

Die unverzichtbare Wissenschaft

The Indispensable Science

*Festschrift für Wolfgang Ernst
zum 70. Geburtstag*

*Essays in Honour of Wolfgang Ernst
on the Occasion of his 70th Birthday*

Herausgegeben von
BEATE GSELL,
THOMAS RÜFNER und
ULRIKE BABUSIAUX

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Vorwort

Über die Frage, ob die Jurisprudenz als eine eigentliche Wissenschaft anzusehen ist, wird seit Langem gestritten. Wenn man unter Rechtswissenschaft die Erkenntnis des geltenden Rechts „ohne Willkür und Absicht“ und die regelgeleitete Anwendung der gefundenen Regeln auf den konkreten Fall versteht, dann ist die Existenz einer Rechtswissenschaft notwendige Voraussetzung des Rechtsstaats. Ohne Rechtswissenschaft ersetzt politische Willkür das gerechte Urteil und „lawfare“ den Kampf ums Recht.

Wolfgang Ernsts wissenschaftliches Werk lässt sich als ein großangelegter Beweis dafür lesen, dass die wissenschaftliche Behandlung des Rechts nicht nur notwendig, sondern auch möglich ist. Die rechtshistorischen Arbeiten von Wolfgang Ernst zum römischen Recht und zur gemeinrechtlichen Tradition sind ebenso wie seine unmittelbar dogmatischen Arbeiten auf die richtige Erkenntnis und Anwendung des geltenden Rechts ausgerichtet. Alle seine Arbeiten sind Beiträge zum Projekt der geschichtlichen Rechtswissenschaft.

Die konsequente Ausrichtung auf die Erkenntnis des Rechts und das Bekenntnis zum „strictly legal point of view“ stehen nicht im Widerspruch zur großen Vielfalt der Methoden und der Themen, die Wolfgang Ernst bearbeitet, sondern sind Ausdruck der Unbedingtheit des Strebens nach rechtswissenschaftlicher Erkenntnis. Die Mannigfaltigkeit des schöpferischen Wirkens des Jubilars spiegelt sich in den Beiträgen dieses Bandes, der ihm zu seinem 70. Geburtstag gewidmet ist. Sie behandeln Themen aus allen Epochen der europäischen Rechtsgeschichte und aus verschiedensten Rechtsgebieten, wenn auch der Fokus – wie im Œuvre von Wolfgang Ernst – auf den Kernbereichen des Privatrechts liegt. Deutsches und Schweizer Recht werden ebenso behandelt wie das angelsächsische Common Law. Die Autorinnen und Autoren, die von Wolfgang Ernst gelernt oder mit ihm wissenschaftlich kooperiert haben und die sich zu seinem Freundeskreis rechnen dürfen, wollen damit einen Beitrag leisten zu der Wissenschaft, die dem Jubilar am Herzen liegt.

Der berühmte Oxford-Althistoriker Sir Ronald Syme hat das Wort von der „indispensable science and art“ geprägt (BHAC 1982/83, 345). Er meinte die Prosopographie als eine für sein Fach unentbehrlichen Hilfswissenschaft. Wer die Begeisterung des Jubilars für die Rechtsidee, seinen unstillbaren Forschungsdrang und seine unermüdliche Ausdauer in der Suche nach der gerechten und konsistenten Lösung kennt, wird das Wort zwanglos auch auf die Rechtswissenschaft beziehen können. Die Rechtswissenschaft, wie Wolfgang Ernst sie pflegt, ist nicht Hilfswissenschaft. Sie ist vielmehr Leitwissenschaft der freiheitlichen Gesellschaft und zentrales Anliegen der rechtsstaatlichen Demokratie.

Foreword

Whether law is a proper science has long been controversial. If legal science combines the process of establishing the applicable rules of law “without arbitrariness or intent” with the proper application of those rules to a particular case, then the rule of law presupposes the existence of legal science. Without legal science, arbitrary political choices replace the fair judgments of the courts, and “lawfare” takes the place of justice.

The scholarly work of Wolfgang Ernst can be regarded as a single large-scale enterprise with the sole aim of proving that scientific treatment of the law is not only necessary, but also possible. Both those of his works that directly address questions of modern law and also those on Roman law and the tradition of the *ius commune* have the ultimate purpose of correctly understanding and applying the law currently in force. All of Wolfgang Ernst’s scholarship contributes to the project of historical legal science.

Wolfgang Ernst’s focus on understanding the law and his insistence on the “strictly legal point of view” are not contradicted by the variety of methods he employs or the range of topics he discusses. Rather, it is Wolfgang Ernst’s unconditional quest for legal understanding that lies at the root of this diversity of approaches. The many facets of his creative work are reflected in the contributions to this volume, which is dedicated to Wolfgang Ernst on the occasion of his 70th birthday. The papers in this book engage with topics from all epochs of European legal history and from many different legal subdisciplines. The focus, as in Wolfgang Ernst’s own work, is on the core areas of private law. German and Swiss law and the common law are all represented. The authors who have learned from or collaborated with Wolfgang Ernst and who may count themselves among his friends strive to make a contribution to the science of law that is so dear to the recipient of this Festschrift.

