

Introduction

Latinorum Philosophorum decus omne penes Ciceronem stat: cujus duo opera de Legibus; & praesertim de Officiis, mirum quantum conferre possunt huic materiae. . . Grotius multa debet his libris, etiam ubi non ostendit.

Johann Heinrich Böcler (1663)

Thomas Hobbes (1588–1679), in his *Elements of Law*, hinted at the problems associated with establishing a doctrine of sources of natural law: “What it is we call the law of nature, is not agreed upon by those that have hitherto written. For the most part, such writers as have occasion to affirm, that anything is against the law of nature, do allege no more than this, that it is against the consent of all nations, or the wisest and most civil nations.” This notion of the wisest and most civil nations seemed problematic to Hobbes, and not sustainable: “But it is not agreed upon, who shall judge which nations are the wisest.”¹ This contention aimed directly at the heart of Hugo Grotius’ (1583–1645) natural law theory as stated in his *De iure belli ac pacis* which confines the relevant consent to the “wisest and most civil nations.” Grotius does not seem to share Hobbes’ qualms in his judgement as to which nations are the wisest: “Histories have a double Use with respect to the Subject we are upon, for they supply us both with Examples and with Judgments. Examples, the better the Times and the wiser the People were, are of so much the greater Authority; for which Reason we have preferred those of the ancient Grecians and Romans before others.”²

Grotius’ use of classical antiquity, starting in his early work, did not go unnoticed by his adversaries. In 1613, the Scottish jurist William Welwod in his *An Abridgement of All Sea-Lawes* mounted fierce criticism of Grotius’ famous 1609 essay *Mare liberum*, attacking especially Grotius’ way of arguing with classical texts:

¹ *EL*, 75. ² *RWP*, 1.123–24; *IBP* prol. 46.

Now remembering the first ground whereby the author would make *mare liberum* to be a position fortified by the opinions and sayings of some old poets, orators, philosophers, and (wrested) jurisconsults – that land and sea, by the first condition of nature, hath been and should be common to all, and proper to none – against this I mind to use no other reason but a simple and orderly reciting of the words of the Holy Spirit concerning that first condition natural of land and sea from the very beginning . . .³

After adducing citations from Genesis in support of his stance, Welwod continues: “And thus far have we learned concerning the community and propriety of land and sea by him who is the great Creator and author of all, and therefore of greater authority and understanding than all the Grecian and Roman writers, poets, orators, philosophers, and jurisconsults, whosoever famous, whom the author of *Mare Liberum* protests he may use and lean to without offence.”⁴

The dispute between Grotius and Welwod thus clearly turned on the proper identification of the relevant rules governing “that first condition natural of land and sea from the very beginning.” While Grotius “uses and leans to” Greek and Roman writers to develop the norms of the natural law, his adversaries in the dispute about the freedom of the seas rely chiefly on other sources, such as “the words of the Holy Spirit” in the case of Welwod, or the papal donation and custom in the case of Grotius’ Spanish and Portuguese opponents, as discussed below. A crucial premise of Grotius’ argument therefore lies in the contested doctrine of sources of the law he is trying to establish – a law that has its ultimate source declaredly in nature, yet seems to be discernible in the “illustrations and judgements” provided by some Greek and Roman writers. The question of the sources of law is of fundamental importance in a horizontal system lacking a lawgiving authority, and the way Grotius attacks his adversaries’ position on the level of the sources of law is therefore of general significance.⁵

Grotius was a humanist.⁶ When the Dutch East India Company (VOC) retained Grotius’ humanist skills in 1604 to mount a legal defense of the VOC’s expansionist war in the East Indies,⁷ he was able to fall back upon a tradition of classical arguments in favor of Roman imperialism. By adapting the classical tradition to contemporary circumstances, Grotius brought

³ *ML* Armitage, 66. ⁴ *Ibid.*, 67.

⁵ Reminiscent of today’s debates about the sources of international law; see, e.g., Higgins 1994, 17.

⁶ See the contributions to Blom and Winkel 2004.

⁷ See Fruin 1925, 39–42; see also Ittersum 2006.

about what has been hailed as a revolutionary and essentially *modern* theory of natural law and of subjective natural rights.⁸ This seeming tension between modern liberalism having its origins in the European overseas expansion of the seventeenth century⁹ on the one hand and the “extremely deep roots in the philosophical schools of the ancient world”¹⁰ displayed by Grotius’ work on the other can only be elucidated by investigating the use the moderns made of the classical tradition.¹¹ Grotius’ work is eminently suitable for such an undertaking, because he is a figure at the crossroads: steeped in classical learning, yet of considerable importance for the subsequent history of modern political and legal thought. The adaptation of the classical tradition in Grotius’ natural law works is thus of considerable interest, given the effect of Grotian natural law on the history of political thought, including the framing of the American Constitution.¹² The question arises of the extent to which Grotius’ reception of classical texts had an effect on the areas in which scholars have portrayed him as a revolutionary reformer. The question is especially urgent with regard to Grotius’ doctrine of subjective natural rights, which would prove extraordinarily influential and has been described as an innovative, essentially modern theory that paved the way for liberalism and human rights.¹³

This book seeks to provide an account of Grotius’ influential theory of natural law and natural rights from the vantage point of Grotius’ use of the classics. It is my argument that Hugo Grotius developed his influential theory of natural law and natural rights on the basis of a Roman tradition of normative texts. Formally, Grotius’ natural law was derived from universal reason; more often than not, reason’s precepts happened to be found in the Roman law texts of the *Digest*. Seeking to situate Grotius in European intellectual history, the book argues that his natural law doctrine relied primarily on a Roman tradition of law and political thought. This Roman tradition allowed for the formulation of a set of universal rules and, importantly, rights which were supposed to hold outside of states and be binding on them. At the heart of this doctrine lies a certain conception of the state

⁸ See Tully 1980, 68–72, 80–85, 90, 114, 168; Tuck 1979, 58–81; Tuck 1993, 137–76; Tuck 1999, 78–108.

⁹ Tuck 1999, 14–15. ¹⁰ *Ibid.*, 9.

¹¹ For a broad overview of the connection between natural rights, imperial expansion and the Roman legal tradition, see Pagden 2003.

¹² See Haakonssen 1985; Haakonssen 1996, 30; Haakonssen 2002, 27–28, claiming a tradition from Grotius to Barbeyrac and Burlamaqui up to the Founding Fathers; Grunert 2003; White 1978. For a bibliography of all editions of Grotius’ works up to the twentieth century, see Ter Meulen and Diermanse 1950.

¹³ See Tuck 1979, 58–81; Tully 1980, 68–72, 80–85, 90, 114, 168; Tuck 1993, 137–176; Tuck 1999, 78–108. Haggemacher 1997, 114n1 emphasizes the importance of Grotius’ doctrine of subjective natural rights for the human rights declarations of the seventeenth century.

of nature and of human nature. I should like to argue in the course of the book that Grotius built his influential theory of natural law and natural rights out of certain classical materials: a Stoic anthropology served as the basis of an essentially Ciceronian theory of justice. This in turn was given expression as a legal code with the help of a Roman law framework. The classics for Grotius, then, were everything but “mere humbug”¹⁴ – they provided crucial elements of his influential doctrine of natural law and natural rights.

