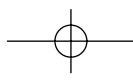
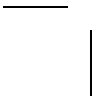
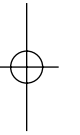
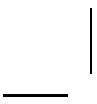
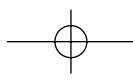


SECTION I

HISTORY OF THE
PHILOSOPHY OF
INTERNATIONAL
LAW



CHAPTER 1

STATE OF NATURE
VERSUS COMMERCIAL
SOCIABILITY AS THE
BASIS OF
INTERNATIONAL LAW:
Reflections on the Roman
Foundations and Current
Interpretations of the
International Political and
Legal Thought of Grotius,
Hobbes, and Pufendorf

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STRAUMANN*

I. INTRODUCTION

Three foundational approaches to international order and law beyond the state were framed in early to mid-seventeenth-century Europe, by Hugo Grotius (1583–1645),

* We would like to thank OUP's anonymous reader for the excellent comments.

Thomas Hobbes (1588–1679), and Samuel Pufendorf (1632–94), at the same time as the recognizable modern idea of the state was itself being framed. Grotius, Hobbes, and Pufendorf each took distinctive approaches to the problems of whether and how there could be any legal or moral norms between these states in their emerging forms. They differed in their views of obligation in the state of nature (where *ex hypothesi* there was no state), in the extent to which they regarded these sovereign states as analogous to individuals in the state of nature, and in the effects they attributed to commerce as a driver of sociability and of norm-structured interactions not dependent on an overarching state. The core argument of this chapter, presented in section II, is that the differences between them on these issues are of enduring importance. To situate them in what we regard as a key element of their intellectual context, that is the Greco-Roman lineage of ideas on law and on order and justice beyond the state, we outline in section I the Carneadean debate and argue for the importance of Roman law and of Greco-Roman political ideas in sixteenth-century writings of Vitoria, Vasquez, Soto, Gentili, and others whose works influenced the seventeenth-century writers. Section II builds on this view of the importance of Roman influences, in engaging with several current historiographical debates about interpretations of Grotius, Hobbes, and Pufendorf. Section III comments on the adaptation of, or responses to, some of these seventeenth-century ideas in certain strands of eighteenth- and early nineteenth-century thought, concerning what by the end of that period had become a recognizably modern idea of international law; the particular focus is on lines of development from David Hume and Adam Smith to Jeremy Bentham and Georg Friedrich von Martens.

Any inquiry of the sort we undertake here entails some confrontation with a fundamental question: Should contemporary thought on international politics and international law be shaped by understandings of its history? Many scholars now engaged in rich debates in the historiography of political thought concerning issues beyond the polity, especially the historiography of early modern European thought on these issues, bring to these debates a set of interests and questions that are tied to the world in which we live now. At the same time, several of the leading historians of political thought (particularly those associated with the Cambridge School) who have helped develop fresh and influential interpretations of early modern writers concerned with normative international thought, place great emphasis on studying these early writers strictly in their own context, and are rightly wary of anachronism in trying to make them speak to us today.¹ In our view, some of the most significant recent interpretations of early modern international political and legal thought, some of them adumbrated by historians linked to the Cambridge School, have much to offer those interested in current problems of international law. In this chapter we will try to demonstrate this. We will refer in particular to

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¹ See the useful discussion of Quentin Skinner's methodological precepts by Boucher, D., 'New Histories of Political Thought for Old?', *Political Studies*, 31 (1983), 112.

debates related to the work of Richard Tuck on self-preservation as the foundation of Grotius's natural law, to interpretations Noel Malcolm advances of Hobbes's views of the state of nature, and to Istvan Hont's arguments about the development of ideas of commercial sociability from Pufendorf to Adam Smith. In engaging with current debates among historians of political thought about the orientations and commitments of these thinkers, we endeavour also to transpose these debates to questions about international law with which these modern historians are not necessarily so centrally concerned. To foreshadow three basic questions we will address in this way:

1. Did Grotius construct a natural law based on self-preservation, as a means to meet the sceptical objections of Montaigne and Charron (as Tuck argues)?; or should Grotius be read as building natural law in a Ciceronian tradition?
2. What is the significance of Hobbes's view of the relation between individual and state, and of his essentially prudential rather than moral account of natural law beyond the state? Or, to put it another way: Are the political realists right about Hobbes, or can he plausibly be read (as Malcolm does) as a philosopher of international peace?
3. What has been the importance of the understanding, which Istvan Hont presents as extending from Pufendorf to Adam Smith and beyond, of commerce as a driver of social and moral order beyond the state?

We will argue in this chapter that the differences between views held by (and taken of) Grotius, Hobbes, and Pufendorf on core issues concerning the sources and nature of law and morality on matters reaching beyond a single polity will continue to be important in the future philosophy of international law. In some basic commitments, however, Grotius, Hobbes, and Pufendorf were all part of one enterprise, and must be read together. Each was acutely interested, for biographical as well as intellectual reasons, in the emergence of modern states as means to overcome civil war and religious strife. We believe it is fair to see some commonality in the engagement of each author, albeit in different ways, with the *salus populi* and reason of state. Grotius, Hobbes, and Pufendorf (as later Hume, Smith, and Bentham) all rejected the Machiavellian *ragione di stato* tradition of republicanism requiring expansionism. But all of them can be read as engaging in some way with the need to commit the sovereign to the *salus populi* while ensuring the sovereign could act to advance the *salus populi* for reasons of state. Grotius's emphasis on individual and collective self-preservation through the right of war can be read as a juridification of reason of state,² although his was less a political theory in the narrow sense than a theory of the norms that apply in a state of nature, understood not as a hypothetical order preceding a hypothetical social contract, but rather

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² This is how Grotius is read by Hont, I., *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, Mass.: Harvard University Press, 2005), 15.

as the actual natural state existing in the areas of the high seas leading to the East Indies, and in international relations more generally. To the extent that this natural law system had political implications, Grotius's accommodation of systems of divided sovereignty and constitutional limits on powers of specific rulers under agreements with their peoples gave a deeper and more context-specific meaning to the ruler's duties to uphold the *salus populi*. Hobbes sought to get away from ideas of divided sovereignty, multiplicity of representation, and popular sovereignty, instead treating the people simply as a multitude until unified by the creation of the state as the representative legal person. The sovereign upheld the *salus populi* by resolving internal conflict and assuring external defence. Pufendorf treated the *salus populi* (the security and the welfare of the people) as the supreme law (divine law excepted), thus imposing duties and constraints on the sovereign, but also freeing and indeed requiring the sovereign to act outside the positive law where reason of state required. Each was interested in the practice of politics, but in different ways. It must also be kept in mind that, while each of them wrote in juridical terms about practical politics, none had the kind of view of the relations of theory and practice that in the eighteenth century began to characterize what was becoming a field of international law, a view articulated to some extent in Vattel's *Law of Nations* (1758) and brought to one methodological culmination in the compendious collections of materials on practice by Georg Friedrich von Martens (from the 1780s to the 1820s).