The celebrated Oxford ancient historian Sir Ronald Syme describes prosopography as the “indispensable science and art” (BHAC 19082/83, 345) for the study of his own discipline. Anyone familiar with Wolfgang Ernst’s enthusiasm for the idea of law, his love of research and his tireless quest for the just and consistent solution to any given legal problem will find it just as natural to apply Syme’s phrase to the science of law. Legal science as pursued by Wolfgang Ernst is not an ancillary study. It is the chief science of a society based on liberty and the rule of law, and a central concern of every democratic state.

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John Selden and the Theodosian Code

Lorena Atzeri

I. Introduction

The jurist; historian; legal historian; statesman; linguistic scholar; orientalist; antiquary; erudite; polymath; one of the most learned scholars England ever produced; a man ‘of so stupendous a learning in all kinds and in all languages’;¹ the ‘star of primary magnitude in the sky of science’;² the greatness of John Selden (1584–1654)³ has been acknowledged in many epithets. As regards Selden as a legal historian, a seminal contribution was made by Hazeltine in 1910.⁴ However, his attention was directed ‘more to his English than to his Latin, and more to his western than to his eastern writings’.⁵ More studies have followed.⁶ Wolfgang Ernst has now highlighted an aspect of Selden’s scholarship which has hitherto remained in the shade: Selden’s interest in Roman law. In the annual lecture given in 2021 to the Selden Society,⁷ Ernst was the first to ask: ‘What did Selden know about Roman law and to what use did he put his knowledge of Roman law?’. He subjected Selden’s vast literary production to a close scrutiny, focusing on two of his more significant publications: *Mare clausum* and *Dissertatio ad*

¹ So Lord Clarendon in his autobiography, reported by *Aikin*, *The lives of John Selden, Esq. and Archbishop Usher*; with notices of the principal English men of letters with whom they were connected, 1812, 191.

² *David Wilkins*, *Vita Ioannis Seldeni iuriconsulti*, in: *Id.* (ed.), *Joannis Seldeni iuriconsulti Opera omnia, tam edita quam inedita*; in tribus voluminibus collegit ac recensuit, [...], vol. I, Londini, 1726, i: ‘cum magnus Seldenus in coelo scientiarum stella primae magnitudinis, oriretur’. Hereafter, the *Opera Omnia* will be cited as ‘OpOm’.

³ On Selden and his life: *Wilkins* (fn. 2); *Aikin* (fn. 1); *Fletcher*, *John Selden 1584–1654*, Selden Society Lecture delivered in the Old Hall of Lincoln’s Inn, July 9th 1969, 1969; *Berkowitz*, *John Selden’s formative years: politics and society in early seventeenth-century England*, 1988; *Rowse*, *Four Caroline Portraits: Thomas Hobbes, Henry Marten, Hugh Peters, John Selden*, 1993; *Christianson*, s.v. Selden, John (1584–1654), lawyer and historical and linguistic scholar, in: ODNB (<https://doi.org/10.1093/ref:odnb/25052> [12.11.2025]); *Toomer*, *John Selden: A Life in Scholarship*, vols. I–II, 2009.

⁴ *Hazeltine*, in: FS für Heinrich Brunner, 1910, 579 ff.; also in: HLR 24.2 (1910), 105 ff. (parts I–III); HLR 24.3 (1911), 205 ff. (parts IV–VIII), from which I quote.

⁵ *Hazeltine* (fn. 4), 109.

⁶ E.g. *Baker*, in *Id.*, *Collected Papers on English Legal History*, vol. II, 2013, 755 ff.; *Berman*, *Yale Law Journal* 103 (1994), 1651 ff.

⁷ *Ernst*, *John Selden and Roman Law*, Selden Society Lecture delivered in the Large Pension Room of Gray’s Inn, September 20th, 2021 (forthcoming). I am grateful to Prof. Ernst for putting the proofs of his text at my disposal.

Fletam. This investigation was long overdue, since Roman law and Roman legal sources play an important, if not a primary role in many of Selden's writings. Inspired by Ernst's study, I wish to investigate a more specific aspect: what use did Selden make of the Theodosian Code (hereafter: CTh) in particular, and to what extent was he interested in its content? What was, in his opinion, the place occupied by this Code in the West?

II. John Selden: a 'bookish man'

To his contemporaries, Selden appeared to spend his life in writing and reading books.⁸ Reading his works, punctuated by countless quotes, is simultaneously to visualise the libraries and books he had at his disposal. A place of primary importance was occupied by the wonderful private collection assembled by Sir Robert Cotton, which he made available to scholars.⁹ But Selden was an assiduous visitor of many other libraries and archives. He also acquired several books and manuscripts.¹⁰ In his will, he had originally planned to leave them to the Bodleian Library, but taking offence at the action of one librarian, he cancelled his original bequest, and in a codicil to his will¹¹ left his books – more than 8,000 volumes – to his executors. But they decided to follow Selden's original will and donated most of them to the Bodleian.¹² As for the printed books, one of the executors, Sir Matthew Hale, arranged for some 200 unwanted duplicates to be given to the Cathedral Library of Gloucester. Thus, of the three printed editions of the CTh once owned by Selden, only two are now in the Bodleian,¹³

⁸ Again Lord Clarendon, reported by *Aikin* (fn. 1), 191: 'a man would have thought he had been entirely conversant amongst books, and had never spent an hour but in reading and writing'.

