Hugo Grotius and Marriage's Global Past: Conjugal Thinking in Early Modern Political Thought

Sharon Achinstein

How do ideas about marriage contribute to the history of political thought in early modernity? In the main, there have been three answers. First, seen as a natural social institution in which hierarchies are present, marriage explains households as the model or prototype of political sovereignty. In this logic, just as husband rules wife and household, so the sovereign governs the subject.[1] This gendered logic of marriage in early modern Europe—wives subordinated to husbands—founded both laws of coverture in England[2] and legal concepts of tutelage or guardianship in the Netherlands, even if such rule was uneven in practice.[3] Adam and Eve were exemplary: in his Biblical drama *Adamus Exul* (1601), Hugo Grotius represents Eve's punishment as her being placed in a more complete subordination to Adam:

[1] On early modern English family analogies, see Gordon Schochet, *Patriarchalism in Political Thought* (New York: Basic Books, 1975); Hugo Grotius, *Introduction to the Jurisprudence of Holland*, trans. R. W. Lee (Oxford: Clarendon, 1926), 1.3.8, p. 17: "The male sex is given by nature a sort of authority over women. . . . From this authority [*gezag*] of husband over wife and of parent over child has arisen family government, which in time extended its range."

[2] Amy Erikson, "Coverture and Capitalism," *History Workshop Journal* 59 (2005): 1–16.

[3] Grotius, *Jurisprudence*: "The wife is deemed to be *sub tutela* [*onmondig*: lit., "minor"] and the husband is termed the guardian [*voogd*] or church-guardian of the wife," I.v.19, p. 29, controlling the wife's property, and representing her in court.

"Ille te imperio reget" and "Vir caput & tutor mulieris."[4] The political resonances are clear: "Imperio," "reget": government, rule; caput, tutor. The husband is the head and the guardian of the wife, a sentiment combining ideas in Gen. 3:16 and the category of "tutela" from Roman civil law on guardianship, where a tutor held a temporary authority over children and other incapacitates.[5] Second, again by a marital analogy, the metaphor provides a way of understanding reciprocity, where a sovereign is taken as a husband to his people, who are likened to a wife—*Princeps maritus republicae est* (in Lucas de Penna's aphorism), an adaptation of a Christian mystical marriage metaphor.[6] Here the marital analogy describes a form of political relationship of mutual obligation or even of contract, despite the reality that women and other subordinates were excluded from formal participation in politics.[7] Based on this logic, John Milton justifies resistance to an unjust governor: "He who marries, intends as little to conspire his own ruine, as he that swears Allegiance: and as a whole people is in proportion to an ill Government, so is one man to an ill mariage."[8] A third way marriage contributes to the history of political thought is as an instance where theological concepts become secularized and brought into the state. No longer a sacrament in Reformed Christianity, marriage in the early modern period became seen as a worldly thing, a social estate, validated by a bond like a secular contract, and overseen by secular authority.[9] The States of Holland are a classic example of the secularization of jurisdiction over marriage: in 1580, the *Politieke Ordonnantie*, rather than an ecclesiastical body, gave

[4] This essay focuses on the category of marriage not on gender or women; nonetheless, the literature on Grotius and gender is sparse; see Helen Kinsella, "Gendering Grotius: Sex and Sex Difference in the Laws of War," *Political Theory* 34, no. 2 (2006): 161–91; Martine J. van Ittersum, "Knowledge Production in the Dutch Republic: The Household Academy of Hugo Grotius,"*Journal of the History of Ideas* 72, no. 4 (2011): 523–48.

[5] Grotius, *Adamus Exul* (The Hague, 1601), 72 (both cites); cf. Grotius's commentaries on Gen. 3:16; 1 Cor. 11.3; and Rom. 13.1, in *Hugonis Grotii Annotationes in Vetus Testamentum* (Hanover, 1727), at 4, 275, 300, linking female subordination and political obedience; for Roman law on tutors, see J. B. Moyle, ed., *Imperatoris Iustiniani Institutionum Libri Quattuor* (Oxford, 1890), 1.13; and Dutch extension of these concepts, in *Jurisprudence of Holland* as cited in n. 1.

[6] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957), 214–15.

[7] Carol Pateman, *The Sexual Contract* (Hoboken, NJ: Wiley, 2014); Victoria Kahn, *Wayward Contracts* (Princeton, NJ: Princeton University Press, 2004).

[8] John Milton, *Doctrine and Discipline of Divorce* (London, 1644), sig. A3v.

[9] Roderick Phillips, *Untying the Knot: A Short History of Divorce* (Cambridge: Cambridge University Press, 1991); John Witte Jr., *From Sacrament to Contract* (Louisville, KY: Westminster John Knox Press, 1997), 127–29.

detailed legislation on marital issues.[10] These approaches have been valuable for understanding how the concept of marriage contributes to the history of political thought and have generated much important discussion on matters of gender, contract, and sovereignty.