The result was an important vision of a rights-based theory of justice which had ramifications both within states and internationally. Grotius’ system of rights could potentially limit the power of governments while at the same time providing justification for freedom of trade and punitive wars between states. Reasons for the doctrine’s success include the fact that it was based on a secular theory of obligation and the sources of law. Furthermore, Grotius’ theory did not presuppose either an established polity or a conception of the good life. The resulting body of rules and rights was thus neither concerned with distributive justice – the prerogative of government – nor with virtue and *eudaimonia*. It was concerned, instead, with private property as the yardstick of justice, expressed in the fine-grained idiom of Roman law. This made Grotius’ into a theory that was both highly applicable and largely insulated from ethical disputes about the good life.

Few of these features were exclusive to Grotius. There are however two important reasons for focusing this book on him, rather than, say, on predecessors such as Fernando Vázquez de Menchaca (1512–69) or Alberico Gentili (1552–1608).¹⁵ The first lies in the fact that Grotius’ enormous success eclipsed his predecessors, and he thus represents one of the most prominent and influential links between the classics on the one hand and the writers of the seventeenth and eighteenth centuries on the other. To the extent that we are still under the influence of Grotius and the ideas flowing through him and shaped by him, the exercise of situating him more precisely in terms of European intellectual history will allow us to get a firmer grasp on our own ideas and their presuppositions.¹⁶ The natural law tradition that he shaped later endowed political theorists of

¹⁴ Eyffinger 2001/2, 118, rendering the Leiden lawyer and professor Benjamin M. Telders’ view of Grotius’ classical references. Telders had issued an extract of *De iure belli ac pacis* omitting these references completely (Telders 1948a). Cf. also Telders 1948b, 8ff.

¹⁵ See Brett 2011, 69–71, on the relationship between Vázquez’ and Grotius’ understandings of natural law.

¹⁶ See n12 above. For Grotius’ influence on the political thought of the English Whigs, see Zuckert 1994, 106–15, 188 (on the influence on John Locke’s *Questions Concerning the Law of Nations*). For Grotius’ status as the second most important legal authority after Coke in pre-revolutionary

the republican mold with a moral account of a realm outside of or prior to the political, viz. the state of nature, thus providing political theory with a yardstick for a moral evaluation of the extent of political power. Historically, this combination of the natural law tradition, growing out of the reception of the normative Roman texts mentioned above, with the republican “institutional” tradition led to constitutionalism and the entrenchment of some of the Roman remedies as constitutional rights.¹⁷ The second reason lies in Grotius’ extremely nuanced way of fleshing out a rule-based theory of natural justice with the intricate details – intimately known to him – of Roman law. This yielded a doctrine of natural law that was correspondingly fine-grained and, above all, legalized and juridical, containing a very high percentage of Roman legal rules and remedies. This, and the resulting equally fine-grained theory of natural rights, set Grotius apart from his predecessors, even Gentili.¹⁸

I am seeking to make the case that the classics must be taken seriously as a highly relevant intellectual context for the humanist Grotius, a context which needs to be taken into account alongside contemporary politics and other intellectual traditions. Both Grotius’ immediate political context – his “experience of international relations”¹⁹ – and the medieval and late scholastic just war tradition²⁰ certainly deserve the ample scholarly attention paid to them and constitute important influences on Grotius’ natural law doctrine.²¹ If the findings of the present book are correct, however, the impact of the normative Roman sources outlined above on Grotius and

America, see Howard 1968, 118–19. For Grotius’ impact on international law, see Haggemacher 1985. For the influence on the early German enlightenment, see Hochstrasser 2000.

¹⁷ István Hont argues, largely based on Tuck’s interpretation of Grotius and thus, to my mind, not entirely convincingly, that Grotius was pivotal in integrating the republican principle of reason of state into natural jurisprudence and that he “juridically reformatted reason of state”: Hont 2005, 11–17.

¹⁸ Grotius is widely acknowledged to have made important contributions to an influential doctrine of individual natural rights. See already Hartenstein 1850, 522, referencing *IBP* 1.2.1.5. On Grotius as the first of the natural lawyers to develop a fully fledged and detailed account of subjective natural rights, see Haggemacher 1990, 161; Harrison 2003, 144–52. For an interpretation downplaying the importance of subjective natural rights in Grotius’ works, see Zagorin 2000, especially 33ff.; and Zagorin 2009, 25. Zagorin’s account of Grotius on natural rights and the state of nature is deeply flawed, and, far from supporting his claim, the passage from Haggemacher he references actually asserts the importance of both natural rights and of the concept of the state of nature in Grotius’ thought; see Haggemacher 1997, 119. Zagorin is correct in pointing out that Grotius’ rights are not grounded exclusively in the “desire for self-preservation and the conveniences of life,” but this does not, of course, show that Grotius does not have a concept of natural rights, only that Grotius’ is not the same as Hobbes’. Incidentally, Zagorin’s characterization of Hobbes’ natural rights as grounded in self-interest seems to be in tension with the main thrust of his interpretation.

¹⁹ Roelofsen 1983, 79. ²⁰ See Haggemacher 1983.

²¹ For the political context see Borschberg 1999; Borschberg 2002; Ittersum 2006; Ittersum 2007a; Ittersum 2010b.

his successors is much more important than hitherto assumed. As Haggemacher has pointed out, Grotius' main reference points were not primarily political events, but intellectual traditions.²²

When starting research on this study, my assumption was that both Greek and Roman sources deserved examination; and while a comprehensive investigation of the full range of Grotius' classical citations – an enormous task that would result in quite different a book – proved impossible, initially equal attention was given to Greek and Roman texts. I came to conclude, however, that the central place Grotius gives to Roman law and to a Ciceronian brand of Stoicism in his doctrine of natural law by far outweighs other classical sources and thus deserves pride of place in the book. It is important to note that this is not simply by virtue of the number of citations, but, more importantly, by virtue of the substantive influence of these Roman sources. Grotius' own claim that both "ancient Grecians and Romans" come "before others" should not be allowed to obscure the fact that he developed his main ideas and arguments out of specifically *Roman* traditions. The main thrust of my argument thus comes to focus on Cicero and the Roman law of the *Digest*, because Grotius' own argument rests ultimately on these Roman foundations. At various points the question of the relative weight of Greek, Roman, and other classical sources is disussed,²³ issuing in the result that the Roman sources had a much greater impact on the substance of Grotius' doctrine of natural law and natural rights than any other classical tradition he was influenced by.

Despite the overwhelming number of classical references in *De iure belli ac pacis*, amounting to nearly 90 percent of all references,²⁴ and despite the obvious extent of the reception of the classics in all of Hugo Grotius' natural-law works, there has been no monographic study of the influence of Greco-Roman antiquity on the Grotian natural-law system. Kaltenborn in 1848 devoted to classical antiquity a very general section of his *Die*

²² Haggemacher 1981, 90–91: "[C]e n'est pas en première ligne par rapport à ce contexte politique que raisonnait Grotius. . . Comme pour nombre de ses contemporains, ses points de référence principaux sont à rechercher dans des textes . . . qui ont nourri la réflexion de générations d'auteurs sur le *ius gentium*."