⁹ An insight into Selden's use of this library in *Tite*, The Bodleian Library Record 13 (1991), 486 ff.

¹⁰ On Selden's library and on his manuscripts: *Barratt*, The Bodleian Library Record 3.31 (1951), 128 ff., 256 ff. (Appendix C: List of Selden's Miscellaneous Manuscripts). A study on the previous owners of the books in *Sparrow*, The Bodleian Quarterly Record 6.70–71 (1931), 263 ff.

¹¹ Both testament and codicil have been published by *Wilkins* (fn. 2), liii–lvi.

¹² A draft document on the disposal of Selden's books, written in 1664 by Sir Matthew Hale, is now preserved in the Beinecke Rare Book and Manuscript Library, Yale University, Osborn Manuscript Files, under 'Hale, Sir Matthew, 1609–1676', file 6452 (<https://collections.library.yale.edu/catalog/2033622> [12.11.2025]).

¹³ These are: (1) *Jacques Cujas*, Codicis Theodosiani lib. XVI [...], Lugduni, 1566 (shelf-mark: A 1.12 Jur. Selden); and (2) Codicis Theodosiani libri XVI [...], Genevae, 1593 (shelf-mark: 4° C 5 Jur. Seld.). This last book bears copious annotations by Selden in the margins, and it seems to have been his 'working copy' (I am very grateful to Dr. Alan Coates, Librarian for 'Bibliography and the History of the Book' at the Bodleian Library, for his kind help). On the printed editions of the CTh: *Mommsen*, Theodosiani libri XVI [...] Pars prior: Prolegomena, 1905, CVII–CXVIII (CVII–CXVI); more recently, *Coma Fort*, Codex Theodosianus. Historia de un texto, 2014, 363–467 (405–418; 432–436); on the Lugduni/Genevae 1593 edition, also *Atzeri*, SCDR 28 (2015), 109–127: although the place of printing on the title-page is 'Lugduni', it was effectively published in Geneva.

whereas the third is to be found in the Cathedral Library of Gloucester,¹⁴ although not strictly a duplicate.¹⁵

Most of the manuscripts also found a home in the Bodleian. One is of relevance for the present study: the MS Arch. Selden. B.16 (olim 32; Summary Cat. No. 3362).¹⁶ It was produced in the 12th cent. (ca. 1129/1130) by the famous medieval historian William of Malmesbury, and contains what might be described as a Romano-centric ‘universal history’. Not only did William compose the text, assembling various works of a historical nature, but wrote the manuscript himself. This contains *inter alia* an ‘enlarged’ version of the Lex Romana Visigothorum (hereafter: LRV), i.e. augmented with later additions.¹⁷ In the architecture of William’s work, the LRV figures (at ff. 140^v–222^v) rather as an appendix to better illustrate the later history of Rome, as William himself states (at f. 140^r). Its text, however, shows some peculiar features: the CTh is incomplete, lacking Book I; while it has been supplemented with elements which were not part of the LRV, i.e. some of the constitutions which were originally included in the CTh, but had been left out by the Visigothic compilers, and some Novels also absent from the LRV. Indeed, many of the Novels reported here have not been transmitted in any other extant source. Selden clearly attached particular value to this manuscript, such that in his codicil he singled it out from his other manuscripts.¹⁸ In his published works Selden always refers to this manuscript as ‘my own manuscript’. It is now considered one of the most important witnesses for the reconstruction of both the CTh and the post-Theodosian Novels. Selden thus had exclusive access to some material which had hitherto been unknown. What use did he make of the CTh and of this new material?

¹⁴ *Jacques Cujas*, *Codicis Theodosiani libri XVI. [...] Omnia ex veteribus libris auctiora aut emendatiora*, Parisiis, 1586 (shelfmark: SEL 2.13). Apart from Selden’s famous ex-libris ‘*περὶ παντὸς τὴν ἐλευθερίαν*’ handwritten on the title-page, this copy does not show any sign of use by him (for this information I would like to thank Rebecca Phillips, Archivist at Gloucester Cathedral Library and Archives). The Godefroy edition (see below, fn. 89) in the same Cathedral Library, despite its shelf-mark (SEL 2.6–9) did not, of course, belong to Selden.

¹⁵ This 1586 edition has never been among the holdings of the Bodleian Library.