II. GRECO-ROMAN AND SIXTEENTH-CENTURY FOUNDATIONS FOR LAW BEYOND THE STATE

All of the seventeenth-century European thinkers we will refer to in this chapter drew heavily on the Greco-Roman classical tradition, in which ideas about empire and about the applicability of law beyond the territorial state and its citizenry had become a significant issue not later than the fifth century BC once the city-state of Athens had assembled an empire. We regard this tradition as essential to understanding the thought of these seventeenth-century writers with regard to law beyond the state, and will seek in this section to identify some ways in which this is so.

Probably the most significant Greco-Roman philosophical assessment of the moral implications of imperialism was that put forward in the mid-first century BC by the Roman orator and statesman Marcus Tullius Cicero.³ Cicero's *Republic* has as its object the ideal constitution and government which Cicero identified with the constitution and government of the early and middle Roman Republic. This was the period that had seen the development of Rome from being one among many cities

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³ Another is the Melian dialogue in Thucydides, *History of the Peloponnesian War*, bk. v, 85–113.

constituting the Latin League to being the dominant power in the Mediterranean and beyond, exerting both direct rule over six provinces and controlling adjacent territories indirectly through diplomatic activity.

After discussing constitutional theory merely in terms of prudential criteria such as stability, effective rule, and longevity, Cicero in book three of the dialogue moves towards a *moral* consideration of the Roman commonwealth, framing it as an exchange of arguments modelled on a pair of famous speeches given by the Academic sceptic Carneades in Rome in 155 BC, speeches in which Carneades had argued, first for the importance of justice for a polity, and then, in the second speech, against its importance. Two things are particularly significant about Cicero's reframing of Carneades' speeches. First, Cicero turned the sequence of the speeches on its head, thus beginning with the sceptical challenge to justice and assigning the defence of justice the last word; and second, when adapting what he knew about Carneades' arguments for his own dialogue, Cicero applied the controversial discussion of the importance of justice for politics to the *international realm*, thus extending political theory beyond the *polis* and rendering Rome's acquisition of an empire a subject fit for normative, moral consideration.⁴

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It is thus fair to say that book three of Cicero's *Republic* has been among the most important of the early Western philosophical treatments of imperial justice, bringing moral philosophy to bear on Rome's rule, beyond the borders of a given polity. To justify the applicability of any particular norms to trans-border issues, it could not possibly be sufficient merely to say that they were the norms of a favoured city-state. These norms would have to be justified by criteria of utility and self-interest (as Philus, the alias for Carneades, is made to argue in the *Republic*), or by criteria of justice, largely framed in Stoic natural law⁵ and Roman just war terms (as Laelius, delivering the pro-justice speech in the *Republic*, maintains). Natural law provides the yardstick for gauging the justice of imperial rule and conquest, and its provisions as presented by Cicero are of a moral kind derived from Stoic ethics, not, as Carneades would have it, merely prescriptions for self-preservation appealing to our self-interest. The Roman legal provisions concerning the waging of a just war embody (in Laelius' and Cicero's view) rules of natural law.

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In the sixteenth-century controversy over the justice of the Spanish conquests and the overseas empire, the Carneadean debate loomed large. Both proponents and adversaries of the Spanish conquest and rule used the Roman Empire and its forcible expansion as a prime analogy, with Augustine's ambiguous account of the justice of the Roman Empire in *City of God* serving as the main text for both sides.⁶ Critics of

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⁴ For the relation between Cicero and the original Carneadean debate, see Zetzel, J. E. G., 'Natural Law and Poetic Justice: A Carneadean Debate in Cicero and Virgil', *Classical Philology*, 91/1 (1996), 297.

⁵ For Stoic political theory, see Schofield, M., *The Stoic Idea of the City* (Chicago: University of Chicago Press, 1999).

⁶ See Lupper, D., *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (Ann Arbor: University of Michigan Press, 2003).

Roman and Spanish imperial rule, notably the Dominican theologian Domingo de Soto, argued that the Romans' right to the territories they conquered was 'in force of arms alone', the Romans having 'subjugated many unwilling nations through no other title than that they were more powerful'.⁷ Defenders of imperialism such as Juan Ginés de Sepúlveda also drew heavily on Augustine's and Lactantius's renderings of the Carneadean debate in Cicero's *Republic*. Importance continued to be given in the seventeenth century to the Carneadean debate, and to Roman political and legal theory more broadly. This orientation helps explain why natural law and the law of nations was so attractive to early modern writers who were defending imperial expansion on grounds of just war waged according to the rules of the *ius naturale* and *gentium*. Writers such as the Spanish jurist and official Ayala perceived Carneades as an orator challenging the justice of Roman imperialism and just war, rather than as an Academic philosopher expressing moral scepticism,⁸ and they often countered this challenge with the arguments adumbrated in Laelius' speech in the *Republic*. Protestant lawyers such as Gentili and Grotius, who were steeped in this Roman background, built on it in their normative thinking about law and politics beyond the polity.⁹ The fundamental question, which had by then arisen prominently as a consequence of the European colonial expansion, endures in international thought today: are there norms outside, and applicable to, the state? If any such norms exist, are they merely of a prudential nature, or do they rise to the level of moral or legal norms?