²³ See especially 30–52; 70–82 on various types of sources, and on their relative weight for Grotius' undertaking the following discussion on the relative weight of Roman law and classical sources generally speaking; 83–88 on the relationship to the Aristotelian tradition; 119–29 on how the Roman law and Cicero's ethics map onto the Aristotelian distinction between distributive and corrective justice and how that motivates Grotius' choices, as well as the remarks on Greek vs. Roman Stoicism on property; and 107–19 on the differentiation between Greek and Roman Stoicism.

²⁴ Of 3,951 references in *IBP*, only 741 are to post-classical texts. 5,210 references are to sources from Greco-Roman antiquity, amounting to almost 90 percent. See Gizewski 1993, 340.

*Vorläufer des Hugo Grotius auf dem Gebiete des jus naturae et gentium sowie der Politik.*²⁵ In 1927, in his *Private Law Sources and Analogies of International Law*, international-law scholar Hersch Lauterpacht emphasized the influence of Roman private law on Grotian natural law and outlined it as follows: “[W]hat were the sources or the evidence of this natural law? They, in turn, were in most cases identical with those rules of private and especially of Roman law which appeared to him as of sufficient generality and as suitable for the purposes of international law.”²⁶ In his *Ancient Law* of 1861, Henry Sumner Maine pointed expressly to the importance of Roman private law in Grotius’ *De iure belli ac pacis* and named some plausible reasons why this influence had been neglected by his readers:

The system of Grotius is implicated with Roman law at its very foundation, and this connection rendered inevitable – what the legal training of the writer would perhaps have entailed without it – the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived.²⁷

Since then, there have been few attempts to demonstrate the effect of Grotius’ classical sources on his ideas about natural and international law. Most recently, these have included those by the ancient historian Christian Gizewski, and Karl-Heinz Ziegler and David Bederman, historians of international law, who have emphasized the relevance of the classical tradition to Grotius’ work, as well as legal historian Laurens Winkel, who has discussed the classical origins of Grotius’ theory of *appetitus societatis*. Winkel and the historian of philosophy Hans Blom also published a collection of essays on Grotius’ relationship with the Stoa.²⁸ Jon Miller, also a historian of philosophy, contributed an essay to this collection, after previously writing about Grotius’ understanding of Stoic ethics in the 2003 collection *Hellenistic and Early Modern Philosophy*, edited with Brad Inwood.²⁹ In a 1973 article, Jonathan Ziskind provided a useful comparison of Grotius’ and John Selden’s use of classical sources in *Mare liberum* and *Mare clausum*.³⁰ More recently, Christopher Brooke’s investigation into Stoicism in early modern political thought and work by Daniel Lee have greatly helped to improve

²⁵ Kaltenborn 1848, 29–37. ²⁶ Lauterpacht 1927, 14. ²⁷ Maine 2002, 351.

²⁸ Gizewski 1993; Ziegler 1972; Ziegler 1991/92; Bederman 1995/96; Winkel 2000; Blom and Winkel 2004.

²⁹ Miller 2003; Miller 2004. ³⁰ Ziskind 1973.

our understanding of Grotius' use of the classics.³¹ The two indices of authors quoted in the English translation of *De iure praedae commentarius* and *De iure belli ac pacis*, by James Brown Scott, also provide a very useful aid in studying the reception of classical authors by Grotius.³² Robert Feenstra undertook a study of the sources cited by Grotius in general, in which he paid attention to the classical sources only to the extent they were of a legal nature.³³ This contrasted with Scott's edition, which limited its examination of Grotius' citations to texts available from the Loeb Classical Library and the Oxford Classical Texts.

Increasing attention is being paid to the study of the late Spanish scholastics and their effect on seventeenth-century natural law; and the connection between the contemporary political context and Grotius' earlier natural-law theories was only recently the subject of thorough monographic treatment.³⁴ But the influence of classical antiquity on Grotius' natural-law works has largely been ignored, aside from the above-mentioned exceptions and the lip service to Grotius' debt to the Stoa that is often found in scholarship on early modern natural law. The view that Grotius' use of a wealth of primarily classical texts and theories was purely ornamental, without any influence on the substance or methodology of his doctrines, and that it arose from a baroque zeitgeist, can be considered to be the *communis opinio* of scholars of the history of international law in particular.

This view is generally joined with a theory about supposedly more significant influences on Grotius. Thus Peter Haggemacher, who places great emphasis on the influence of scholastic laws of war on Grotius, speaks generally of the "cohorte obligée d'auteurs anciens." Medievalist Brian Tierney points out that Grotius "decorated" his text in *De iure praedae* "in his usual fashion" with quotations from Cicero, while the actual basis of his thinking should be sought in Pope John XXII's dispute with the Franciscans and can only be described in medieval categories.³⁵ Similar views have been expressed by scholars who deal mainly with Grotius, such as Edwards, Vermeulen, and Van der Wal.³⁶ In contrast, scholars of the history of ideas in the early modern period, such as Richard Tuck and

³¹ Brooke 2012; Lee 2011.

³² *IPC* Scott, 397–412; *IBP* Scott, 889–930. See Feenstra's discussion of the indices in *IBP*, 929–34.

³³ *Ibid.*, *IBP*, 930; Feenstra 1992, 14–16.

³⁴ See, e.g., Chroust 1943; Brett 1997; Seelmann 1979; Seelmann 1997; Lupher 2003; Ittersum 2006.

³⁵ Haggemacher 1997, 101 (noting, however, the crucial importance of Cicero, 119); see also Haggemacher 1983; Tierney 1997, 330; Tierney 1983.

³⁶ Edwards 1981, 47–64; Vermeulen and Van der Wal 1995/96, 58ff.

Knud Haakonssen, have endeavored to portray Grotius as a thinker closely related to Thomas Hobbes, stressing his modernity, and as the creator of a secular natural law that contained within it the seeds of a theory of personal natural rights.³⁷ The controversial question of the secular nature of Grotian natural law is often reduced to a discussion of the famous *etiamsi daremus* passage in the Prolegomena of *De iure belli ac pacis* – where Grotius argues that “indeed, all we have now said would take place, though even if we should grant (*etiamsi daremus*), what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs.”³⁸

The authors who emphasize the importance of certain traditions to Grotius’ works of natural law contrast with historians who consider the political conditions surrounding the works’ origins, especially the earlier works of natural law, to be more important. Although he is in principle willing to grant “considerable value” to the intellectual tradition manifested in Grotius’ classical references, C. G. Roelofsen concludes with resignation “that the foundations of the Grotian system cannot be easily discerned among the impressive mass of materials.” He ascribes the main “source” of Grotius’ natural law doctrine to “the author’s experience of international relations and his extensive knowledge of contemporary diplomatic history.”³⁹ Some scholars who have paid particular attention to the political context of Grotius’ natural law works, above all *De iure praedae*, seem to seek to discredit Grotius’ arguments by studying the political and socio-economic conditions under which they emerged.⁴⁰

Study of Grotius’ method has also suffered from blindness towards Grotius’ humanistic education and his use of classical references: research has so far mainly concentrated on the Prolegomena of *De iure belli ac pacis* and has sought to connect Grotius to various authors such as Ramus and Descartes, from whom Grotius’ methodological orientation is then derived.⁴¹ The role of classical rhetoric, which could already be seen in *De iure praedae* and then appears very prominently in *De iure belli ac pacis* in Grotius’ natural law epistemology and methods of proof, and which

³⁷ Tuck 1979, 58–81; Tuck 1999, 78–108; Haakonssen 1985, 240; Haakonssen 1996, 26–30.