¹⁶ On this manuscript, see *Mommsen*, *Prolegomena* (fn. 13), LXV–LXVII; *Meyer*, *Prolegomena to Mommsen/Meyer* (eds.), *Theodosiani libri XVI*, vol. II: *Leges Novellae [...]*, 1905, XLVIII. More recently: *Thomson*, in: *De La Mare/Barker-Benfield* (eds.), *Manuscripts at Oxford: an exhibition in memory of Richard William Hunt (1908–1979)*, Keeper of Western Manuscripts at the Bodleian Library [...], 1980, 27 ff. (29); *Thomson*, *William of Malmesbury*, 1987, 67, 177; *Munk Olsen*, *L’étude des auteurs classiques latins aux XIe et XIIe siècles*. Tome I. *Catalogue des manuscrits classiques latins [...]*, 1982, 374 (C.31); *Gameson*, *The Manuscripts of Early Norman England* (c. 1066–1130), 1999, 126; further, *Coma Fort* (fn. 13), 188–195; *Atzeri*, *Initium* 2008, 3 ff. (18–41).

¹⁷ A description of the content of this part of the manuscript in *Atzeri* (fn. 16), 31–36.

¹⁸ Reported in *Wilkins* (fn. 2), lv: ‘I give and bequeath all and every my manuscripts [...]; as also with them a manuscript in Latin concerning Dares Phrygius, Paulus Orosius, Jordanes, and some others, together with Theodosius his Code, Pauli Sententiae, etc.’

III. The Theodosian Code in Selden's early works

The first trace of the use of the CTh by Selden can be detected in his *De diis Syris Syntagmata II* (1617).¹⁹ Here, Selden refers to the title of the CTh *De Iudaeis et Coelicolis* (Cod. Theod. 16, 8), and specifically to a constitution mentioning the *Coelicolae*.²⁰ Brief quotations appear in the *Historie of Tithes*,²¹ in which he refers to two constitutions on the duty of paying a tenth of earnings of mines and quarries.²² A few quotations can also be found in *Mare clausum*, which – although published in 1635²³ – had been written by 1618: here Selden refers to a constitution issued by Theodosius II at the request of the Bishop Asclepiades²⁴; moreover, on two different occasions, he quotes a constitution on the officers patrolling the borders of the Roman Empire.²⁵ A further reference to the CTh has been inserted in the second edition of *Mare clausum*,²⁶ where Book I.6 has been expanded with a disquisition on the Roman fleets. Here Selden recalls a title of the CTh on the *naves lusoriae*.²⁷ More quotations can also be found in his notes to the *History* composed by Eadmerus Cantuariensis.²⁸ Here he quotes²⁹ various constitutions both from the CTh³⁰ and the Code of Justinian (hereafter: CJ). Sporadic references are also found in his edition of the so-called *Marmora Arundelliana*.³¹ In commenting upon fragm. II and the right to asylum, Selden refers to the titles *De his qui ad ecclesias confugiunt* (Cod. Theod. 9, 45; C. 1, 12), and *De crimine sacrilegii* (C. 9, 29).³² As for fragm. IV, in order to explain the meaning of *Asiarcha*, Selden refers to various constitutions both from the CTh and the CJ.³³ Finally, in commenting on fragm. IX and the office of *alytarcha*,

¹⁹ John Selden, *De diis Syris syntagmata II* [...], Londini, 1617.

²⁰ Selden (fn. 19), 278 (OpOm II.1, 406): Hon./Theod. Cod. Theod. 16, 8, 19 (a. 409).

²¹ John Selden, *The Historie of Tithes*, [...], s.l. [but London], 1618. This book had sparked bitter accusations by the clergy and a long controversy.

²² Selden (fn. 21), 39 f. (OpOm III.2, 1098): Grat./Valent./Theod. Cod. Theod. 10, 19, 10 (a. 382); Grat./Valent./Theod. Cod. Theod. 10, 19, 11 (a. 384).

²³ John Selden, *Mare clausum, seu de dominio maris libri duo* [...], Londini, 1635.

²⁴ Selden (fn. 23), 83 fn. d (= OpOm 2, 2 col. 1251 fn. a): Hon./Theod. Cod. Theod. 9, 40, 24 (a. 419) = C. 9, 47, 25.

²⁵ Selden (fn. 23), 144 fn. f, 155 and fn. b (OpOm II.2, 1296 fn. g, 1306 and fn. l): Valent./Valens Cod. Theod. 7, 1, 9 (a. 367).

²⁶ John Selden, *Mare clausum, seu de dominio maris libri duo* [...], Londini, 1636.

²⁷ Selden (fn. 26), 120 fn. h (OpOm II.2, 1300 fn. l): Cod. Theod. 7, 17.

²⁸ John Selden, *Eadmeri monachi Cantuariensis historiae novorum sive sui saeculi libri VI, res gestas* [...], in lucem ex bibliotheca Cottoniana emisit [...] et notas porro adiecit [...], Londini, 1623.

²⁹ John Selden, *Ad Eadmerum Notae*, in OpOm II.2, 1679.

³⁰ Under the titles *De spectaculis*, Cod. Theod. 15, 5; *De decurionibus*, Cod. Theod. 12, 1, and *De Iudaeis*, Cod. Theod. 16, 8.