This essay widens the lens, by taking Grotius as one of the makers of early modern international thought and showing how his reasoning about marriage was part of that logic.[11] By approaching the question of marriage in relation to the international, several aspects of Grotius's thought come into view, in particular concepts of governing, asymmetrical power relations, powers of consent of subordinates, and what is legal and permissible in war conduct. As did most early modern thinkers, Grotius placed marriage within the compass of the laws of nature, common to all humanity, and precedent to any national laws. Perceiving marriage thus suited his thinking about the international, that is, beyond Christianity, to understand marriage as a pattern of "government" arising from the laws of nature. For Grotius, marriage was vital as an example of a natural human association, where the right over persons arises from nature. With the authority of his Biblical gloss (Eph. 5:23), he writes, "The most natural association appears in marriage. However, on account of the difference in sex, the authority is not held in common, but 'the husband is the head of the wife' " [*Consociatio maxime naturalis in conjugo apparet: sed ob sexus differentiam imperium non est commune, sed maritus uxoris caput*].[12] Indeed, it may be something we skip over, but much of the fifth chapter of Grotius's second book of *On the Law of War and Peace* (*De Jure Belli ac Pacis*) (1625; 1646) concerns marriage.[13] Considering a variety of marriage rules and prohibitions across history—from Roman Law,

[10] Manon van der Heijden, *Women and Crime in Early Modern Holland* (Leiden: Brill, 2016), 103.

[11] For Grotius, *De Jure Belli ac Pacis Libri Tres,* texts cited are *Hugo Grotius: On the Law of War and* Peace, ed. Stephen C. Neff (Cambridge: Cambridge University Press, 2012). English citations are to this edition indicated as Neff, unless stated otherwise. Other cited texts include the facsimile of 1646, *Hugonis Grotii De Jure Belli ac Pacis Libri Tres*, ed. James Brown Scott (Buffalo, NY: Hein, 1995) [hereafter *DJB*]; the translation by Francis W. Kelsey in *De Jure Belli Ac Pacis Libri Tres*, ed. James Brown Scott (Buffalo, NY: Hein, 1995), vol. 2 [hereafter *LWP*], which preserves Grotius's annotations and references that have been stripped from Neff; and Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005) [hereafter *RWP*]. Also consulted is the edition of 1625: *Hugo Grotius: De Iure Belli ac Pacis Libri Tres*, ed. B. J. A. De Kanter-Van Hettinga Tromp (1939), and newly annotated by R. Feestra and C. E. Persenaire (Aalen: Scientia Verlag, 1993). Notes refer to multiple editions for ease of consultation.

[12] Neff 126; *DJB* 147.

[13] Neff's useful edition of *De Jure Belli* omits discussion, allusions, and extensive notes Grotius supplied for his claims. For changes in editions between the first (Paris, 1625) to

the Bible, Classical literature, Rabbinic jurisprudence, Church Fathers, and the Councils—Grotius discusses such matters as polygamy, divorce, parental consent, polyandry, consanguinity (the marriage of blood relations and prohibitions against different degrees of relation), incest, the marriage of partners of vastly different ages, concubinage, marriage between the unfree, and the validity of different sorts of conjugal agreements. Writing from exile, Grotius in his *De Jure* was no longer advancing the interests of the Dutch East India Company (VOC), or simply writing a plan for commercial trade, but was, rather, seeking to find valid grounds for initiating and conducting war, believing that there was "a common law among nations, which is valid alike for war and in war."[14] Nonetheless, his *De Jure* has been seen as a "systematic exposition" of questions vital to his prior writings on "principles of commercial interaction, treaty- and alliance-making raised" by his productions for the VOC.[15] There are two decades of maturing reflection between his trade work and the production of *De Jure*. In the second book, he considers in particular the origins and extent of the right over persons, as distinct from those over property—and it is there he treats marital topics as part of his theory of the original appropriation of rights.[16] Grotius had it that these were moral as well as legal, modelled on remedies from Roman law.[17] Just as he extended the norms of Roman private law to consider the nature of law, contract, agreement, and promise in international relations and on the high seas, he extends concepts from Roman private law (that is where all aspects of conjugality fall in the *Corpus Juris*) to the wider discussion of laws of nature and of nations.

This essay demonstrates how marriage proves a useful resource in the creation of important distinctions and justifications in Grotius's thought. Marriage in the experience of Dutch overseas trade was not a stable thing—

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the final, authorially produced 1646 *De Jure*, see Jacob Ter Meulen and P. J. J. Diermanse, *Bibliographie de Grotius* (The Hague: Nijhoff, 1950), 222–32. Placing Grotius on marriage in the neo-Thomist tradition is John Witte, "Hugo Grotius and the Natural Law of Marriage," in *Studies in Canon Law and Common Law in Honor of R. H. Helmholz*, ed. Troy L. Harris (Berkeley, CA: The Robbins Collection, 2015), 231–49.

[14] Neff 8; Prolegomena, section 28; see James Brown Scott, "Grotius' De Jure Belli ac Pacis Libri Tres: The Work of a Lawyer, Statesman, and Theologian," *American Journal of International Law* 19, no. 3 (1925): 461–68, at 462.