For Alberico Gentili, a civilian jurist, it was possible to apply rules taken from the Roman law of the *Institutes* and the *Digest* to the relations between different European polities and to some relations beyond Europe. The Spanish scholastics from Soto and Francisco de Vitoria onwards had already done this (to the extent they were sufficiently versed in Justinian's law code), drawing on the Roman law concepts of natural law and the law of nations (*jus gentium*) in order to apply them to the behaviour of Spain overseas, thus effectively using the universality of these legal ideas against the jurisdictional claims of the old universalist powers, the pope and the emperor. Gentili explicitly put forward the claim that the Roman law was valid in the extra-European domain and between sovereign polities and empires, on the ground that Justinian's rules, or at least some of them, were declaratory of the *jus naturale* and *gentium*:

[T]he law which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature; and with this last it is all so in accord, that if the empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself

⁷ de Soto, D., *Relección 'De Dominio'*, in Brufau Prats, J. (ed. and trans.) (Granada: Universidad de Granada, 1964), 150.

⁸ See Tuck, R., *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* (Oxford: Clarendon Press, 1999), 5; Tuck, R., 'Grotius, Carneades and Hobbes', *Grotiana New Series*, 4 (1983), 43.

⁹ For Grotius and his use of the classics, see Straumann, B., *Hugo Grotius und die Antike* (Baden-Baden: Nomos, 2007).

among all the nations of mankind. This law therefore holds for sovereigns also, although it was established by Justinian for private individuals¹⁰

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This Roman law heritage is one of the keys to understanding important fissures in how a pivotal early modern concept of political thought—the state of nature—was elaborated and understood. Part of what distinguished the various early modern writers from each other with regard to their respective theories of international norms was differences in the views they held of rights and obligations in the realm external to established polities.

Before turning to make this argument, we note one implication of it, namely that the distinction frequently drawn between the traditions of scholasticism and humanism is not, in our view, central in distinguishing the views the seventeenth-century writers held of international relations, transnational normativity, and the state of nature. Modern studies of the international political thought of the early modern epoch often associate ‘humanist’ accounts of international relations with vigorous strategies of self-preservation and imperialist aggrandizement, and ‘scholastic’ accounts with a richer *corpus* of moral and legal constraints that reach beyond the established polities.¹¹

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In evolutionary terms, Aristotelian and Thomist conceptions of justice underpin the scholastic tradition from Aquinas to the Spanish scholastics of Salamanca, and then the humanists, breaking with the scholastics, are said to combine a fresh account of natural rights with a Roman tradition of reason of state, drawing on Cicero and Tacitus and acknowledging to a large degree the force of sceptical anti-realist and subjectivist arguments in the domain of morals. Richard Tuck presents this humanist tradition as leading from Gentili and especially Grotius up to its most radical representative, Thomas Hobbes. Clearly the humanist and scholastic traditions are each important for the content of various doctrines. Our argument, however, is that the traditions these writers were drawing upon did not determine the content of their views on such key issues as self-interest and imperial expansion. For example, the humanist jurist Vázquez de Menchaca, in his *Controversiae illustres* (1564), quoting extensively from Roman literature and Roman law, was among the most ardent critics of the Spanish imperial endeavour, more critical in fact than any of the Spanish theologians. Affirming a strong belief in the natural liberty of all human beings,¹² Vázquez rejected any arguments designed to bestow title to overseas territories based on religious¹³ or civilizational superiority.¹⁴

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¹⁰ Gentili, A., ‘*De iure belli libri tres*’, trans. Rolfe, J. C. in *The Classics of International Law*, no. 16, vol. ii (Oxford: Clarendon Press, 1933), 17.

¹¹ See, e.g., Tuck, R., *The Rights of War and Peace* (above, n. 8); Piirimäe, P., ‘Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War’, *Historical Journal*, 45/3 (2002), 499.

¹² Vázquez de Menchaca, F., ‘*Controversiae illustres*’, in Rodríguez Alcalde, F. (ed.), *Controversiarum illustrium aliarumque usu frequentium libri tres*, vol. ii (Valladolid: Talleres tipográficos ‘Cuesta’, 1931), 1. 10. 4–5. (A belief taken from Roman law; see *Institutes*, 1. 3.)

¹³ *Ibid.* 2. 24. 1–5.

¹⁴ *Ibid.* 1. 10. 9–12; 2. 20. 10; 2. 20. 27. On Vázquez’s political and legal thought see Brett, A., *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997),

Such arguments had on the other hand been supported both by humanists such as Sepúlveda and theologians in the medieval tradition, such as Suárez. Gentili, while in some sense a humanist and influenced in his *De Legibus* (1584) by Machiavelli's account of statecraft,¹⁵ in *De Jure Belli* (1598) eschews the humanist practice of justifying wars by reference to 'imperial power and glory'.¹⁶ Gentili's doctrine of just war instead relies on more or less orthodox criteria for just war supplemented with reasoning from Roman law.¹⁷ In his *De armis Romanis* (1599), a work in two books putting forward, in a Carneadean vein, first an accusation of the Roman Empire and then a defence, Gentili defends the justice of the Roman Empire and its imperial wars on grounds of natural law,¹⁸ precisely as Cicero had made Laelius do in the *Republic*.

We contest Richard Tuck's claim that the 'new' humanist natural rights tradition established its doctrine of natural law as a defence against moral scepticism by 'building' the sceptical assumption of self-preservation 'into its theories',¹⁹ yielding only a morally shallow set of rights and duties. The humanist Grotius, writing in support of the United Provinces' imperial expansion, set out to refute Carneades' claims as presented in Cicero's *Republic*, it is true—but it had been Carneades (or rather Philus) who had conjured up a natural order consisting purely of self-interest, while Grotius would draw upon the rich combination of Stoic natural law and Roman legal concepts that had already underpinned Laelius's response to Carneades in the *Republic* and which refused to acknowledge self-interest as the only basis of political life, evoking a Roman theory of international justice instead.²⁰ Thomism and canon law were undoubtedly important for the development of early modern international thought. The traditions Tuck discusses certainly provided part of the reason why authors such as Grotius removed Roman law concepts from their jurisdictional origins and couched them in a language of natural law. But in Grotius's elaborate system of natural law and natural rights, the influence of ancient political and legal thought, particularly the influence of Roman law, is of central importance.