³⁸ *RWP* 1.89; *IBP* prol. 11. For a discussion of the passage see, e.g., Todescan 2003; Schneewind 1998, 67–68; Haakonssen 1996, 29; Besselink 1988; Zajadlo 1988; Passerin d’Entrèves 1967, 50ff.; St. Leger 1962; Chroust 1943.

³⁹ Roelofsen 1983, 75; 79.

⁴⁰ Cf. Pauw 1965; Röling 1990; Ittersum 2006. Such discrediting is, of course, impossible; it depends on the genealogical fallacy.

⁴¹ See Schnepf 1998; Tanaka 1993; Vermeulen 1982/83; Dufour 1980; Röd 1970; Ottenwälder 1950, 15ff.; Vollenhoven 1931.

also exercised a profound influence on the concept of natural law and the distinction between natural law and *ius gentium*, has been ignored.

The influence of Ciceronian ethics and of the *Corpus iuris* can be shown in the way Grotius justifies and undergirds his natural law system, but it is most pronounced in his conception of subjective natural rights. Recently, Peter Garnsey has convincingly drawn our attention to the important “contribution of Roman law to Rights Theory,”⁴² concluding, very much in accord with my own findings, that “the Romans did possess the concept of property rights and individual rights in general.”⁴³ This is a view that goes against that put forward by Michel Villey and Brian Tierney, who have argued, respectively, that modern rights doctrines were the result of a deformation of Christian doctrines brought about by William of Ockham and the Franciscan Order,⁴⁴ or that the origin of rights doctrines lies in the rights language of the canonists,⁴⁵ thereby relegating the rather obvious fact that Grotius “in his usual fashion” quoted widely “from Cicero and Seneca”⁴⁶ to a mere humanist whim. Villey attempted to show that the development of subjective rights doctrines constituted an aberration from a pure Thomist natural law, acknowledging Grotius as one of the main protagonists in the development of the modern, post-Ockham doctrine of rights, a doctrine the Thomist Villey himself deemed detrimental. He argued vehemently against a subjective Roman notion of right – an argument that has influenced Isaiah Berlin’s “Two Concepts of Liberty” – and charged the early modern jurists with misrepresenting Roman law on this point.⁴⁷ The medievalist Brian Tierney, while critical of Villey with regard to the sharp fault line drawn between Thomist natural law and Ockham’s notion of subjective rights and locating the origin of subjective rights in the canonist jurisprudence of the twelfth century, has adopted Villey’s stance on the Roman sources and their use by early modern lawyers such as Grotius.⁴⁸

In this book I argue that Grotius developed his natural law and natural rights doctrine primarily out of normative Roman sources, that is to say, Roman law and ethics. If this Roman tradition has been as central to Grotius’ influential writing on natural rights as I will suggest, why has it not received more scholarly attention? The main reason lies in the view that while rights are constitutive of modern liberty, they were

⁴² Garnsey 2007, 237. ⁴³ *Ibid.*, 194; see esp. 184–203; 211–12. ⁴⁴ Villey 1964.

⁴⁵ Tierney 1997, 43–77. ⁴⁶ *Ibid.*, 330.

⁴⁷ See Villey 1946; Villey 1957. For a good summary of Villey’s views and the debate surrounding the origins of individual rights, see Tierney 1997, 13–42.

⁴⁸ See Tierney 1997, *passim* and esp. 93–130.

unknown in classical antiquity. The classic expression of this view of rights as an essentially modern phenomenon can be found in Benjamin Constant's famous 1819 lecture *De la liberté des anciens comparée à celle des modernes*, where Constant, drawing on Condorcet, developed a rights-based notion of "modern" liberty by contrasting it with the "liberty of the ancients." According to Constant, the "ancients, as Condorcet says, had no notion of individual rights. Men were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law."⁴⁹ Modern liberty, on the other hand, in Constant's view consists of an array of individual rights.⁵⁰ Constant, very much in the tradition of the Scottish Enlightenment, credited commerce as the crucial force for the development of this rights-based, "modern" conception of liberty, which not only "inspires in men a vivid love of individual independence"⁵¹ and "emancipates" the individual, but also helps to make individuals "stronger than the political powers."⁵²

This tenacious view of an "ancient" version of liberty, lacking any notion of subjective rights and therefore lacking what Isaiah Berlin has called "negative" liberty,⁵³ seems to be informed by a focus on the historical social institutions of classical antiquity, and, as far as democracy and the democratic elements of Greek antiquity are concerned, nourished by the bias against democracy expressed by classical political philosophy. It is a line of thought that can be found in Hobbes' scornful remarks about the "Libertie, whereof there is so frequent, and honourable mention, in the Histories, and Philosophy of the Antient Greeks, and Romans" in *Leviathan* as well as in the contrast drawn by Rousseau in his *Contrat social* between the modern and the ancient state.⁵⁴

How did this historical picture develop in the first place? Broadly speaking, there are two traditions that deserve attention. The first is concerned with the early Roman republic and its institutions, as they appear in the historical writings of Livy and Dionysius of Halicarnassus, in the biographies of Plutarch, and in Polybius' constitutional analysis. This is the

⁴⁹ Constant 1988, 312.

⁵⁰ *Ibid.*, 310–11. Professor Leslie Green has pointed out to me that Constant could be interpreted as claiming only that there were no individual rights among the ancients which amounted to our basic liberties; on my interpretation of Constant, however, he is resting his case on the claim that there were no individual rights among the ancients *tout court*.

⁵¹ *Ibid.*, 315.

⁵² *Ibid.*, 325. For this tradition of thought, see Nippel 2003. Nippel shows a line of argument ranging from Constant over Fustel de Coulanges, Jacob Burckhardt and Lord Acton to Max Weber, and influencing twentieth-century historians such as Moses Finley and Paul Veyne.

⁵³ Berlin 1969. ⁵⁴ *Leviathan*, 2.332; Rousseau 1997, 114–15.

“neo-Roman”⁵⁵ or republican tradition⁵⁶ and can be found in Machiavelli and then again in seventeenth-century English and eighteenth-century French and American political thought, and it was this tradition that provided the foundation for Hobbes’, Rousseau’s, and Constant’s claims about the nature of ancient liberty.⁵⁷

But there is a second tradition that has proved at least as influential, looking not to the mythical Roman republic of Livy’s first ten books (covering the years 509 to 292 BC), but to texts stemming from the last century of the Roman republic and later. More importantly, the texts used in this second tradition are not historical narratives, nor are they concerned with analyses of various constitutional or institutional arrangements. Rather, they are of a *normative* nature, comprising some of Cicero’s ethical works and, most importantly, texts from the body of private Roman law contained in Justinian’s *Digest*.