[15] Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (Singapore: National University of Singapore Press, 2011), 56.

[16] See Peter Haggenmacher, "Droits subjectifs et système juridique chez Grotius," in *Politique, Droit et Théologie chez Bodin, Grotius et Hobbes*, ed. Luc Foisneau (Paris: Éditions Kimé, 1997), 73–130; at 102–3.

[17] Benedict Kingsbury and Benjamin Straumann, "The State of Nature and Commercial Sociability in Early Modern International Legal Thought," *Grotiana* 31 (2010): 22–43, at 41–42.

alternative arrangements were being fashioned to suit the needs of men living far from home. Yet it appeared to be grounded in nature. Marital thinking, it will be argued below, was used to shape specific notions of hierarchy and obligation of unequals; to theorize the distinction between the legal and the permissible; and to shed light on obligations of consent and promise. Grotius did not develop his views on marriage in order to serve the commercial interests; rather war, commerce, and trade were conditions that prompted the investigation of relationships of unequal hierarchy and contract, those arising out of a purported natural law that marriage had long encompassed. Thus marriage provides a fruitful resource for his thought.

I. GLOBAL QUESTIONS

Marriage, as arising out of natural law, transcended national or confessional bounds, and thus supplied a lens through which might be seen other associations with non-Christians. Even as the jurist considered Christianity to be superior to pagan forms of religion, in part because of its adherence to monogamy and opposition to divorce,[18] Grotius underscored the binding force of marital relations between Christians and non-Christians, and between those outside Christianity. By analogy, inter-confessional treaties or bonding instruments might also have force. Without international laws, war was inevitable: "A few years ago . . . I saw that the commerce with that India which is called East was of great importance for the safety of our country and it was quite clear that this commerce could not be maintained without arms."[19] For commerce, as in war, the most pressing question was whether Christians could make treaties with non-Christians.[20] In southeast Asia, agreements with sovereigns were taken as privileges that could be

[18] Grotius, *True Religion Explained and defended* (London, 1632), 2:15, p. 121; and see 118–21, 232; Grotius, *Meletius*, ed. and trans. G. H. M. Posthumus Meyjes (Leiden: Brill, 1988), sect. 72–73, pp. 126–28; sect. 88, p. 132. Also collating Grotius's remarks on marriage in relation to obedience is Peter Borschberg, "Grotius, the Social Contract and Political Resistance: A Study of the Unpublished *Theses LVI*," 34–36, New York University School of Law, IILJ Working Paper 2006/7 (History and Theory of International Law Series), accessed 15 November 2019, www.iilj.org.

[19] Grotius, "Defense of Chapter V of the *Mare Liberum*," in Grotius, *The Free Sea*, trans. Herbert F. Wright and ed. David Armitage (Indianapolis: The Liberty Fund, 2004), 77.

[20] Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 1999), 92.

revoked at pleasure.[21] This concept of treaty or agreement, with no guarantee of succession or continuity, was rather different to that of Europe where a contract was an agreement to be honored.

Grotius holds that conjugality arises from nature: "For since there is among some mute Animals a certain conjugal League or Covenant, how much more equal is it, that so holy a Creature as Man should not be born of uncertain seed; with the extinction of all those mutual affections, which are naturally between Parents and their Children."[22] In thinking about the natural origins of marriage Grotius has in mind global variations among different peoples. His curiosity about the customs across the globe is evident in his *Dissertatio de Origine Gentium Americanarum* (1642), which had compared New and Old World plural marriages.[23] He claimed marriage arose out of nature. Explaining Gen. 2:18 by a quotation from "Cicero ex Oeconomicis," he writes, "The married state [was] instituted by nature" (*Maritale conjugium sic comparatum est naturâ*).[24] As a bond that arose out of nature, it is of special interest to Grotius who was seeking principles on which to ground an understanding of justice, a ground for law and war ethics that would hold for Christians and non-Christians, even if "there is no God" (*non esse Deum*).[25]

Whether we think the larger purpose of *De Jure* to be the creation of an international order (at most idealistic) or a continuation of his earlier practical-minded defense of the Dutch international enterprise, the book certainly responded to, and shaped, the world of trade between Christian and non-Christian, European and foreigner, and set a ground for international relations.[26] Indeed, international trade questions are not far from