165–204; for his stance on empire and the law of nations, see Pagden, A., *Lords of all the World: Ideologies of Empire in Spain, Britain and France, c. 1500–c. 1800* (New Haven/London: Yale University Press, 1995), 56–62.

¹⁵ Although Gentili certainly did not start out as a *legal* humanist, but as a rather explicit follower of the *mos Italicus* and Bartolus.

¹⁶ Tuck, R., *The Rights of War and Peace* (above, n. 8), 23.

¹⁷ See Haggemacher, P., 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Bull, H., Kingsbury, B., Roberts, A. (eds.), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), 133–76.

¹⁸ Gentili, A., *De armis Romanis* (Hanoviae, 1599), 2. 2. 112 ff; 2. 7. 168.

¹⁹ Tuck, R., *The Rights of War and Peace* (above, n. 8), 6.

²⁰ For Grotius's use of the Stoic idea of *oikeiosis*, see Straumann, B., 'Appetitus societatis and *oikeiosis*: Hugo Grotius' Ciceronian Argument for Natural Law and Just War', *Grotiana New Series*, 24/25 (2003/2004), 41.

III. SEVENTEENTH-CENTURY VIEWS OF THE STATE OF NATURE: GROTIUS, HOBBS, AND PUFENDORF

Differences about the state of nature, and about the possibilities and basis of obligation in it, are at the core of the distinctions we draw between the approaches of Grotius, Hobbes, and Pufendorf to international law.

For Grotius in his *De Jure Belli ac Pacis* (1625), moral or legal norms can apply outside the polity, and not simply for reasons of expediency: ‘great states’, although seemingly containing ‘in themselves all things required for the adequate protection of life’, are still susceptible to the claims of the ‘virtue which looks towards the

FN:21 outside, and is called justice’,²¹ making the standard of justice applicable to sovereign polities or their rulers. But where were these norms that should govern the natural state to be found? And were they legal or rather moral in character? Richard Tuck has argued strongly that Grotius’s natural law is based ultimately on the universal human urge for self-preservation and consists only in ‘an extremely narrow set of rights and duties’.²² We understand Grotius’s approach to norms in the state

FN:22 of nature as broader both in their content and in their basis. Like Gentili before him, Grotius thought that norms of private Roman law were applicable to subjects beyond the polity, both to private individuals and to sovereign polities. Like Gentili, he thought that certain Roman law norms were declaratory of natural law; but for these norms to be valid for sovereigns as well this was not sufficient—an analogy between polities and private individuals had first to be established. Well aware of the importance of this move, Grotius explicitly addressed the extension of private Roman law to the relations between polities and, after applying a discussion of servitudes by the Roman jurist Ulpian to the high seas, justified it thus: ‘It is true that Ulpian was referring [. . .] to private law; but the same principle is equally applicable to the present discussion concerning the territories and laws of peoples, since peoples in relation to the whole of mankind occupy the position of private individuals’.²³

This allowed Grotius to attribute natural rights and duties not only to sovereigns in the East Indies who were trading partners of his own country, the expansionist Dutch Republic, but also to private entities such as the Dutch East India Company,

²¹ Grotius, H., *De Jure Belli ac Pacis* (1625), prol. 21.

²² Tuck, R., *The Rights of War and Peace* (above, n. 8), 6.

²³ Grotius, H., *De iure praedae*, 12, fo. 105 (*Mare liberum* 5. 36).

and thus made for a rich account of the state of nature.²⁴ Grotius applied to places that had remained in a natural state, such as the high seas, and to the relations between and across sovereign polities, a doctrine of natural rights modelled on certain remedies from Roman law. Rights to self-defence, and certain property rights and contractual rights (all capable of being vested in individuals, sovereign states, and other entities), were embedded in Grotius's natural law and applicable beyond any given polity.²⁵ These subjective rights, best described as claim-rights in the Hohfeldian sense, were derived from a natural law system based on Aristotle's expletive justice. Both the natural law and the subjective natural rights flowing from it were held to be of a dual nature, moral as well as legal. This meant that the rules and rights of Grotius's state of nature were not only requirements of justice, but also of *law*, in a narrow sense—that is to say, natural law, which is what Grotius termed law (*jus*) 'in the proper sense'.²⁶ Defining law in terms of justice by stipulating that everything that was not unjust was lawful, Grotius's theory of natural legal norms responded exclusively to the demands of justice, yielding effectively a theory of practical ethics couched in legal terms. This offered one solution to what remains a pressing problem in international legal theory—namely the source of validity for international obligations.²⁷ Grotius's criteria for validity of law in *De Jure Belli ac Pacis* thus blend source criteria with content criteria in a way apt to address jurisprudential problems concerning the nature of international law that remain fundamental in modern times, when a perceived lack of settled formal criteria for sources has led some scholars to assume that international law, not amounting to a legal system, is but a set of separate rules.²⁸ The sources are natural law, divine volitional law, and human volitional law—the human volitional law encompasses sub-municipal orders (such as *paterfamilias* over wife/children, and master over slave), municipal laws (*jus civile*, and incidental agreement among municipal laws, which is not *jus gentium*), and *jus gentium* (true law, and that which produces merely external effects).²⁹ Another source criterion lies in the requirement that a rule, in order to be of the *jus gentium*, must conform with the understandings and practices of all nations or all of the better nations. Additional content criteria are introduced because Grotius requires, for proof of natural law, that it conform with right reason and hence not be unjust. A rule might well be part of the *jus gentium* without being part of natural law. For example, *De Jure Belli ac Pacis* treats the

²⁴ A term (*status naturae*) used by Grotius even before Hobbes; see Grotius, H., *De Jure Belli ac Pacis* (above, n. 21), 2. 5. 15. 2; 3. 7. 1. 1. For a more detailed account of Grotius's notion of the state of nature, see Straumann, B., 'Ancient Caesarian Lawyers' in a State of Nature', *Political Theory*, 34/3 (2006), 328.

²⁵ This suggests that the subjects of private Roman law served as models for the emerging early modern states rather than the other way round, see Tuck, R., *The Rights of War and Peace* (above, n. 8), 8 ff. For this argument, see Straumann, B., 'Hugo Grotius und die Antike' (above, n. 9), 32 ff.