The thinkers of this second tradition were not, strictly speaking, concerned with political theory; instead they put forth ethical theories about the normative conditions obtaining in a state of nature, in other words, theories of natural law. In developing these theories, the exponents of the natural law tradition referred back to resources providing a rights-based account of rules obtaining both within and without the Roman polity. The state of nature, as conceived by Hugo Grotius and his followers, became a domain governed by remedies contained in the Roman praetor’s edict and later integrated in Justinian’s *Digest*; these remedies, however, were stripped of their original jurisdictional meaning and turned into

⁵⁵ See Skinner 1998; however, cf. Skinner 2008 for a change in terminology.

⁵⁶ The literature on republicanism is of course vast; just for starters, see the groundbreaking classic Pocock 1975; see also Rahe 1992; Gelderen and Skinner 2002, with further literature; Skinner 1998; Skinner 2008; Kapust 2011.

⁵⁷ Constant’s view is probably untenable with regard to “the ancients” as a whole even if one were willing to grant the narrow, restricted focus on institutional history. The view seems tailored to the Greek concept of freedom, and would most probably not withstand scrutiny in terms of Roman institutional history; the Romans considered their constitutional safeguards, such as the right to appeal a magistrate’s order (*provocatio*), as “bulwarks to guard freedom”: Livy 3.45.8; see also Cic. *Rep.* 2.55. In the Greek city-states, “the concept of freedom gained political importance [in the context] of the community’s defense against foreign rule and tyranny,” and was thus understood collectively. In Rome, by contrast, *libertas* had a “primarily negative orientation” and was “almost without exception – for aristocrats and commoners alike – protection against (excessive) power, force, ambition, and arbitrariness.” In Rome, the freedom concept was focused “on the needs of individual citizens,” and “its function was markedly negative and defensive,” and was “linked primarily with individual rights that eventually were fixed by law.” It is of course this last aspect that provides the link to our topic. Raaflaub 2004, 267; see also Wirszubski 1950, esp. 24–30. It bears mentioning that the Romans did not have the legal concept of expropriation; even for public projects, the government had to buy (without any means of legal coercion) property regularly like a private actor.

substantive rights.⁵⁸ By letting just causes of war arise from unlawful acts as defined under Roman private law,⁵⁹ Grotius was attempting to resolve the fundamental problem of the medieval law of war, which had been that of establishing unlawful acts conclusively and with sufficient precision.⁶⁰ Grotius combined the tradition of the Roman doctrine of just war with the Roman private law tradition and used the latter to formulate a detailed catalogue of just causes of war.⁶¹

Throughout this book I shall argue that these normative Roman works were particularly authoritative and influential – in a way other sources were not – for Grotius’ doctrine of natural law and his theory of subjective natural rights. Grotius’ doctrine of natural law and natural rights was intended to bolster the claims of the expanding commercial empire of the United Provinces.⁶² The Dutch humanist made a crucial contribution to the development of a modern, rights-based natural law advocating the freedom of trade,⁶³ clearly driven by a desire to promote what Constant thought to be the force behind “modern liberty,” namely commerce. Yet paradoxically Grotius developed his conception of natural rights out of materials stemming from a time that had allegedly “no notion of individual rights” and when “[m]en were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law.”⁶⁴

The present book seeks to lay out some of the hitherto neglected evidence for an appreciation of the Roman law influence on Grotius’ conception of natural rights. While the results of my research thus do have a tendency to diminish the importance of Thomism and canon law for the development of modern rights doctrines, stressing the influence of Roman law remedies

⁵⁸ Reminiscent of the way Edward Coke’s *First Institute* was used in the American colonies before the Revolution and in the early Republic: “From the late seventeenth century until the early nineteenth, Americans learned property law from Coke’s treatise without regard to the court system in which those rules arose, which magnified the conceptual division between remedy and right, jurisdiction and jurisprudence, the Westminster courts and the common law”: Hulsebosch 2003: 480.

⁵⁹ See *IBP* 2.1.2.1. ⁶⁰ See Haggenmacher 1990, 164–65.

⁶¹ Vollenhoven 1931, 103 notes with regard to *De iure belli ac pacis*: “The system used for expounding the law of binding duties . . . is practically the system of Justinian’s corpus of Roman private law.” See also Ottenwälder 1950, 125–26. For a detailed account of Grotius’ system, see Feenstra 1991.

⁶² For an account of Grotius’ Dutch context and the relation in the early seventeenth century between Dutch Roman legal scholarship and the rise of a new commercial morality in the United Provinces, see Whitman 1996. For the intellectual climate of the humanist so-called “niederländische Bewegung,” see Oestreich 1980, 301ff.

⁶³ Grotius’ contribution to the development of a doctrine of natural rights is well known and has received a lot of scholarly attention; see Haggenmacher 1997, 114n1; Tierney 1997, 316–42; Tuck 1979, 58–81; Tuck 1993, 137–76; Tuck 1999, 78–108; Tully 1980, 68ff., 80ff., 90, 114, 168; Villey 1957.

⁶⁴ Constant 1988, 312.

and Ciceronian political theory instead,⁶⁵ I do not of course mean to argue that scholasticism and canon law had no impact on Grotius' work. But what I should like to show is that with regard to Grotius' doctrine of natural law and his elaborate system of subjective rights flowing from that doctrine, the Roman sources emphasized throughout this book deserve primary attention – attention they have not hitherto received.

The most important immediate predecessors of Grotius were certainly the legal humanists of the *mos Gallicus*, above all Donellus, who did develop an influential account of subjective rights based on material found in the *Corpus iuris*, but theirs was not a doctrine of natural rights.⁶⁶ And while several of Grotius' immediate predecessors, especially Alberico Gentili, Vázquez de Menchaca, and Francisco Suárez,⁶⁷ did indeed have a notion of subjective natural rights and influenced Grotius, particularly in his decision to remove the Roman law remedies from their origins and frame his doctrine as an account of *natural* rights, the fine-grained legalistic elaboration of a system of subjective rights by the Dutch humanist is a novel and momentous contribution to the earlier writing on natural law.⁶⁸

It is important to note that the approach followed in this book does not allow us to determine with much precision the extent to which Grotius depends on the ancient sources directly. Insofar as contemporary scholastic writers also availed themselves of the normative Roman sources in question – especially the Spanish jurist Fernando Vázquez de Menchaca (1512–69) is a prime candidate in this regard, but so were Gentili and others⁶⁹ – Grotius must at times have followed their lead in his selection of classical sources. For example, Grotius might well have borrowed the term *appetitus societatis* from Vázquez, a writer who was also very well versed in

⁶⁵ In his later natural law work, when the argument was no longer directed against Spain, Grotius turned at times very explicitly against the school of Salamanca (see, e.g., *IBP* 2.20.40.4, on which see Chapter 9 on the right to punish), while he sometimes adduced the Spanish neo-Thomists in his earlier works for prudential reasons.

⁶⁶ On Donellus' subjective rights, see Coing 1962, 251–54; Haggemacher 1983, 178–80; Haggemacher 1997, 113; Garnsey 2007, 201–3. On Donellus' and Grotius' respective doctrines of subjective rights and their relationship to modern human rights, see Giltaij 2011, 23–27; Brett 2011, 102ff.