[21] Jan A. Somers, *De VOC als vokenrechtelijke actor* [The Dutch East India Company as an actor in International Law] (Rotterdam: The Sanders Institute, 2001), 333–34.
[22] Grotius, *The Truth of Christian Religion in six books*, trans. Simon Patrick (London, 1680), Bk. II, Sect. XV, 74–75.
[23] Grotius, *Hugonis Grotii Dissertatio De Origine Gentium Americanarum* (Paris, 1642), 7–8; see also Joan-Pau Rubiés, "Hugo Grotius's Dissertation on the Origin of the American Peoples and the Use of Comparative Methods," *Journal of the History of Ideas* 52, no. 2 (1991): 221–44.
[24] Grotius, *Annotata Ad Vetus Testamentum* (1644), 6 [on Gen. 2:18], there naming Cicero, but most likely drawing upon Columella *De re rustica* 12.1.1, who was quoting Xenophon and Cicero; see Columella, tr. E. S. Forster and Edward H. Heffner, *On Agriculture*, vol. 3, Loeb Classical Library (Cambridge, MA: Harvard University Press, 2014), 174–75.
[25] Neff 4; *DJB* sig. *5; *RWP* 89.
[26] Earlier defense of Dutch East India Company interests had given rise to his *Commentary on the Law of the Prize* and *Mare Liberum*. See Martine J. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Leiden: Brill, 2006).

marriage questions in Grotius's thinking. In Book Two, Chapter Five of *De Jure*, when Grotius considers the different rights of buying and selling (that is, of restricting imports) and of monopolies, he opines: "There is not an equally valid right obliging a man to sell what belongs to him; for everyone is free [*liberum*] to decide what he will or will not [sell]."[27] That principle is something like the liberty of choosing to marry whomever one loves:

> In this right . . . we think there is included also liberty to seek and contract marriages among neighboring peoples; when, for example, in case a large number of men has been expelled [*expulsus*] from one place and has come to another. Although, to be sure, it is not entirely repugnant to human nature for a man to live without a woman, nevertheless this is repugnant to the nature of most men. . . . Men ought not, therefore, to be cut off from the opportunity to secure wives."[28]

More than simply alluding to marriage as an analogy for trade, Grotius posits that conjugal relation is a common right due to nature.[29] Though he cites classical examples here of intermarriage (Romulus, Canuleius), the contemporary facts on the ground would have been compelling enough. Indeed, the Dutch trading companies of the East and West Indies were forging new practices of marriage.[30] In the colonial Americas, temporary marriages—what were there called "Suriname marriages"—sprung up as a liaison between colonial men and women that obtained no legal status but entailed some rights and ended with the departure of the man.[31] Indeed, marriage was a limited possibility for Dutch workers stationed in the trading outposts of the East India Company. There, agents or factors adopted sexual alliances and ordered households based on concubinage.[32] Across

[27] Neff 102; *DJB* 121; *RWP* 450.
[28] Neff 102–3; *DJB* 121; *RWP* 450–51.
[29] On Grotius's philosophy of "nature-management," see Annabel Brett, "Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius," *The Historical Journal* 45, no. 1 (2002): 31–51.
[30] Wil O. Dijk, *Seventeenth-Century Burma and the Dutch East India Company, 1634–1680* (Singapore: Singapore University Press, 2006), 20, 63: in 1642, the previous policy against marriage was amended so that these factors could marry local women, on the condition that they agreed to stay there for life or as long as their wives and children remained alive; and see Eric Jones, *Wives, Slaves, and Concubines: A History of the Female Underclass in Dutch Asia* (Ithaca, NY: Cornell University Press, 2015), 62–63.
[31] Cornelis Ch. Goslinga, *The Dutch in the Caribbean and in the Guianas*, 1680–1791 (Assen: Van Gorcum, 1985), 358.
[32] Leonard Blussé, *Strange Company: Chinese Settlers, Mestizo women, and the Dutch VOC in Batavia* (Dordrecht: Foris, 1986).

Southeast Asia, it had long been local practice to engage in temporary marriage with foreigners.[33] Intimate relations with non-Christians certainly challenged European norms.[34] Divorce was easy and frequent in Dutch East Asia,[35] though disallowed in Europe except for adultery; Grotius considers divorce in his *De Jure* as well. In Asia, the VOC had taken steps to prohibit marriages to any Company personnel except the soldiers; and all Company personnel had to obtain written permission from the Governor General and Council before marrying.[36] However Company law banned Dutch husbands from taking their Dutch wives to live with them at trading stations, which had no military garrison force. In 1642, this policy was amended so that these factors could marry local women, on the condition that they agreed to stay there for life or as long as their wives and children remained alive.[37] Grotius indirectly responds to such matters by his work in *De Jure*, not to defend VOC practice, but in his going beyond standard Reformers' views on conjugality, he is thinking through the fundamental principles on which such intimate conduct may be understood in natural law. Indeed, Batavia's legal plurality opened up new categories (racial, national, religious, enslaved, or bound and free) through which people had particular obligations and privileges.[38] In much of Book Two, Chapter Five of *De Jure*, Grotius untangles the rights and responsibilities of these sorts of arrangements that were under the jurisdiction of the corporations and foreign powers, indirectly answering specific quandaries of the long-distance economic activity such as were presented in the trading posts of the East and West Indies.[39]

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[33] Barbara Watson Andaya, "From Temporary Wife to Prostitute: Sexuality and Economic Change in Early Modern Southeast Asia," *Journal of Women's History* 9, no. 4 (1998): 11–34.