³¹ John Selden, *Marmora Arundelliana, sive saxa Graece incisa* [...], Londini, 1628.

³² Selden (fn. 31), 126 (OpOm II.2, 1031).

³³ Selden (fn. 31), 163 (OpOm II.2, 1567): Hon./Theod. Cod. Theod. 15, 9, 2 (a. 409); 165 (OpOm II.2, 1570): Theod./Arcad./Hon. Cod. Theod. 6, 3, 1 (a. 393); Grat./Valent./Theod. Cod. Theod. 12, 1, 103 (a. 383); Constant. C. 5, 27, 1 (a. 336) and Leo C. 1, 36, 1 (a. 465).

Selden again finds testimonies in both Codes.³⁴ In all these early works, the CTh is clearly used by Selden as a source of historical, chronological and terminological information, while the legal content is little exploited.

IV. The first appearance of the manuscript of William of Malmesbury

In 1629, amidst a dispute between the House of Commons and the Crown, Selden, by now a Member of Parliament, was accused of ‘sedition and contempt’ and committed to the Tower.³⁵ He was later transferred to the infamous Marshalsea prison, from which he was only released in May 1630.³⁶ In the meantime, his library had been sealed, and he was even deprived of the use of pen, ink, paper and – above all – his books, being permitted only a few from his friends. Selden spent the months in prison reading the Bible, the Talmuds and Lucian. As noted by Aikin, ‘Selden’s literary studies at this period of his life were of a kind extremely alien from the stormy scenes in which he was politically engaged’.³⁷

The fruit of this reading was his *De successionibus in bona defuncti* (1631)³⁸ written during his ‘abundant otium’ in prison (so Selden).³⁹ Here Selden explores the regulations on succession in Jewish and Roman law. It is his first fully legal treatise on a private law subject, although examined from an historical perspective. In a veritable ocean of quotations of sources from every epoch, the only references to the CTh are Hon./Theod. Cod. Theod. 16, 8, 22 (a. 415) and Grat./Valent./Theod. Cod. Theod. 2, 1, 10 = C. 1, 9, 8 (a. 398),⁴⁰ which allowed the Jews to follow their own laws; and to Theod./Valent. Cod. Theod. 16, 8, 28 (a. 426),⁴¹ forbidding Jews and Samaritans to disinherit their children and grandchildren for converting to Christianity. As in his previous works, Selden quotes these sources in a somewhat uncritical way, without really examining their legal content.

However, a significant change can be detected in the second, revised edition, published in 1636.⁴² Here for the first time Selden explicitly mentions his manuscript of the LRV. It may therefore be inferred that Selden acquired it between 1631 and 1636. The most relevant additions are already in the first few pages, in which more references to other laws on the Jews have been added.⁴³ One of

³⁴ Selden (fn. 31), 172 (OpOm II.2, 1577): Grat./Valent./Theod. Cod. Theod. 10, 1, 12 (a. 379); Hon./Theod. Cod. Theod. 15, 9, 2 (409); Leo C. 1, 36, 1 (a. 465) and Theod./Valent. C. 11, 78, 2 (s.d.).

³⁵ Aikin (fn. 1), 70 f.

³⁶ Aikin (fn. 1), 78.

³⁷ Aikin (fn. 1), 72 f.

³⁸ John Selden, *De successionibus in bona defuncti, seu iure haereditario* [...], Londini, 1631.

³⁹ *Ibid.*, I. In the second edition, the reference to the prison is omitted.

⁴⁰ Selden (fn. 38), III f.

⁴¹ Selden (fn. 38), IV.

⁴² John Selden, *De successionibus in bona defuncti ad leges Ebraeorum liber singularis. Editio altera, correctior et multum auctior. Accedunt eiusdem de successione in pontificatum Ebraeorum libri duo* [...], Londini, 1636.

⁴³ Selden (fn. 42), IV f. (OpOm II.1, iii): Grat./Valent./Theod. C. 1, 9, 8; Arcad./Hon. Cod. Theod. 2, 1, 10 (a. 398); Cod. Theod. 16, 8.

them, namely *Arcad./Hon. Cod. Theod. 2, 1, 10* (a. 398), imposing the application of Roman law in cases in which the Jewish religion was not at issue, is closely analysed. Selden – citing his manuscript – points out some philological aspects of the text of this imperial enactment:

‘Iudaeos quidem omnes *Romano communi more viventes* (sic lege ex Ms. meo codice; non *iure*, ut in editis) [...]; sic interim, ut *si qui* [...] *tanquam cognitoris arbitrio fuerint attributae*. Ita leguntur postrema rescripti verba in Codice meo Theodosiano Ms. sed acephalo, quem ante annos CCCC abbreviationi suae de gestis imperatorum, [...] subiunxit Guilielmus Malmesburiensis monachus. Editus Theodosianus habet *tanquam ex sententia cognitoris arbitri fuerint attributi*. [...]. Verum Codex meus ms. pro eo, quod est *apud Iudaeos vel patriarchas*, habet *apud iudices vel patriarchas*. Contra receptissimam utriusque codicis editi lectionem.’