²⁶ Grotius, H., *De Jure Belli ac Pacis* (above, n. 21), prol. 8.

²⁷ See Hart, H. L. A., *The Concept of Law* (2nd edn., Oxford: Oxford University Press, 1994), 213–37, esp. 224 f.

²⁸ See *ibid.* 232–7; for criteria for a legal system and the idea of a basic rule of recognition, see *ibid.* 79–99.

²⁹ Grotius, H., *De Jure Belli ac Pacis* (above, n. 21), 1. 1. 13–14.

slavery that results from capture in war as a legal structure of the *jus gentium*, not of natural law.³⁰ These multiple legal orders are not necessarily in strictly hierarchical relationship one with the other, nor need they be strictly horizontal, but they all derive their validity ultimately from the natural law.

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Grotius's theory of natural justice and his inclusion of diverse actors as subjects of natural law has important further implications: individuals or groups maintain certain natural rights even within a polity, so that states are parts of a larger legal order, susceptible to demands of justice even across borders. This leads Grotius to a permissive attitude to what is now called humanitarian intervention.³¹ Any violation of the natural law and the rights it gives rise to triggers the right to punish,³² a right parasitic upon the existence of a strong normative framework. For Grotius, the parallel between individuals and states is complete: polities have the same set of rights and duties in the state of nature as individuals, including the natural right to punish violators of the law of nature. While Gentili had already acknowledged a private victim's natural right to punish,³³ Grotius went further by asserting, against both theologians like Vitoria and humanists such as Vázquez and later Hobbes, a *general* right to punish.³⁴ The revolutionary potential of this doctrine was to become obvious in John Locke,³⁵ who enunciated the chief normative consequence of Grotius's teachings in his 'Second Treatise of Government':

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And that all Men may be restrained from invading others Rights [. . .] the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation. For the *Law of Nature* would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a *Power to Execute* that Law.³⁶

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This was not only of deep importance to constitutional theory, but it also weakened both in Grotius and Locke the moral status of state sovereignty and could support, as already hinted at in Grotius's case, arguments in favour of intervention in another state's affairs by third parties.

³⁰ Ibid. 2. 7 and 3. 14. Grotius did not accept that anyone was a slave by nature, but he accepted slavery by consent, by punishment of a delict, by capture, and in certain circumstances by birth to a mother who is a slave. Cf. Justinian's *Institutes*, 1. 3. 2: 'Slavery is an institution of the *jus gentium* by which one person is subjected to the ownership of another contrary to nature'. See Cairns, J., 'Stoicism, Slavery, and Law', *Grotiana New Series*, 22/23 (2001/2002), 197.

³¹ Grotius, H., *De Jure Belli ac Pacis* (above, n. 21), 2. 25. 6.

³² For Grotius's influential doctrine of a natural right to punish, see Straumann, B., 'The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law', *Studies in the History of Ethics*, 2 (2006), 1, available at <<http://www.historyofethics.org/022006/022006Straumann.shtml>>.

³³ Gentili, A., *De iure belli*, 1. 18, pp. 136–7.

³⁴ Grotius, H., *De Jure Belli ac Pacis* (above, n. 21), 2. 20. 40. 1. This general right was modelled upon a class of Roman penal actions, the *actiones populares*, which were open to any citizen in virtue of the public interest and not just to the injured party; see *Digest*, 47. 12. 3 pr.

³⁵ See Tuck, R., 'The Rights of War and Peace' (above, n. 8), 82.

³⁶ Locke, J., *Two Treatises of Government*, ed. Laslett (Cambridge: Cambridge University Press, 1967), 'Second Treatise', § 7, 271–2 (italics in the original).

In stark contrast to Grotius's notion of the state of nature is the view of the state of nature ordinarily attributed to Hobbes. Although Hobbes does refer to certain norms in the state of nature, they seem to us to be legal only in a metaphorical sense and moral only by name. It is characteristic that Hobbes does not acknowledge a natural right to punish: 'A Punishment, is an Evill inflicted by publique Authority', because the 'Right which the Common-wealth [. . .] hath to Punish, is not grounded on any concession, or gift of the Subjects'. This follows from Hobbes's conception of the state of nature, where 'every man had a right to every thing',³⁷ that is to say people in the natural state did not have, on Hobbes's account, claim-rights of any sort, but rather Hohfeldian privileges,³⁸ which cannot give rise to any duties on anybody's part. Consequently, there is nothing, no possible violation that could trigger a right to punish. In Hobbes's state of nature, rights and duties can thus be described as legal only in a very attenuated sense. Nor can they be described as moral if by 'moral' is meant anything going beyond self-interest.³⁹ There are no legal ones because according to Hobbes's legal theory, natural laws are called 'by the name of Lawes, but improperly: for they are but Conclusions',⁴⁰ mere principles, to which the basic obligation of the subjects in the state of nature, to preserve themselves, is owed. And there are moral ones only if one is willing to buy into Hobbes's exercise in renaming purely prudential grounds of obligation as moral ones. Opposing Hobbes's view to approaches prevalent in classical ethics, it could be said that in classical ethics there was a prevailing attempt to identify prudential with moral reasons for action by showing that to act morally is in one's own self-interest, that is to say by changing the meaning of and effectively re-defining 'self-interest' such that other-regarding, moral reasons become a requirement for acting in one's 'self-interest'. Hobbes, on the other hand, engaged in a re-definition of 'moral', so that self-interested action becomes a requirement of Hobbes's changed meaning of 'moral'. As in classical ethics, self-interest and morality in Hobbes thus do not seem to be in conflict—yet once Hobbes's exercise in renaming is understood, it becomes clear that Hobbes's state of nature is indeed conventionally 'Hobbesian' in that prudential self-interest rather than an independent sense of obligation to

³⁷ Hobbes, T., *Leviathan*, ed. Tuck, R. (Cambridge: Cambridge University Press, 1996), ch. 28, p. 214.