⁶⁷ For Gentili, see Haggemacher 1990; Kingsbury and Straumann 2010b; see also the Introduction in Kingsbury and Straumann 2011, esp. xxiv–xxv; for Vázquez, see Brett 1997, 165–204; for Suárez, see Tuck 1979, 54ff.

⁶⁸ As Haggemacher has shown, Grotius is, of course, indebted to the just war tradition, but he was original in adding to that medieval tradition his detailed account of rights modeled after Roman remedies. Grotius did not invent all elements of his doctrine of subjective natural rights, “mais des différents apports qui s'y combinent résulte une construction inédite.” Haggemacher 1997, 130.

⁶⁹ On Vázquez and the Roman law tradition, see Brett 1997; on Gentili, see Kingsbury and Straumann 2010b.

the Roman law tradition. Thomas Aquinas himself, as Jean-Marie Aubert showed some time ago, owed a fair amount to concepts taken from the Roman law.⁷⁰ While it is thus perfectly clear that the use of the classics was by no means exclusive to Grotius and that various scholastic natural lawyers also put classical texts to work in their writings, an investigation into the relative weight of the classics versus the influence of contemporary natural law on Grotius lies outside the scope of this book; the different intellectual currents that can be detected in Grotius' thought do not work at each other's expense as in a zero-sum game, and it remains for others to determine the precise limits of the influence of contemporary natural law on Grotius.

It would therefore be foolish to claim exclusive importance for the classical, especially Roman, sources at the *expense* of contemporary natural law, but there is still a way in which I believe specific Roman materials were used by Grotius in order to justify a novel conception of natural law and natural rights that is stripped of an Aristotelian or Thomist metaphysical framework and correspondingly difficult to detect in contemporary natural lawyers (again with the exception of Vázquez and Gentili). This novel conception, focused as it was on rules as opposed to virtues, may best be called a "jural" or "quasi-jural" doctrine as opposed to a eudaimonist one.⁷¹ Grotius' use of Roman sources, to the extent that its effects differ in his work from his contemporaries' use of classical sources, can thus legitimately serve to shed light on a question still very hotly debated in the history of ethics and political thought, namely the question of Grotius' modernity. Whether or not Grotius should be seen as a pioneer is therefore a question that can to my mind be profitably and freshly approached from the viewpoint of his use of classical sources, as I try to demonstrate especially in Chapter 4.⁷² Furthermore, as we shall see in Chapter 9, Grotius' concept of a universal right to punish does not sit comfortably, as a matter of substance, with the doctrinal framework established by the late Spanish scholastics. The fact that Grotius in his early work chose, for political reasons, not to emphasize this difference,⁷³ has often led scholars to exaggerate the Spanish influence on Grotius.

It is instructive to keep in mind that Grotius' humanist acquaintance with Roman law and the classics was immense, something borne out not simply by the vast number of citations but also, as will be shown

⁷⁰ See Aubert 1955. ⁷¹ The term is Sidgwick's; see the discussion below, 86–87.

⁷² See the discussion of Grotius' modernity below, 84–88.

⁷³ In contrast to *De iure belli ac pacis*, where Grotius openly turned against the late Spanish scholastics; see below, 216 see also 78n133.

throughout this book, by his intimate knowledge of the substance of the concepts involved. The view that Grotius' use of a Roman tradition of normative texts represented something important and novel is not itself new. It has a quite estimable pedigree reaching back into the seventeenth century, when in 1663 the Strasbourg history professor Johann Heinrich Böcler can be found emphasizing that the "whole glory of the Latin philosophers is represented in Cicero, whose two works (the *De legibus* and especially the *De officiis*) can speak volumes on this subject . . . Grotius is indebted at many points to these books, even when he does not show it."⁷⁴ Böcler's intention was to reproach Pufendorf for failing to pay sufficient attention to Grotius' classical, and especially Roman, sources.⁷⁵ Jean Barbeyrac is known in 1729 to have deemed Grotius a pioneer for having emancipated ethics from scholasticism.⁷⁶ Gershom Carmichael (1672–1729), first professor of moral philosophy at Glasgow and probably the most important link between the natural lawyers of the seventeenth century and the Scottish Enlightenment, had in 1724 already described Grotius as following in the footsteps of the classics: "[Moral] science had been most highly esteemed by the wisest of the ancients, who devoted themselves to its study with great care. It then lay buried under debris, together with almost all the other noble arts, until a little after the beginning of the last century, when it was restored to more than its pristine splendor . . . by the incomparable Hugo Grotius in his outstanding work *The Rights of War and Peace*."⁷⁷

Apart from the fact that Grotius as a humanist lawyer was steeped in Roman law, there are four substantive reasons for Grotius' use of normative Roman texts. First, Grotius' aim was to put forward a *secular*,

⁷⁴ Böcler 1687, 13, "Latinorum Philosophorum decus omne penes Ciceronem stat: cujus duo opera de Legibus; & praesertim de Officiis, mirum quantum conferre possunt huic materiae . . . Grotius multa debet his libris, etiam ubi non ostendit." Trans. Hochstrasser (2000, 58). On Böcler see below, 76–77.

⁷⁵ See Hochstrasser 2000, 57.

⁷⁶ Barbeyrac 1749, 67. On Barbeyrac's take on Grotius, see below, 55–56.

⁷⁷ Carmichael 2002, 9–10. For Carmichael's nuanced view of the role of Roman law, see 14: "They are therefore merely dabblers in one or in both kinds of law who persuade themselves that an accurate knowledge of natural law can be derived from the study of Roman law or of any civil law whatsoever. This is not to denigrate the study of civil jurisprudence, however; for besides the value of studying the law that is used in the courts for the authority of such law in addition to its manifest equity, I also readily acknowledge that the civil law of the Romans often illustrates the natural law, reflecting the light which it receives from it. So just as it is reasonable to teach moral science to those students of the civil law who want it, a knowledge of civil law is virtually necessary in the present state of our moral studies. Indeed the need is so great that the science of natural law will never reach perfection or be cultivated with felicity, until the philosophers know more about the civil law and the jurists know more about philosophy; until, that is, the philosophers recover, or the jurists restore, the garments borrowed from philosophy which at one time added luster to the attire of Roman jurisprudence."

denominationally neutral natural law which had to be based on secular, non-Christian sources – Grotius explicitly states in the dedication to *Mare liberum* that his natural law work “does not depend upon an interpretation of Holy Writ in which many people find many things they cannot understand.”⁷⁸ This ties in with, and lends additional support to, those strands in the scholarly literature that have affirmed the essentially secular nature of Grotius’ natural law doctrine and might help move the debate about Grotius’ secularity away from the famous *etiamsi daremus* passage in the *De iure belli ac pacis libri tres*.⁷⁹ As Knud Haakonssen points out, “Grotius firmly denies that natural law can be identified with either the Old or the New Testament (Prol. XLIX, LI), in sharp contrast to Suárez, who saw the Decalogue as containing the natural law.”⁸⁰ To some extent, this secular outlook of Grotius’ natural law doctrine is simply an expression of his rationalist outlook when it comes to the relationship between God’s will and the norms of natural law, a rationalism perfectly in line with many protagonists of mainstream scholasticism. But in the case of Grotius, his use of the Roman law of property and obligations and, most importantly, his argument for a novel doctrine of the sources of law acquire a new quality in that his argument is motivated by concerns with the rise of commerce and the need for a denominationally neutral doctrine of the sources of law. While Grotius’ rationalist conception of the law of nature as expressed in the *etiamsi daremus* passage is thus anything but novel, his grafting of a doctrine of sources that gives Roman private law its due onto this rationalist conception can lay claim to originality.⁸¹