[34] Deborah Hamer, "Marriage and the Construction of Colonial Order: Jurisdiction, Gender and Class in Seventeenth-Century Dutch Batavia," *Gender and History* 29, no. 3 (2017): 622–40; 622; Jean Gelman Taylor, *The Social World of Batavia: European and Eurasian in Dutch Asia*, 2nd ed. (Madison: University of Wisconsin Press, 2009).

[35] Jones, *Wives, Slaves, and Concubines*, 17.

[36] See Somers, "The VOC as an actor under international law," 330–39; M. A. P. Meilink-Roelofsz, "Aspects of Dutch Colonial Development in Asia in the Seventeenth-Century," in *Britain and the Netherlands in Europe and Asia*, ed. J. S. Bromley and E. H. Kossman (London: Macmillan, 1968), 56–82, esp. 62–63. Cf. the legislative oversight of marriage by the English East India Company; see Stern, *The Company-State*, 37–38.

[37] Wil O. Dijk, *Seventeenth-Century Burma and the Dutch East India Company, 1634–1680* (Singapore: Singapore University Press, 2006), 20, 65.

[38] Hamer, "Marriage," 622–23; and Martine J. van Ittersum, "Debating Natural Law in the Banda Islands: A Case Study of Anglo-Dutch Imperial Competition in the East Indies, 1609–1621," *History of European Ideas* 42, no. 4 (2016): 459–501.

[39] See Somers, *De VOC*, 330–39; M. A. P. Meilink-Roelofsz, "Aspects of Dutch Colonial Development in Asia in the Seventeenth-Century," in *Britain and the Netherlands in*

In *De Jure* Grotius writes that marriages of men to their servants or slaves, or of citizens to foreigners, were valid even if they were not recognized by municipal or Christian law: "A certain form of concubinage is in reality a valid marriage, although it is deprived of certain effects peculiar to municipal law [*juris civilis*]."[40] There Grotius alludes to the Roman Law status of "cohabitation [*contubernium*] and not marriage," that is, between male and female slaves. Concubinage (*concubinatus*) is that relation between "a free man and a slave girl," as well as that of "other unions betweeen persons of unequal rank," including relations between a citizen and a foreign woman (*inter civem & peregrinam*).[41] While not legitimate according to local laws, these alliances are nonetheless marriages as according to the Law of Nature:

> Under these conditions in the state of nature there could be a true marriage [*conjugium verum*] between such persons as I have mentioned if the woman was under the husband's protective care [*custodia*] and had promised him fidelity. Also under the Christian law that will be a true marriage between a male and a female slave, or between a free man and a slave woman; and much the more between a citizen and a foreign woman, or a senator and a freedwoman, if the necessary conditions according to the divine law of Christianity are present, to wit: an indissoluble union of one man and one woman, even if certain effects of the municipal law do not follow.[42]

European Christians were divided about whether marriages with non-Christians or foreigners were supportable.[43] Grotius however sees in them some moral, and some legal, validity. Grotius's book insisted that such marriages as they had been contracted, were not to be voided. "To prohibit [*prohibere*] and to annul [*irritum facere*] are in fact two different things."[44]

Europe and Asia, ed. J. S. Bromley and E. H. Kossman (London: 1968), 56–82, esp. 62–63; Hamer, "Marriage"; Charles R. Boxer, *The Dutch Seaborne Empire, 1600–1800* (London: Hutchinson, 1965).

[40] Neff 131.

[41] *LWP* 2.5.15, p. 247; *DJB* 154; *RWP* 542; not in Neff.

[42] *LWP* 2.5.15, p. 248; *DJB* 154; *RWP* 543; truncated at Neff 131.

[43] On debates over concubinage in the East Indies, see Leonard Blussé, *Strange Company: Chinese Settlers, Mestizo Women and the Dutch in VOC Batavia* (Dordrecht-Holland: Foris, 1986), 156–62.

[44] Neff 132; *LWP* 2.5.16, p. 248; *RWP* 544; *DJB* 155: "Sunt enim diversa, prohibere, & irritum quid facere." See Boxer, *Dutch Seaborne*, 217.

Such marriages, if not permitted to be contracted, he judged, when yet contracted, did stand good in the law.[45] Even the Bible is not the final word: when God commands that the man should leave his father's family to make a new family, Grotius explains that this was most "pleasing to God," but that it was not God's explicit command (*imperatum*) that the union "be perpetual."[46] Even though a permanent, monogamous condition was a preferable condition, Grotius contests that all marriages on earth have that specific form.[47] Incest, however, is always to be forbidden, "sufficiently forbidden by natural reason [*ratio naturalis*] without a formulated law."[48]