³⁸ See Hohfeld, W. N., *Fundamental Legal Conceptions As Applied In Judicial Reasoning* (New Haven: Yale University Press, 1964), 36. For an application of Hohfeld's analysis to Hobbes see Malcolm, N., *Aspects of Hobbes* (Oxford: Oxford University Press, 2002), 445.

³⁹ The following is based on Thomas Nagel's very persuasive interpretation of Hobbes's concept of obligation; Nagel, T., 'Hobbes's Concept of Obligation', *Philosophical Review*, 68/1 (1959), 68, 74: 'Hobbes's feeling that no man can ever act voluntarily without having as an object his own personal good is the ruin of any attempt to put a truly moral construction on Hobbes's concept of obligation. It in a way excludes the meaningfulness of any talk about moral obligation. [. . .] Nothing could be called a moral obligation which in principle never conflicted with self-interest'. The reason why there are no moral duties in the state of nature is thus that for Hobbes there are no such duties *tout court*.

⁴⁰ Hobbes, T., *Leviathan* (above, n. 37), ch. 15, p. 111. The laws of nature are not only obligatory as the commands of God, it is rather that obligations to the authority of God are derived from the laws of nature, to which the basic obligations are owed: Nagel, T., 'Hobbes's Concept' (above, n. 39), 75–8.

^{FN:41} moral or legal norms drives behaviour in the state of nature.⁴¹ There is no clash in Hobbes between personal aims and impartial morality, because Hobbes's redefined morality, starting from the single normative principle of rational self-interest, is not based on impartiality.

Noel Malcolm has made a stimulating case that Hobbes's state of nature is, with regard to international relations, much more substantively regulated than we have suggested above and than most interpreters of Hobbes have thought, with the dictates of natural law being applicable at the international level.⁴² While Richard Tuck has interpreted Grotius and Gentili to be much more akin to Hobbes as traditionally understood, Malcolm presents a Hobbesian view of international relations much closer to Grotius, as traditionally understood. Malcolm maintains that Hobbes, in terms of what behaviour his take on international relations prescribed, was guarding against imperialism and therefore far from being a Machiavellian realist.⁴³ In terms of the jurisprudential justification of his normative outlook, Hobbes was, as Malcolm puts it using the idiom of modern jurisprudential disputes, a 'naturalist', and his state of nature 'not a realm of sheer amorality'.⁴⁴ Malcolm is undoubtedly correct in attaching weight to Hobbes's strong reservations against imperialism—but these reservations seem to us to be based on prudence, not on anything resembling a substantive notion of legal, let alone moral obligation.⁴⁵ Similarly, the breakdown of the analogy between states and individuals in Hobbes, the fact that the parallel between the interpersonal and international state of nature is not a complete one, might diminish the 'moral' duty of self-preservation as far as polities are concerned;⁴⁶ but, again, this diminution seems to occur for prudential reasons. If individuals were less secure in commonwealths than they contingently happen to be, commonwealths would not exist in the first place. It is thus not surprising that Hobbes's state of nature, lacking very substantive moral and legal norms, provides a continuing inspiration for so-called realist views, i.e. scepticism regarding international law and the applicability of moral standards to international affairs.⁴⁷

The difference between Grotius and Hobbes with regard to their respective conceptions of the state of nature can be explained, at least in part, by the diverging purposes that the doctrines were at first supposed to serve. Whereas Grotius had developed his doctrine of a state of nature and the natural right to punish against

⁴¹ In classical ethics, the relation between morality and self-interest is characterized by the identification of the *utile* with the *honestum* and *iustum*, and a certain redefinition of the *utile* takes place; not, however, without the attempt to show how that redefinition at a deeper level is in accord with the conventional understanding of expediency.

⁴² Malcolm, N., *Aspects of Hobbes* (above, n. 38). ⁴³ *Ibid.* 441.

⁴⁴ *Ibid.* 439–40.

⁴⁵ See Hobbes, T., *De cive, the Latin Version*, ed. Warrender, H. (Oxford: Clarendon Press, 1983), ch. 13, para. 14, p. 202.

⁴⁶ Malcolm, N., *Aspects of Hobbes* (above, n. 38), 448.

⁴⁷ For the latter, see the criticism of Hobbes's position in Beitz, C., *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 11–66.

the backdrop of the need to show that the Dutch East India Company, even if acting on its own behalf as a private actor, had the right to wage a war of punishment against the Portuguese fleet in Southeast Asia, Hobbes's theory was a political one in a much narrower sense. Hobbes thus sought to theorize a strong form of political authority, whereas Grotius wanted to theorize an environment in which a strong overarching authority was *ex hypothesi* lacking. Thus the body of law Grotius presents in *De Jure Belli ac Pacis* is potentially applicable to many orderings (for example, a transnational commercial order) that are neither inter-state nor simply a single civil state.

Samuel Pufendorf's *De Jure Naturae et Gentium* (1672), the essentials of which were made highly accessible in his popular *De Officio Hominiis* (1673), had a considerable influence on the reception and to some extent the integration of Grotian and Hobbesian international thought. But Pufendorf can also be read as having framed a distinctive approach: in the following paragraphs we will address one such reading put forward by Istvan Hont. Pufendorf distinguished between government established by (or at least understood by) Hobbesian contract (Hobbes's political union), and the non-contractual constitution of commercial society (the concord or consensus that Hobbes sought decisively to reject, but that Pufendorf was able to reframe not in a republican-political way but through a more modest conception of society). Pufendorf agreed with Hobbes that the reasons for instituting government are best understood by positing the idea of a contract, that law is the command of a superior, and that law depends for its validity not on its content but on the authority of whoever promulgates it, a view much different from Grotius's grounding of validity in natural law. Because of this, Pufendorf's ideas of government, of human law, and of non-deistic authority were treated by later thinkers as disjoint from Pufendorf's important argument that commercial sociability could create society without state or government, and that in such a society plain obligations could exist, and indeed reason and laws of nature derived from the command of God.