Second, as we have seen, Roman law had already developed a doctrine of the freedom of the high seas, based on the idea of the sea as having remained in a natural state; this, as we shall see in the sixth chapter, was highly congenial to the interests Grotius was hired to defend. Third, the

⁷⁸ *ML*, 5: “Sed quod hic proponimus nihil cum istis commune habet . . . non ex divini codicis pendet explicatione, cuius multa multi non capiunt . . .” For an excellent discussion of the secular character of Grotius’ natural law and especially the famous *etiamsi daremus* passage, see Haakonssen 1985, 247ff., with further literature; see also Haakonssen 1996, 29. Grotius in his use of a Stoic concept of nature could be described as a precursor to Deism; he was also perceived as an atheist and precursor to Deism due to his innovations in biblical criticism: cf. Israel 2001, 447–56. On Grotius’ secularity, see Somos 2011 383–438.

⁷⁹ The literature on the *etiamsi daremus* passage is vast, but it does provide a good starting point for the debate on Grotius’ secularism. See especially Todescan 2003; Schneewind 1998, 67–68; Haakonssen 1996, 29; Besselink 1988; Zajadlo 1988; Passerin d’Entrèves 1967, 50ff.; St. Leger 1962; Chroust 1943; Grotius’ secularity is affirmed above all by Passerin d’Entrèves and Haakonssen.

⁸⁰ Haakonssen 1996, 29.

⁸¹ For Gentili as an important predecessor in this regard, see Haggenmacher 1990; and our Introductions in Kingsbury and Straumann 2010b and Kingsbury and Straumann 2011.

parallels between Roman imperialism and the Dutch expansion in the East Indies made Roman political and legal theory particularly attractive for Grotius. Finally, Roman law provided a fair number of commerce-driven remedies in contract law, which were part of the so-called law of peoples (*ius gentium*), a body of law initially created to accommodate foreigners (*peregrini*), especially merchants, and give them standing in Roman courts. This body of rules – albeit clearly positive Roman law founded upon the praetor’s edict, and flowing from the jurisdictional authority of the praetor (*ius praetorium*) – was thought to obtain even beyond Roman jurisdiction and contained remedies granted by the praetor as a matter of equity because they were taken to be furthering rightful claims.⁸² (Constant was thus not wrong in identifying a causal relationship between commerce and the development of individual rights – the remedies contained in the *ius gentium*, which in turn had a distinct impact on Cicero’s ethics, were indeed largely commerce driven.)

The book proceeds in nine chapters. In the first, I shall present Grotius’ main works on natural law in their historical and intellectual contexts. Concrete political challenges concerning the Dutch East India Company motivated Grotius to formulate a doctrine of natural law which was not based on state practice and customary law, but on a doctrine of the sources of the relevant norms – itself gleaned from classical texts – which put a premium on a priori reasoning, human nature, and certain normative texts from classical antiquity. This doctrine of the formal sources of Grotius’ norms will be the subject of the second chapter. Here it will be shown that Grotius puts arguments from (human) nature and certain classical texts front and center. The classical texts he has in mind are, first and foremost, Roman private law as contained in the *Digest*, and philosophical works by Cicero. The use of these classical texts is justified by virtue of their being indicative of what a priori reasoning, and therewith natural law, demand. There are also further norms, not part of natural law, but of (arbitrary) agreement and will, which can be shown from consensus. This two-fold structure of rational a priori natural law on the one hand and consensual positive law of nations on the other corresponds neatly with

⁸² The legal foundation of these remedies, however, was deemed to consist, in a positivist manner, entirely in the authority (*iurisdictio*) of the praetor. For the *ius gentium*, see the authoritative Kaser 1993, esp. 4–7, 165; see also Grosso 1973, 442: “[S]i può dunque dire che la trasformazione e crescita sociale di Roma trova nel *ius gentium*, in particolare nei negozi sanzionali *ex fide bona*, la diretta traduzione in schemi giuridici.” See also Cicero’s account of equitable remedies in the praetor’s edict, Cic. *Off.* 1.32. For a recent expression of the opposing view that *ius gentium* was nothing more than a loose term used by the Roman lawyers to embrace all the legal provisions commonly observed by all humankind, see Ando 2006, 134ff.; Ando 2010.

Grotius' method of proving natural law and the law of nations, which is the subject matter of the third chapter, where it is shown to be very much dependent on classical rhetoric.

Chapters four and five are concerned with fleshing out the presuppositions of the system of natural justice Grotius proposes, namely his (Stoic) anthropological assumptions (dictated by the doctrine of sources described earlier) and the way he fleshes out these assumptions along very Roman, Ciceronian lines into a universal, rule-based theory of natural justice and natural rights. Chapter five will also show how his view of the natural condition pushes Grotius to rid himself of much Aristotelian ballast, as he jettisons the most important elements of Aristotle's virtue theory of justice, namely distributive justice, guarding only those parts amenable to being formulated as rules, that is to say *corrective* justice.

Chapter six is concerned with Grotius' concept of the state of nature. It will become clear that for Grotius, the state of nature, far from being merely a hypothetical device, was actually existing, namely on the high seas, for which the norms of his natural law doctrine were originally designed. The chapter will also show how Grotius' conception of the natural state differs from that of his eminent successor, Hobbes, and will critically engage with the scholarly distinction usually drawn between "humanist" and "scholastic" approaches to political thought.

Grotius' theory of natural justice and his concept of the state of nature, which relies on that theory of justice, yield famously a doctrine of subjective natural rights. These natural rights, which lie in many respects at the very core of the theory of justice Grotius propounds, are discussed in chapters seven to nine, where it is shown that natural rights, for Grotius, resemble suspiciously the legal actions made available by the law of civil procedure contained in the *Digest*. Grotius' state of nature, then, comes to resemble the Roman Forum, a place governed by the rules and remedies of private Roman law, giving rise to a set of specific natural rights which will be treated in chapter eight. Grotius' is a state of nature which, importantly, also contains an enforcement mechanism for the natural law that governs it: a universal right to punish violations of natural law and natural rights, a right which will be discussed in chapter nine.