II. THE LAWFUL AND THE PERMISSIBLE

Citing the Pauline aphorism (Rom. 4:15), Grotius distinguishes what is best or legal from what is permissible: "From that first condition, in which God assigned only one woman to one man, that is sufficiently apparent which is best and most pleasing to God. It follows that this has always been excellent and praiseworthy. Yet it was not wrong to do otherwise, because where there is no law there is no transgression of law. There was in fact no law on that question in those times."[49] Surveying Biblical and historical marriage practices in *De Jure* 2.9 and, much later, giving still further conjugal examples (3.4.2), Grotius distinguishes between permissive as supererogatory and permissive as non-punishable.[50] Brian Tierney has seen *De Jure Belli* as "a treatise on permissive law, on what is permissible in the conduct of warfare according to the law of nature and the law of nations."[51] Thus through marriage, Grotius not only ponders the legitimacy of alternative conjugal

[45] Cf. the prohibition against intermarriage with non-believers in his Commentary on 1 Cor. 7:12, in Grotius, *Opera Omnia Theologica* (Amsterdam, 1679), II, 789.
[46] *LWP* 2.5.3, p. 236; *DJB* 148; *RWP* 521; not in Neff.
[47] Contra this secularizing account, see Witte, "Natural Law of Marriage."
[48] *LWP* 2.13.3, p. 243; *DJB* 152; *RWP* 534; not in Neff. Cf. "Defense of Chapter V of the *Mare Liberum*," trans. Herbert F. Wright, in Hugo Grotius, *The Free Sea*, ed., Armitage (Indianapolis: Liberty Fund, 2004), 105: "In the marriage of persons who are joined by proximate ties of blood or affinity, even if we did not have the written law of God, nevertheless it would by no means be licit to ignore that such a union is illicit."
[49] *LWP* 2.5.9, p. 236; *DJB* 148: "Ubi lex non est, ibi non est legis transgressio"; *RWP* 521; not in Neff.
[50] *LWP* 3.4.2, p. 642; truncated at Neff 348; and see Christoph Stumpf, *The Grotian Theology of International Law: Hugo Grotius and the Moral Foundations of International Relations* (New York: Walter de Gruyter, 2006), 232–33, on these distinctions.
[51] Brian Tierney, *Liberty and the Law: The Idea of Permissive Natural Law* (Washington, DC: Catholic University of America, 2014), esp. 228–29; on enforcement, see Stumpf, *Grotian Theology*, 65.

relations but also probes a useful analogy for articulating distinctions between what is licit and what permissible.

This logic applies outside marriage: in considering the conduct of war, specifically the right to kill one's enemies in *De Jure* Book Three, Grotius exalts the moral qualities of moderation and restraint. Even though it is lawful to kill the enemy, and to exact revenge and to seize plunder, Grotius posits that what is indeed lawful may not satisfy higher claims of morality. Here it works the other way around: what is morally unacceptable may not always be impermissible. Grotius quotes Paul, 1 Cor. 6:12: "All things . . . are lawful for me, but not all things are expedient."[52] Marriage is one of those things: "To marry a second time is lawful; but it is more honourable to be content with one marriage."[53] With this example in mind, he makes his distinction between those things which are permissible because they are wrong and those which are permissible because it is impossible to punish them: "In another sense, however, something is said to be permissible, not because it can be done without violence to right conduct and rules of duty, but because among men it is not liable to punishment. In this sense fornication is permitted [*licet*] among many peoples."[54] There Grotius makes a distinction between those actions over which humans have choice to be virtuous and those which are given permission because they are simply unpunishable.[55] Permission opens up a gap between what is a limitation of a law and what are the consequences of liberty. The instance of marriage helped explain how law acts as a binding or limiting force on an originary freedom, not as a "right."[56]

This difference between what is positively legal and what is explicitly prohibited is a crucial one for the right of war. In *De Jure* 1.3, Grotius distinguishes war that is either formal or less formal. Public war, properly made, is formal (*solenne*), so it is *justum* (lawful or legal). The parallel is marriage: marriages may be lawful (*justae nuptiae*) or not, as in the union

[52] *LWP* 3.4.2, p. 641–42; *DJB* 3.4.2, p. 456; *RWP* 1271; not in Neff. The place of Christianity, and how to reconcile reason with religion in Grotius's marriage thinking is beyond the scope of this essay. On Grotius's use of the Bible as a secularizing strategy, see Mark Samos, "Secularization in *De Iure Praedae*: From Bible Criticism to International Law," *Grotiana* 26–28 (2005–7): 147–91.

[53] Neff 349; *LWP* 3.4.2, p. 642; *RWP* 1272.

[54] Neff 349; *LWP* 3.4.2, p. 642; *RWP* 1272–73; *DJB* 457: "Alias vero licere aliquid dicitur, no quod salva pietate & officiorum regulis fieri potest, sed quod apud homines poenae non subjacet. Sic apud populos multos scortari licet."

[55] Tierney, 240–41; Stumpf, *Grotian Theology*, 233.

[56] On liberty as a natural starting point for Grotius's social and political life, see Daniel Lee, "Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius's *De Jure Belli ac Pacis*," *Journal of the History of Ideas* 72, no. 3 (2011): 371–92.

of Slaves (*contubernium*); even between free citizens there are illegal marriages, *matrimonia non justa*.[57] Despite their irregular legal status, however, these are not to be prohibited (*non quod non liceat*). It is only that they lack the formality requisite to be legitimate marriages (*nuptiae solennes*).[58] This distinction between the legal and the permissible in conjugality is a foundation of his analysis of formal and just war.