In comparing the printed editions of the CTh with the version of this constitution in his manuscript, Selden simply reports its variant readings, without passing judgment on their value. But he also gives some details about the manuscript itself and its content.

The manuscript is also used in relation to the law of succession of the Jews and Samaritans. On this topic, in the 1631 edition Selden had not referred to any Roman legal source, but in the second edition he added the following lines:

‘Et observandum est illud D. Theodosii in Novellis tit. 3 ubi *Neminem Iudaeum, neminem Samaritam* (seu ut in Ms. meo *Samaritanum*) *neutra lege constantem*, etc.’⁴⁴

This refers to *Nov. Theod. 3* (a. 438), which, among other disabilities, excluded both Jews and Samaritans from higher office. In the first edition of the *De successionibus*, Selden had passed this over, but now he notes some textual discrepancies between the manuscript and the printed versions. It cannot be said that the reading ‘Samaritanum’ instead of ‘Samaritam’ made a substantial difference, but it is a manifestation of Selden’s philological orientation.

V. The Theodosian Code in Selden’s ‘Oriental’ writings (1640–1649)

Selden’s further research on Oriental – mainly rabbinical – law led him to publish a significant number of renowned treatises. Here he made increasing use of the CTh and of his own manuscript. In 1640, Selden published his *De iure naturali et gentium*.⁴⁵ The panoply of Roman legal sources employed has inevitably increased, and Selden also makes use throughout this work of the CTh and the post-Theodosian Novels. His manuscript plays an important role. To give one example, in Book III.19, dedicated to questions of chronology, Selden recalls a constitution forbidding the conduct of business in court on a Sunday. Selden’s manuscript presented some readings which were different from those in the printed edition:

⁴⁴ Selden (fn. 42), 99 (OpOm II.1, 74).

⁴⁵ John Selden, *De iure naturali et gentium iuxta disciplinam Ebraeorum libri septem*, Londini, 1640.

‘Constantini Magni [...] rescriptum: *sicut indignissimum videbatur, diem Solis* (insertur ibi, in Guilielmi Monachi Malmesburiensis, quae habeo MS. Excerptis e codice Theodosiano, *quem dominicum dicimus*) *venerationis suae* (ex MS. corrige *veneratione sui celebrem* etc.’⁴⁶

The variant reading ‘veneratione sui’ sounded more convincing to Selden, who did not hesitate to suggest emending the printed editions accordingly. The reading was in fact to be confirmed in due course by other manuscripts and adopted by subsequent editors of the CTh.

Various constitutions from the CTh are also quoted in the commentary to the *editio princeps* of Eutychius’s *History*, published by Selden in 1642.⁴⁷ References to the CTh – mostly to Book XVI – are also scattered throughout Selden’s *De anno civili* (1644).⁴⁸ Neither of these two works, however, shows any reference to Selden’s manuscript.

In 1646, there appeared Selden’s *Uxor ebraica*,⁴⁹ in which the complex regulation of women in ancient law is examined. Here numerous Roman legal sources have not only been quoted, but – unlike in most of the previous works – analysed in detail, and their content discussed, while their text is also subject to philological scrutiny. In Book III.12, on adultery, Selden deals with Nov. Maior. 9 (a. 459). This Novel had been recovered (along with others) and published in 1571 by the French humanist Pierre Pithou,⁵⁰ and since then was included in editions of the CTh. However, according to Selden, its printed text was still not free from errors, so that he considered it worth transcribing the whole text ‘e codice meo pervetusto qui Guilielmi erat monachi Malmesburiensis’,⁵¹ which exhibited some significant variant readings. In actual fact the quality of these readings is inferior, with the exception of the *subscriptio* of the constitution, i.e. its date of issue. In this latter regard Selden puts forward convincing arguments in favour of the reading of his manuscript,⁵² which was adopted in subsequent editions.

In Book III.28, on divorce, Selden reports the printed text of a constitution of Constantine on *repudium*,⁵³ writing in the notes the variant readings of his manuscript. One of them, namely *dissolutorem*, passed into future editions of the Code. Another application of the manuscript by Selden concerns a constitution issued in 333 by Constantine on the jurisdictional power of bishops. In the printed editions of the CTh, it was located, together with two more consti-

⁴⁶ Selden (fn. 45), 407 (OpOm I.1, 389): Const. Cod. Theod. 2, 8, 1 (a. 321).

⁴⁷ John Selden, Eutychii Aegyptii, patriarchae Orthodoxorum Alexandrini, [...] Ecclesiae suae origines, [...], Londini, 1642.

⁴⁸ John Selden, De anno civili et calendario veteris ecclesiae seu reipublicae Iudaicae dissertatio [...], Londini, 1644.

