

Cambridge University Press  
 978-1-107-09290-7 - Roman Law in the State of Nature: The Classical Foundations  
 of Hugo Grotius' Natural Law  
 Benjamin Straumann  
 Excerpt  
[More information](#)

## *Introduction*

Latinorum Philosophorum decus omne penes Ciceronem stat: cuius  
 duo opera de Legibus; & praesertim de Officiis, mirum quantum con-  
 ferre 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.”<sup>1</sup> 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.”<sup>2</sup>

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:

<sup>1</sup> *EL*, 75.    <sup>2</sup> *RWP*, I.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 . . .<sup>3</sup>

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.”<sup>4</sup>

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.<sup>5</sup>

Grotius was a humanist.<sup>6</sup> 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,<sup>7</sup> 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

<sup>3</sup> *ML* Armitage, 66.      <sup>4</sup> *Ibid.*, 67.

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

<sup>6</sup> See the contributions to Blom and Winkel 2004.

<sup>7</sup> See Fruin 1925, 39–42; see also Ittersum 2006.

*Introduction*

3

about what has been hailed as a revolutionary and essentially *modern* theory of natural law and of subjective natural rights.<sup>8</sup> This seeming tension between modern liberalism having its origins in the European overseas expansion of the seventeenth century<sup>9</sup> on the one hand and the “extremely deep roots in the philosophical schools of the ancient world”<sup>10</sup> displayed by Grotius’ work on the other can only be elucidated by investigating the use the moderns made of the classical tradition.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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

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

<sup>9</sup> Tuck 1999, 14–15. <sup>10</sup> *Ibid.*, 9.

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

<sup>12</sup> 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.

<sup>13</sup> 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”<sup>14</sup> – 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).<sup>15</sup> 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.<sup>16</sup> The natural law tradition that he shaped later endowed political theorists of

<sup>14</sup> 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.

<sup>15</sup> See Brett 2011, 69–71, on the relationship between Vázquez' and Grotius' understandings of natural law.

<sup>16</sup> See 112 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

*Introduction*

5

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.<sup>17</sup> 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.<sup>18</sup>

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”<sup>19</sup> – and the medieval and late scholastic just war tradition<sup>20</sup> certainly deserve the ample scholarly attention paid to them and constitute important influences on Grotius’ natural law doctrine.<sup>21</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> Roelofsens 1983, 79. <sup>20</sup> See Haggemacher 1983.

<sup>21</sup> 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.<sup>22</sup>

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 discussed,<sup>23</sup> 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,<sup>24</sup> 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*

<sup>22</sup> 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*.”

<sup>23</sup> 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.

<sup>24</sup> Of 5,951 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.

Introduction

7

*Vorläufer des Hugo Grotius auf dem Gebiete des jus naturae et gentium sowie der Politik.*<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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*.<sup>30</sup> More recently, Christopher Brooke’s investigation into Stoicism in early modern political thought and work by Daniel Lee have greatly helped to improve

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

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

<sup>29</sup> Miller 2003; Miller 2004.    <sup>30</sup> Ziskind 1973.

our understanding of Grotius' use of the classics.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Similar views have been expressed by scholars who deal mainly with Grotius, such as Edwards, Vermeulen, and Van der Wal.<sup>36</sup> In contrast, scholars of the history of ideas in the early modern period, such as Richard Tuck and

<sup>31</sup> Brooke 2012; Lee 2011.

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

<sup>33</sup> *Ibid.*, *IBP*, 930; Feenstra 1992, 14–16.

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

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

<sup>36</sup> 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.<sup>37</sup> 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.”<sup>38</sup>

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.”<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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

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

<sup>38</sup> *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.

<sup>39</sup> Roelofsen 1983, 75; 79.

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

<sup>41</sup> 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,”<sup>42</sup> concluding, very much in accord with my own findings, that “the Romans did possess the concept of property rights and individual rights in general.”<sup>43</sup> 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,<sup>44</sup> or that the origin of rights doctrines lies in the rights language of the canonists,<sup>45</sup> thereby relegating the rather obvious fact that Grotius “in his usual fashion” quoted widely “from Cicero and Seneca”<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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

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

<sup>45</sup> Tierney 1997, 43–77.      <sup>46</sup> *Ibid.*, 330.

<sup>47</sup> 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.

<sup>48</sup> See Tierney 1997, *passim* and esp. 93–130.