At the center of Istvan Hont's interpretation is the following claim:

Post-Hobbesian political theory can be said to have started with Pufendorf's reinstatement of utility as a force of social integration. Contemporaries recognized this. In the eighteenth century Pufendorf's adaptation of Hobbes's state of nature to the explanation of society came to be seen as the beginning of a distinct and separate school in natural jurisprudence. Pufendorf himself was credited with making 'society' a foundational category of modern political thought. [. . .] Although Pufendorf accepted that society was secondary in importance to the [Hobbesian] political state, nonetheless he saw it as important enough to be theorized in its own right.⁴⁸

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⁴⁸ Hont, I., *Jealousy of Trade* (above, n. 2), 45.

As Hont has pointed out, Pufendorf did not think collective sociability was natural quite in the same way as the drive to individual self-preservation is, but driven by the human need to cooperate stemming from incapacity and ever-growing wants. He contrasted the natural state of humans marked by *imbecillitas* (weakness) and *indigentia* (neediness), with the state of life produced by human industry, *cultura*. Society is formed as the means to overcome neediness. Commerce, and the *cultura* that is intertwined with commerce, thus corresponds with the formation and flourishing of society. This commercial society was not necessarily preceded by, and did not lead inexorably to, the contractual formation of the *civitas* (the state). In Hont's crisp assessment of Pufendorf's view: 'Hobbes was wrong in thinking that social diversity and the difficulty of survival required the creation of the *civitas*'.⁴⁹ Pufendorf illustrated the possibilities by reference to the society existing among neighbouring families in an agricultural community, and by the cross-border relations of international trade. The creation of a *civitas* depended on constitution of a state by a specific act of will—the adoption of a contract by which the participants surrender their natural liberty. Hont suggests that for Pufendorf this contract was the means to achieve not only security, but also the 'Prospect of living in a better Fashion and greater Plenty', especially in the burgeoning cities.⁵⁰

Rulers should in ordinary times adhere both to the positive law of the state and to the natural law of relations beyond the polity—interest, sociality, reason, and commerce would normally require adherence to these. But the existence of legal norms did not mean that rulers of states must always be tightly constrained by them, nor that the juridical would necessarily dominate the political. As Horst Dreitzel observes, Pufendorf, while avoiding the language of reason of state, 'did not shirk from advocating the disarmament of citizens, the disempowerment of *potentes*, forbidding the formation of parties, and proscribing any innovation, using trade policy to disadvantage other states and cancelling treaties according to changes in the political situation'.⁵¹ The question of when a breach of the applicable positive law was the right policy for the *salus populi* was one requiring the highest expertise in statecraft and in policy—it was not a question for ordinary judges, but nor was it a matter for capricious will or irresponsible decision.

⁴⁹ Hont, I., 'The Languages of Sociability and Commerce: Samuel Pufendorf and the Foundations of Smith's "Four Stages" Theory', in Pagden, A. (ed.), *Languages of Political Theory in Early Modern Europe* (Cambridge: Cambridge University Press, 1987), 271–316.

⁵⁰ Ibid. 275. See also LeGoff, J., 'The Town as an Agent of Civilization', in Cipolla, C. M. (ed.), *The Middle Ages* (London: Fontana, 1976).

⁵¹ Dreitzel, H., 'Reason of State and the Crisis of Political Aristotelianism: An Essay on the Development of 17th Century Political Philosophy', *History of European Ideas*, 28 (2002), 163, 171. We draw here also on ongoing work by Martti Koskenniemi.

IV. FROM COMMERCIAL SOCIABILITY TO POSITIVE INTERNATIONAL LAW IN THE EIGHTEENTH CENTURY: HUME, SMITH, VATTEL, BENTHAM, AND MARTENS

Hobbes's political thought, which steadfastly denied any relevance to modern politics of what Hobbes believed were the dubious if ancient assertions that humans are naturally social or naturally political, generally had no great use for political economy, let alone for inter-state political economy, as a shaping force in politics.⁵²

FN:52 It was Adam Smith who was able to construct a powerful and persuasive alternative to Hobbesian theory. Humans are born needy and must thus seek society, but Smith (like Pufendorf, Locke, and Hume) thought that the pursuit of material economic needs and desires was a substantial reason for sociability and for particular forms of social organization. Smith rejected Hobbes's 'state of nature' terminology, focusing instead on the developmental stage of economic organization in any particular society, from hunter-gatherers through pastoralists and settled agriculturalist to commercial society with a highly specialized division of labour and monetized exchange. Smith's brief histories included a place for reversal and decay, as with the destruction of Roman commercial society with its contracted-out military by pastoralist-warriors in the first cycle, then the destruction of the European feudal order under the economic burden of obsessive demand of the dominant classes for luxury goods to prove their status. But the culmination of Smith's account was a showing that post-feudal modern European liberty was integrally connected with modern commercial society. John Locke had sketched the rudiments of an evolutionary account correlating the development of political organization and structures of government with changing economic patterns, but these rudiments did not lead convincingly to Locke's own account (which purported to be empirical as well as normative) of modern English politics in which executive corruption had increased with economic affluence and was eventually overturned by revolutions which installed modern legislative supremacy based on popular consent. Smith agreed with his friend David Hume's powerful refutation of the Lockean claim that consent was the real basis of governmental authority. Smith instead proposed that authority depended in great measure on wealth, because the human tendency to sympathize much more with the rich in their success than with the poor in their misery aligns with such dependence of the poor on the rich as endures in modern commercial society. Authority in large societies typically depends much more on

⁵² Hont, I., *Jealousy of Trade* (above, n. 2), 18–21.

the state of mind of the dependent, than it does on actual coercion or incentives deployed by the wielders of authority and their agents. The authority of the modern political state, which protects the anxious rich in their accumulations but also protects all or most of the citizenry in their basic liberty, was itself an outcome of the commercial society which made these accumulations and their distribution possible.