Grotius adopts this distinction from the domain of conjugal practices to explore the varying legal constraints in the conduct of war, for instance how far the license to harm the enemy extends—whether to enemy women, children, slaves, supplicants, prisoners, hostages, and captives. As he sums up his section on war cruelties in *De Jure* 3.4, he states, "just as the law of nations . . . permits many things . . . which are forbidden by the law of nature, so it forbids certain things which are permissible by the law of nature."[59] The principle is established in the chapter on marriage (2.5):

> Not all acts which are contrary to the law of nature are rendered invalid by it [*irrita*] . . . but only those are invalid in which the essential point is lacking to give validity to the act, or in which the fault continues in the result of the action. The essential principle, both here and in other acts, out of which right [*jus*] arises, is that right [*jus*] which we have explained as a moral capacity for action, joined with a will sufficiently free [*voluntate sufficiente*].[60]

What makes an act valid is that the *jus* depends not on a prior condition of capacity and will, but also on the ultimate end of the act. When applied to the lawfulness of killing enemies in war, Grotius (3.4.1) cites Virgil: "Tum certare odiis, tum res rapuisse licebit (*Aeneid* X.11ff: "Then to strive in hatred, then to plunder, / Will become permissible").[61] As Grotius considers these lines from Book X of the epic, where Jupiter looks ahead to the war with Carthage, he considers what is meant by the term *licebit*. He sees a double meaning: on the one hand "lawful" may denote something that is "right from every point of view and is free from reproach"[62] (as in Virgil, he notes); or "what becomes you" (citing Cicero);[63] what it "behoveth"

[57] Neff 45–46; *RWP* 250; *DJB*: 49, 70 (Annotations).
[58] Neff 46; *RWP* 250; *DJB* 49.
[59] Neff 353; *LWP* 651–52; *RWP* 1290.
[60] Neff 127; *RWP* 523–24; *DJB* 149.
[61] *DJB* 456; *LWP* 641; not in Neff.
[62] *LWP* 641.
[63] *LWP* 643; cf. RWP 1273: "what is suitable to be done."

one to do (*quod oportet*), citing Seneca;[64] or avoiding what is "shameful" (Pliny).[65] Outside of lawful, on other hand, there is "that which is not punishable by human Laws, and yet is not consistent with Piety, or the Rules of Morality."[66] It is in the second sense that Grotius applies marriage thinking to the conduct of war. Marriage questions have forced Grotius to the limits of the enforceability of natural law. Thus attending to Grotius's thought on marriage helps elucidate a key concern to the history of political thought: the role of law as an objective concept ("what is just")[67] as well as a moral faculty, possession, or aptitude (a "body of rights"),[68] in the overlapping areas of natural law and the laws of peoples.

III. MARRIAGE-THINKING AND RELATIONS OF UNEQUAL ASSOCIATION

At last we can return to the marriage topics that appear in the fifth chapter of *De Jure*, "On the original acquisition of rights over persons" (*De acquisitione originaria juris in personas*). This analysis pertains to several different topics: "the right of parents, marriages, associations, and the right over subjects and slaves."[69] Between these different kinds of "right" over persons, there are important distinctions to be made. While it is tempting to convert *dominium* in all cases of human dominance to the property relation of ownership, and this has been the tendency in Grotius scholarship, there are strands of other ways of understanding such relationships of right, even as figured through natural law, most notably the Ciceronian lexis of obligation and duties.[70] Marriage is an important way, then, that we might find a means of understanding the fundamentals of morality somewhere between individuals and states: marriage supplies thinking about contract, obligation, and other relationships of association. In exploring inequality, Grotius

[64] *RWP* 1273; *DJB* 457.
[65] *RWP* 1274; *LWP* 643.
[66] *RWP* 1272; *LWP* 3.4.2, p. 642; not in Neff.
[67] Neff 24; *LWP* 1.1.3, p. 34.
[68] Neff 24; *LWP* 1.1.4, p. 35.
[69] Neff 124.
[70] Contrast Tuck, *Rights of War and Peace*, 84, 95. On Grotius's early aggressive defense of trade rights on the basis of subjective rights of *dominium* as well as on Roman civil law concepts, see Martti Koskenniemi, "Empire and International Law: The Real Spanish Contribution," *University of Toronto Law Journal* 61 (2011): 1–36, at 32–34; Straumann, " 'Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's 'De iure praedae,' " *Political Theory* 34, no. 3 (2006): 328–50; Robert Feenstra, "Grotius and Private Law," *Grotiana* 11 (1990): 3–6.

