at 175.
governing treaty construction rendered it possible for the British to invalidate the treaty of 1674 on the grounds that the Dutch were acting in bad faith in undertaking French colonial trade, and that general conditions had changed so dramatically as to render a strict application of the treaty subversive of the intentions of the signatory parties. Applying the principle of good faith, the Lords Commissioners of Prize Appeals determined, in the case of the Dutch ship America, that a ship participating in a trade that had been closed to it in time of peace was not acting in good faith and thereby assumed an enemy character. Thus was the Rule of the War of 1756 born. Similarly, the case law and correspondence surrounding such cases as the Jesus Maria Joseph and De Fortuyn demonstrate the role that the principle of good faith played in the emergence of the Doctrine of Continuous Voyage. For by failing to report intermediate stops, the illegal practice of transshipping became a means by which the Dutch could undertake the French colonial trade. The Doctrine of Continuous Voyage put an end to the ultimate transport of goods to a blockaded state by requiring that the trading ship account for all intermediate stops during the course of its voyage.

V. CONCLUSION

In his Discourse on the Conduct of the Government of Great-Britain in the Present War, Charles Jenkinson writes:

About the middle . . . of the last Century, when the Commercial Regulations, which at present subsist between the European Powers, first began to be formed, it became absolutely necessary to call back the Attention of Governments to those Principles of Natural Right, from whence They had strayed; and to fix, and determine, what was the Law of Nations, by the Articles of their respective Treaties[.]

Out of this process emerged the Anglo-Dutch Treaty of Navigation and Commerce of 1674, upholding the free ships, free goods doctrine and a mutual "freedom of navigation and commerce" between the two nations. Less than a century later, Britain was once again engaging in the same sort of inquiry, trying to formulate viable solutions to contemporary commercial problems through recourse to natural law theory and the law of nations. This time, however, a treaty could not provide a resolution. Instead, British prize courts became the venue in which the matter was settled.

The "Principles of Natural Right" in which British lawyers and statesmen sought the solution to the contemporary crisis of neutral rights had been set forth by Grotius and Bynkershoek. To both writers, the sum total of natural rights was defense of one's own rights and possessions, and respect for those of others. However, each writer's conception of human nature delineated the manner in which the individual person or nation could exercise those rights. For both Grotius and Bynkershoek, the laws of nature permit any and all measures against the enemy. To Grotius, however, the law of nations—the sum total of reason, custom, and treaty rights—determines

211. JENKINSON, supra note 112, at 26.
212. Treaty of 1674, supra note 12, art. 2.
213. JENKINSON, supra note 112, at 26.
belligerent rights according to man's natural desire to seek peace. Likewise, the desire to seek peace requires that the neutral try to bring the war to an end as quickly as possible by doing nothing to disadvantage the just cause and nothing to advantage the unjust one. To Bynkershoek, on the other hand, humanity's natural self-interest justifies the belligerent's destruction of the enemy by any means necessary to defend itself. The law of nations—again, a positive body of law and custom with roots in natural reason—like the law of nature requires that the neutral do nothing to advantage or disadvantage either side.

As Jenkinson's pamphlet demonstrates, the natural law theories and jus gentium jurisprudence of Bynkershoek and Grotius were not incompatible. In fact, Jenkinson rendered them compatible by cobbling together a composite theory of neutrality out of Grotian natural law theory and Bynkershoek's permissive view of wartime right. Ultimately, however, Bynkershoek's conception of neutrality carried the day in Britain, for the systems of wartime rights he propounded were most relevant to the scale and objectives of the Seven Years' War, a global war waged on battlefields and trade routes alike. The practical dimensions of this struggle were played out in prize courts, where the combatants were litigants trying to defend their property and trading rights.

Although concerned with technical points of law, the Rule of the War of 1756 and the Doctrine of Continuous Voyage at once affirmed the benefits of privileged neutrality and limited the rights of neutrals in war. They did not overhaul the doctrine of free ships, free goods, nor did they even question its legitimacy. Instead, these new rules circumscribed the doctrine's scope to only those trades that had been open to the Dutch in peacetime, creating stringent standards against which good faith in international trade could be measured. In fact, these standards constituted the means by which conflicting legal rights could be reconciled in wartime. The Doctrine of Continuous Voyage set a measure by which good faith in trade could be demonstrated through documentary proof. A Dutch ship stopped by a British privateer in the Caribbean need only show its papers to demonstrate that it was trading in good faith. Furthermore, the Rule of the War of 1756 established a legal mechanism by which treaty obligations would be upheld when undertaken in good faith, rendering it impossible for the scope of a commercial treaty to be broadened ex post facto.

Thus in 1756, when it again "became absolutely necessary to call back the Attention of Governments to those Principles of Natural Right, from whence they had strayed," the paths that governments followed were not entirely the same. Indeed, Britain and the Dutch Republic still subscribed to the Grotian view of humanity's natural sociability, as is evidenced by Jenkinson's pamphlet; their path, however, was now cobbled with cruder stones, for the Grotian conception of just war was no longer of concern to the neutral in determining its conduct with respect to belligerents. Instead, a positivist theory of neutrality began to take hold when, in order "to fix, and determine, what was the Law of Nations, by the Articles of their respective
Treaties, the prize courts generated two humble solutions with profound ramifications: the Rule of the War of 1756 and the Doctrine of Continuous Voyage.

The practical ramifications of the Doctrine of Continuous Voyage persist to this day. International legal scholarship has recently begun to recognize that the doctrine is relevant to problems for enforcement and interdiction in contemporary international affairs. In an article aptly titled The Feigned Demise of Prize, David Bederman notes the potential utility of the doctrine for the enforcement of U.N. sanctions prohibiting the export of contraband to targeted countries. He writes:

It has certainly become notorious that UN sanctions have been unsuccessful because of those countries willing to allow contraband to cross their borders into the sanctioned State. A doctrine of continuous voyage ... would, in short, shift the presumption that the destination of a cargo is the port-of-call for the vessel upon which it is being carried.

Instead, such a presumption would render the ultimate destination of cargo probative of the nature of the voyage. This permutation of the doctrine could play a role in the legal regime that will emerge around the recently launched Proliferation Security Initiative, enabling participating states to undertake interdictions where the ultimate destination of weapons of mass destruction and their components is a rogue state or a terrorist organization.

Although a full consideration of the ramifications of applying the Doctrine of Continuous Voyage to contemporary international challenges lies beyond the scope of this Essay, the viability of the doctrine merits mention.

This Essay has mapped the emergence of the Rule of the War of 1756 and the Doctrine of Continuous Voyage in the British prize courts of the Seven Years' War. It has shown, through the events and debates surrounding the emergence of these doctrines, how wartime exigencies may force public officials to reassess the basic principles that inform their understanding of international law. For British legal practitioners and statesmen of the Seven Years' War, this reassessment prompted an intellectual alignment with the legal thought of Bynkershoek and a doctrine of neutrality reflecting a commitment to positivism that has characterized international law throughout the modern period.

215. Id.
217. Id. at 40-41.