David Hume had defined a basic orientation to the law of nations: nations are like individuals in requiring mutual assistance, while being selfish and ambitious, yet are very different in other respects, so regulate themselves by a law of nations, which is superadded to the laws of nature but does not abolish them. Hume's three fundamental rules of justice apply to nations: the stability of possession (without which there is perpetual war), its transference by consent (upon the capacity for which, commerce depends), and the performance of promises. But while the mutual intercourse of nations on this basis is often advantageous or necessary, thus giving rise to natural obligations of interest and corresponding morality, 'the natural obligation to justice, among different states, is not so strong as among individuals, the moral obligation, which arises from it, must partake of its weakness'.⁵³

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Adam Smith shared this basic orientation, and did not himself develop much more explicitly the implications for international law and politics of his account of commercial society and of the twin roles of utility and authority. His persuasive rejection of mercantilism, and his insistence that closing the lines of commerce at national borders was usually (not always) a costly mistake, involved influential commitments in political philosophy as well as having immense practical importance. Among these commitments was a basic acceptance that vast economic inequality could be tolerated in states which embraced basic premises of political and juridical equality. This idea, that 'legal and political equality could coexist with economic inequality without causing endemic instability in modern Western States', was at the heart of what came in the early nineteenth century to be called liberalism, and it was not of course Smith's creation.⁵⁴ His importance was in showing how it might actually be achieved in parts of Europe, through private property, free markets without price controls in labour and essential goods such as foods, judicious intervention where necessity required it, and a suitable political order based on respect for law and legislative supremacy. The international legal order of Europe should thus be aimed at actuating and supporting these commitments. The grounds for such an international political and legal order were tied to historical evolution of European commercial society (itself somewhat anomalous in Smith's view) rather than universals of nature; and they were secular rather than theological. Smith thus helped pave the way for the growing historicization, secularization, and European focus of international law. He was not himself insensible to global

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⁵³ Hume, D., *A Treatise of Human Nature*, III. ii. 11.

⁵⁴ Hont, I., *Jealousy of Trade* (above, n. 2), 92 ff.

problems. He denounced the grotesque injustices of colonial treatment of Indians in the Americas. He struggled to see ways in which his particular idea of sympathy as a driver of society and authority could extend to relations between British commercial society and those immiserated Bengalis who increasingly supplied its wants. But his system of politics was not one in which redistributive justice was required, nor did imperfect rights and obligations carry much weight beyond sheer charity.

Although Smith lectured on jurisprudence, and paid considerable attention to law and legal institutions, his was not a jurisprudential theory in the way the theories of Gentili, Grotius, and Pufendorf had been. The jurisprudential implications of many of the commitments Smith had embraced were perhaps worked out most fully, at least in British thought, by Jeremy Bentham. Bentham differed from Smith in many respects, not least over the value of great reform projects. But Bentham's effort to base law on utility rather than on claims of natural rights, his enthusiasm for positive law and particularly for legislation over natural law, his commitment to demystification (including his showing that legal custom tended not to be utilitarian local practice but merely the customs among the judges), his condemnation of colonialism and imperial expansion on grounds of cost, all drew Smithian themes into what Bentham chose to name, apparently for the first time in English or the Romance languages, international law.

This line of development from Smith to Bentham was paralleled over the same period by German public law scholarship. In 1750, Gottfried Achenwall and Johann Stephan Pütter produced the first edition of what became Achenwall's *Elementa juris naturae*, a vast systematic effort to deduce natural law norms for real societies, based on a social view of the state of nature and on Christian Wolff's Leibniz-inspired ideas of self-perfectioning, and to integrate these with statistics and other positive empirical material on societies and government; this work was read carefully by Kant. Their short discussion of principles of the law between nations was soon echoed in much more expansive form by Vattel. Their method was refined by Martens (1756–1821), who compiled monumental compilations of treaties and other documents of official interaction between sovereigns (for the most part European sovereigns), to ground what he regarded as a public law of Europe. In Martens's thinking, speculations about the state of nature and right reason no longer played any external part—the positive legal materials he compiled were both the direct evidence of what was natural law, and the practical adaptation of natural law to the complexities of modern states and their interactions,⁵⁵ a tendency which helped to strengthen the primacy of state sovereignty, with a strong principle of non-intervention and autonomy.

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⁵⁵ Koskeniemi, M., 'G. F. von Martens (1756–1821) and the Origins of Modern International Law', *NYU Institute for International Law and Justice Working Paper* (2006–1), <www.iilj.org>.

V. CONCLUSION

In this chapter we have sought to show the importance of current historiographical debates on different ideas about order and law beyond the state that were framed in Europe in the seventeenth century, presenting the ideas of Grotius, Hobbes, and Pufendorf as fundamentally distinct. Understandings of the ideas of, and especially the relations between the ideas of, Grotius, Hobbes, and Pufendorf, varied considerably in the seventeenth century and have varied in different ways ever since. Istvan Hont's interpretation of Pufendorf as having made 'society' into 'a foundational category of modern political thought' has a significant pedigree, but whether it will endure and become a dominant understanding will depend on further historiographical debates.⁵⁶ Noel Malcolm's interpretation of Hobbes's international thought also builds on some prior approaches, but seems destined to remain a minority position. Richard Tuck's interpretation of Grotius, although much contested, has by no means been decisively displaced. What is the importance of our present-day interpretation of the early theorists for today's international legal thought? On a genealogical level concerned with causes, the historical account can show us which tradition we are in fact part of, and may help identify some of the contingent features of that tradition—a vital prerequisite for any subsequent normative assessment of the tradition. Secondly, on an epistemic level concerned with reasons, we hope that historical accounts such as the one given here will contribute to a better understanding of the presuppositions of current international thought and thus enrich today's debates. This would seem to require a historiography of political thought that does not on *a priori* grounds preclude the possibility of certain questions that, remaining in important ways the same (enduring questions), have met with long-standing interest in the history of political thought, nor would this historiography of political thought seek to describe every work of political thought mainly in momentary terms as a political performance. Whether a work of political thought responds to enduring questions rather than to individual historical circumstances and whether it puts forward a proposition or argument that speaks to our concerns are empirical matters for historical investigation and theoretical matters for sustained reflection. The contemporary philosophy of international law must rest on both.

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⁵⁶ Hont's approach has been contested, in different ways, by Palladini, F., *Samuel Pufendorf discepolo di Hobbes* (Bologna: Il Mulino, 1990) and several other works; by Saastamoinen, K., *The Morality of Fallen Man: Samuel Pufendorf on Natural Law* (Helsinki: Suomen Historiallinen Seura, 1995); and by Tully, J., *On the Duty of Man and Citizen According to Natural Law* (Cambridge: Cambridge University Press, 1991).