⁴⁹ John Selden, Uxor Ebraica, seu de nuptiis et divortiis, ex iure civili, id est divino et Talmudico, veterum Ebraeorum libri tres, [...]. Accedunt non pauca de contrahendis solvendisque matrimoniis paganorum, Mahumedanorum atque Christianorum, idque ex jure tum caesareo [...], Londini, 1646.

⁵⁰ Pierre Pithou, Imperatorum Theodosii Valentiniani Maioriani Anthemii novellae constitutiones XLII nunc primum in lucem editae, Lutetiae, 1571.

⁵¹ Selden (fn. 49), 388 (OpOm I.2, 739).

⁵² Selden (fn. 49), 390 (OpOm I.2, 739 f.).

⁵³ Const. Cod. Theod. 3, 16, 1 (a. 331).

tutions, at the end of Book XVI under the title *de episcopali iudicio*, with the caveat that such a title did not in fact belong to the Code itself. In 1631, the French Jesuit Jacques Sirmond published an independent collection of 16 constitutions of this kind,⁵⁴ which also included (as Sirm. 1) the constitution of Constantine mentioned above. Selden's manuscript presented those three constitutions as well, located in Book XVI of the CTh under the apparently new title *12 de episcopis, ecclesiis et clericis*⁵⁵ (which may be due to the pen of William of Malmesbury). Finally, Nov. Theod. 12 (a. 439), on divorce, was also collated by Selden against his manuscript: here again, he retained the edited text, merely writing as marginal notes six variant readings found in his manuscript,⁵⁶ some of which were adopted in subsequent editions of the Novels.

VI. The Theodosian Code in Selden's 'European Legal History'

In 1647, another of Selden's masterpieces saw the light: the *editio princeps* of *Fleta*, an early treatise on the common law of England. This was accompanied by a short, but very valuable legal-historical treatise by Selden, the *Dissertatio ad Fletam*.⁵⁷ In the words of Ernst, Selden's *Dissertatio* is 'nothing less than a comprehensive history of European law, from late antiquity to the middle of the seventeenth century', and a 'pioneering work of advanced historical research'.⁵⁸ As stated by Ernst,

'For Selden, only one strand of Imperial law stood out that had continued to enjoy the status of living law, and that was the Theodosian Code, as it had been integrated into the Lex Romana Visigothorum. He stresses that Justinian's codification had not displaced the Theodosian Code.'⁵⁹

The CTh is first duly listed⁶⁰ among the sources of the *Jus Caesareum*. But it is in Ch. V that Selden dedicates two Sections (V.2 and 3) to the CTh, attributing to it an unprecedented importance. In V.2, he also deals with the question of the date of Nov. Theod. 1 (which will be discussed in § VIII, below). The whole Section V.5 is then dedicated to demonstrating Selden's contention, according to which Roman law in Western Europe was for centuries represented by the *Theodosiana iura*, as received in the LRV and in other barbarian codifications, rather than by the Justinianic compilation. His opinion was based on his unique knowledge of the medieval sources, often derived from manuscripts and archival doc-

⁵⁴ Jacques Sirmond, Appendix Codicis Theodosiani novis constitutionibus cumulator [...], Parisiis, 1631.

⁵⁵ Selden (fn. 49), 563 f. (OpOm I.2, 830).

⁵⁶ Selden (fn. 49), 566 (OpOm I.2, 831 f.).

⁵⁷ John Selden, *Fleta, seu commentarius juris Anglicani* [...] nunc primum typis editus. Accedit tractatus vetus [...] *Fet assavoir* dictus. Subjungitur [...] ad *Fletam* dissertatio historica, Londini, 1647.

⁵⁸ Ernst (fn. 7), 17 f.

⁵⁹ Ernst (fn. 7), 21. See also the analysis at 22–26.

⁶⁰ Selden (fn. 57), 455 (OpOm II.2, 1037).

uments. These revealed that Justinianic law had not penetrated the West before the 12th cent. Among various pieces of evidence, Selden quotes the punishment of homosexual acts by ‘burning at the stake’, foreseen in a constitution included in the CTh⁶¹ but not in the CJ. It followed that any mention of this punishment in medieval sources could only derive from the former. Selden again reports⁶² the version of this constitution found in his manuscript, which had a number of better readings than those found in contemporary printed texts.

In Section V.6 Selden goes on to demonstrate how canon law legislators and writers made frequent use of the CTh. Here he again refers to those imperial constitutions collected under the title *De episcopali iudicio*, dealing once more with the question of the original structure of Book XVI of the CTh.⁶³ In the course of this discussion, he dates his manuscript to the year 1120,⁶⁴ a date which is not far from modern attributions. In discussing the crucial question of the jurisdictional power of bishops, more examples of the continuous use of the CTh rather than the CJ are given by Selden, and further references to the manuscript are made. Finally, Selden deals (in Ch. VII) with the reception of Roman law in Britain. For the 12th cent., what better example could be cited than the use of the CTh – or rather the LRV – by William of Malmesbury?⁶⁵ Even though William knew of the existence of the CJ, he had selected for his ‘universal history’ the CTh.⁶⁶ On this occasion, Selden also gives a very detailed description of his manuscript and of its particular features.⁶⁷