A few words on method

Much has been written on method in the practice of intellectual history, or the history of ideas. This is not the proper occasion to add unduly to this kind of scholarly literature, but a few words are in order. This

book aims to identify intellectual influences on Hugo Grotius and his work and consequently to help situate him in the history of political thought. This requires clarity with regard to the kind of “influence” we are talking about. In a way, my approach is orthodox and Cantabrigian in nature: both Grotius’ pragmatic context, the political circumstances he found himself in, as well as the ideas he was impressed with and used in his arguments, are going to be of interest to us. The role of pragmatic reasons and political motives is quite obvious in Grotius’ case, and it will be seen that they play a weighty part indeed, primarily in providing the initial motivation to develop particular arguments and ideas. When it comes to intellectual influences, which constitute the primary focus of this book, we shall attend first and foremost to ideas and works he both demonstrably knew and which he put explicitly to use by citing them.⁸³

As we shall see, the reasons for adopting particular intellectual influences rather than others need to be explained in part by reference to the immediate political context, but in part it is clear that Grotius adopts positions on what he believes their philosophical merits to be. This makes it necessary to attend to both pragmatic as well as epistemic reasons when describing Grotius’ use of the classical tradition. It also requires an open mind when it comes to the (itself almost perennial) issue of “perennial questions.” The mere possibility of certain questions which, remaining in important ways the same, have met with longstanding interest in the history of political thought should not be excluded on a priori grounds, nor should every work of political thought be described exclusively in pragmatic terms as a political performance. Rather, the question whether and the degree to which a work of political thought is responding to “perennial” ideas rather than to individual historical circumstances seems itself to be an empirical question open to and worthy of historical scrutiny.⁸⁴

Such scrutiny requires proper regard to arguments – as Knud Haakonssen puts it, it “would seem to be part of the intellectual historian’s task

⁸³ See the following two conditions for influence in Skinner 1969, 26: “(a) that there should be a genuine similarity between the doctrines of A and B; . . . (c) that the probability of the similarity being random should be very low (. . . it must . . . be shown that B did not as a matter of fact articulate the relevant doctrine independently).” I take these two necessary conditions to be jointly sufficient. See also the illuminating discussion of influence in Schneewind 2003.

⁸⁴ Haakonssen 1996, 13: “[W]e have no means of knowing whether there are such ideas except by piecemeal investigation. We cannot start from them; whether we can end up with them is at least questionable.” See *ibid.*, 8–14, for a convincing outline of this methodological outlook.

to write the history of the utterance not only as a performance but also as a reference. The latter, however, cannot be done except through an investigation of the purported objects of reference, which, in intellectual history, will primarily be the ideas employed by an historical speaker in making an utterance.”⁸⁵ A similar stance is Morton White’s, when he says, in a preface aptly titled “On the Absurdity of Writing the History of Ideas without Analyzing Them”: “a work in which an effort is made to place ideas in a historical and social context *must*, to some degree, offer a logical analysis of those ideas.” White goes on to say that

psychology, sociology, or history of ideas . . . go beyond logical analysis but for that reason they are not only compatible with it but presuppose it. They *supplement* the logical analysis of ideas; they are not rivals of it. The scholar who tells us what the “Protestant ethic” *is* gives a logical analysis of it, and when he tells us how it is causally linked to capitalism, he is advancing a sociological thesis . . . [A]ll of which amounts to saying that if you are going to talk about the causes and consequences of philosophical beliefs, you had jolly well better know a lot about what those beliefs *are*.⁸⁶

The humanist nature of Grotius’ undertaking makes it necessary to extend the horizon of the relevant intellectual contexts far beyond his age into classical antiquity. This is an approach which has been shown to be highly fruitful, with Iain McDaniel’s book *Adam Ferguson in the Scottish Enlightenment*, Christopher Brooke’s *Philosophic Pride*, Daniel Lee’s work on Grotius,⁸⁷ Eran Shalev’s *Rome Reborn on Western Shores*, Wilfried Nippel’s *Antike oder moderne Freiheit?*, Peter Garnsey’s *Thinking about Property*, Eric Nelson’s *The Greek Tradition in Republican Thought*, or David Lupher’s *Romans in a New World* merely being the most recent examples. Investigating early modern political thought in light of the classical tradition is an extraordinarily interesting and promising undertaking, and it is very obviously a prime candidate for the kind of long-range diachronic intellectual history David Armitage has recently proposed.⁸⁸

Grotius’ natural law works are a particularly fruitful object of such research, as they are located halfway, as it were, between modernity and antiquity. *De iure praedae* and *De iure belli ac pacis* both freely make use of humanist scholarship and are rich in references to the classical period, while the significance of Grotius’ natural-law ideas, and especially his doctrine

⁸⁵ Haakonssen 1996, 10. ⁸⁶ White 1978, xiii–xiv.

⁸⁷ Lee 2011. ⁸⁸ Armitage 2012.

of subjective natural rights, for political and legal thinking up to the end of the eighteenth century is unquestioned.

It is the central claim of this book that the traditions that exercised the greatest influence on Grotius' natural-law works were classical, and above all Roman. Biblical and patristic sources were obviously used by Grotius in *De iure belli ac pacis* with great erudition. As far as the normative content of Grotius' *natural law* is concerned, however, they played a negligible role. Grotius explained the reasons for this in his dedication in *Mare liberum*, addressed to the princes and free peoples of the Christian world. There Grotius stated that the natural law arguments in which his work was grounded did not depend on biblical exegesis, equating the Bible with the particular laws of individual peoples and underscoring the lack of universality of biblical norms and thus their unsuitability for natural law arguments.⁸⁹ The independence of natural law norms from biblical and patristic sources remained in *De iure belli ac pacis*, where Grotius explained that the Old Testament primarily contained norms originating in God's free will, while the New Testament contained norms binding exclusively on Christians.⁹⁰

At first glance, Grotius seemed to speak of antiquity quite generally, expending little effort on geographic or historical differences; it was "ancient Grecians and Romans" whom he preferred to all others, without showing any preferences within these rough categories. Such preferences emerge quickly, however, if one studies the historical development and normative substance of Grotius' natural law theory. Grotius was an exponent of a Roman tradition, or more exactly, the tradition of Cicero's ethical writings and the imperial legal scholars of the *Corpus iuris*. In Grotius' early work *De iure praedae*, especially its twelfth chapter, published as *Mare liberum*, we can see with great clarity his use of Cicero and "some old Caesarian jurists" (*Caesariani aliquot Iureconsulti veteres*), as Grotius' English antagonist John Selden would later remark disparagingly in his *Mare clausum*.⁹¹ His *De iure belli ac pacis libri tres* in 1625, in contrast, demonstrates at first glance a more balanced use of classical sources, which increased in each later edition; the Bible, too, was used more frequently than in *De iure praedae*. As far as the fundamental legal principles were concerned, however, twenty years after *De iure praedae* little had changed.

⁸⁹ *ML* ded., 5; "Sed quod hic proponimus . . . non ex divini codicis pendet explicatione, cuius multa multi non capiunt, non ex unius populi scitis quae ceteri merito ignorant."

⁹⁰ *IBP* prol. 48–50; see the discussion below, 77.

⁹¹ *MC* ded., 3.

In substance, Grotius remained faithful to his Roman legal sources and the ethics of Cicero, who was well disposed towards the principles of Roman private law; in combination, they made up the majority of his substantive legal sources, even in *De iure belli ac pacis*. In addition, he increasingly brought methodological questions to the fore, and thus an orientation towards classical rhetoric, especially that of Quintilian.