VII. The Theodosian Code in Selden’s last ‘Oriental’ study *De synedriis*

In his last years, Selden returned to his beloved ‘Oriental’ studies. In his treatise *De synedriis*, he reconstructs 4,000 years of the history of jurisdiction regarding the Jews. He lived to see only the first two volumes of his work published, in 1650⁶⁸ and 1653 respectively,⁶⁹ the third appearing a year after his death, in 1655.⁷⁰ In this work, Selden’s historical and comparative method is very much to the fore. Due to the numerous imperial statutes enacted by the Christian Emperors on religious matters in general, and on the legal position of the Jews in particular, references to the CTh are frequent. Here too, Selden often uses Wil-

⁶¹ Valent./Theod./Arcad. Cod. Theod. 9, 7, 6 (a. 390).

⁶² Selden (fn. 57), 490 (OpOm II.2, 1066).

⁶³ Selden (fn. 57), 491 (OpOm II.2, 1068).

⁶⁴ Selden (fn. 57), 493 (OpOm II.2, 1069).

⁶⁵ Selden (fn. 57), 506 f. (OpOm II.2, 1081).

⁶⁶ Selden (fn. 57), 507 f. (OpOm II.2, 1082).

⁶⁷ *Ibid.*

⁶⁸ John Selden, *De synedriis et praefecturis iuridicis Ebraeorum liber primus*, Londini, 1650. I will only cite it from the Opera Omnia.

⁶⁹ John Selden, *De synedriis et praefecturis iuridicis Ebraeorum liber secundus*, Londini, 1653.

⁷⁰ John Selden, *De synedriis et praefecturis iuridicis Ebraeorum liber tertius*, Londini, 1655.

liam's manuscript as a quarry for new readings, constantly collating its text with that of the printed editions.

A key-provision was found in a constitution issued in 398,⁷¹ which regulated the jurisdiction to which the Jews were subjected. Selden, who had already examined it in the second edition of his *De successionibus*, reconstructs its application and reception in later legal sources. He reports⁷² the text as given in the printed editions of the CTh, adding all the variant readings derived from his manuscript. Inevitably, Selden had also to deal with the jurisdiction of bishops. Numerous other constitutions from the CTh are quoted, including the three constitutions *de episcopali iudicio* appended to the Code. For Sirm. 1 (a. 333) he also refers to his manuscript.⁷³ Another occasion for providing some new variant readings is the analysis of Valens/Grat./Valent. Cod. Theod. 16, 2, 23 (a. 376) on jurisdiction in ecclesiastical matters:

*'Qui mos est, inquit, causarum civilium, idem in negotiis ecclesiasticis obtinendus est (sic Ms. meus codex uti et Baronius; ubi editi habent obtinendi) [...] aut inlustribus potestatibus audienda (sic Ms. ubi editi Audientia) constituit.'*⁷⁴

The readings derived from the manuscript were in fact of better quality, and have all been adopted in modern editions of the CTh. From his manuscript Selden also reports the whole text of Sirm. 3 (a. 384?), claiming that the version in his manuscript was superior to that published by Sirmond.⁷⁵

In volume II, Selden focuses on various aspects of civil, criminal and religious jurisdiction in Jewish as well as Roman law. The references to the CTh are again numerous. This applies especially to those constitutions concerning the recognition of the special jurisdiction of the Jews and their *patriarchae*, and to the introduction of analogous jurisdictional powers for the Christian bishops. The CTh, and particularly Book XVI, is considered by Selden essential for reconstructing the historical development of these regulations, and some citations of the manuscript can be found here as well. In Ch. XI.6, dedicated to oaths sworn by Christians, Selden notes that, on one occasion, the text of a constitution had been substituted in his manuscript by its *interpretatio*:⁷⁶ a phenomenon which was typical of the epitomes of the LRV. Moreover, in the *Addenda*,⁷⁷ Selden observes that the addressee of the constitution Valens/Grat./Valent. Cod. Theod. 2, 2, 1 (a. 376) was indicated in his manuscript as the praetorian prefect *Bassus*, instead of (the *praefectus Urbi*) *Graecum* or – as in the CJ⁷⁸ – *Gracchum*, both readings found in the printed editions. He then reports the final lines of the same constitution, which again differed in some points from the version in the printed editions.

⁷¹ Arcad./Hon. Cod. Theod. 2, 1, 10 (a. 398).

⁷² Selden (fn. 68), in OpOm I.2, 865.

⁷³ Selden (fn. 68), in OpOm I.2, 956.

⁷⁴ Selden (fn. 68), in OpOm I.2, 965 f.

⁷⁵ Selden (fn. 68), in OpOm I.2, 968.

⁷⁶ Selden (fn. 69), 489 (OpOm I.2, 1471).

⁷⁷ Selden (fn. 69), 740 (OpOm I.2, 1492).

⁷⁸ Valens/Grat./Valent. C. 3, 5, 1 (a. 376).