accepts the conventional gender arrangement of paternal sovereignty, subscribing to a hierarchical arrangement of husband over wife adopted from the Roman legal categories of tutelage or guardianship. In the *Jurisprudence of Holland*, first published in 1631, but written around 1620, he explains that the "wife is deemed to be *sub tutela* and the husband is termed the guardian or church-guardian of his wife."[71] In law wives were disallowed full independence, despite ideals of balance and reciprocity in marriage.[72] Unlike in the case of wives, pupils in Roman law were legally incapacitated as wards under the guardianships of their tutors, but did remain free, that is, under their own dominium.[73] In *De Jure* Grotius explores the nature of such rights over persons, and with wives he uses the language of custody rather than tutor: each, however indicates a power over free persons only in those who are explicitly designated, not as a general right.[74]

At various points the analogy of marriage sheds light on the relations between a people surrendering to external authority. For instance, in distinguishing between public and private war, he considers whether sovereignty always resides in the people. A people can make a voluntary contract for submission, "as in the case of a woman giving authority over herself to a husband, whom she must ever after obey."[75] Marriage provides the example for a type of transfer of authority that, once agreed, is complete: there is no divorce. A notion of voluntary surrender or enslavement was, of course, the one on which Rousseau characterized Grotius's political theory as most "favorable to tyrants."[76]

A marital analogy thus justifies not just the rule of the king over a people but sovereignty over another nation—and here his earlier language of marriage as a relationship between tutor and ward shifts. As Grotius

[71] Grotius, *The Jurisprudence of Holland*, trans. and ed. Robert Warden Lee (Oxford: Clarendon Press, 1926), 29; see Alan Watson, *The Law of Persons in the Later Roman Republic* (Oxford: Clarendon, 1967), 104–5.

[72] Sherrin Marshall, *The Dutch Gentry, 1500–1650* (Westport, CT: Greenwood, 1987), 27; Robert Warden Lee, *An Introduction to Roman-Dutch Law* (Oxford: Clarendon Press, 1953), 77–85.

[73] Distinguishing guardianship of minors and of wives is Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford: Oxford University Press, 2016), 134–35.

[74] Cf. Neff 126; *DJB* 2.5.8, p. 147. On the power of the tutor in Roman law, see Watson, 111–13.

[75] Neff 53–54; *DJB* 1.3.8, p. 56; *RWP* 272.

[76] Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (Harmondsworth: Penguin, 1984), 51. On Grotius's notion of a people's voluntary right to surrender, see Tuck, *Natural Rights Theories* (New York: Cambridge University Press, 1979), 79; and Lee, *Popular Sovereignty*, 259–68.

cites the analogy of marriage as indicating either reciprocity or surrender between ruled and ruler, he uses it to examine the legitimacy of and restraint upon conquering or enslaving powers. Some powers of rule are like marriage, designed for the purpose of mutual utility, "Sunt alia regimina mutuae utilitatis causa, ut maritale."[77] The term here is "regimen," not "potestas," "dominium" (as over slaves), or "ius." With the marriage analogy, Grotius introduces concepts of governing that are more subtle than simply a dichotomy between absolute subjection and autonomy.[78] By the prototype of the guardian relation, in which the ward is not without freedom, and where the guardian has legal restrictions on action, a mutually beneficial sort of association may be distinguished from the power of a "Master over his Slave."[79] Grotius holds that "in the case of most states, the benefit of those who are governed is the primary consideration."[80] In the category of "mutual Advantage," Grotius views what we might call conquest: "As when a people, powerless to help itself places itself in subjection to a powerful king for its own protection."[81] From marriage as a relation of reciprocal utility arises the justification for voluntary or even involuntary submission of one nation to another.

And what of resistance? In *De Jurae Praedae*, Grotius claims that the seizure of the prize counts as public war, justifies the legality of the States Assembly of Holland to declare war, and gives the authority to inferior magistrates of "punishing foreign malefactors."[82] In his discussion, Grotius briefly wanders into a justification of the Dutch Revolt. As he considers when allegiance to a prince might be revoked, he posits that self-defense is a meaningful justification for resistance: a people oppressed by a prince may renounce allegiance.[83] But this is not on the contractarian grounds of an exchange of protection for obedience. Instead it is something foundational, resting on the nature of the thing. Kingship may be revoked when the prince is no longer acting as a prince. Grotius turns to marriage to explain this. According to divine law, marriage may be dissolved for adultery, because with adultery it ceases to be a marriage. Adultery is "that sin which is contrary to the very nature of marriage," and thus invalidates the

[77] Neff 54; *RWP* 273; *DJB* 1.3.8, p. 56.
[78] Cf. Lee, *Popular Sovereignty*, 266.
[79] Grotius blends together categories distinct in Roman law; see Lee, *Popular Sovereignty*, 134–35.
[80] Neff 54; *LWP* 1.3.8.14, p. 110; cf. *DJB* 56.
[81] Neff 54; *RWP* 273.
[82] Grotius, *Commentary on the Law of Prize and Booty*, ed. Julia van Ittersum (Indianapolis: Liberty Fund, 2006), chap. 13, p. 394.
[83] Grotius, *Commentary*, 396–97.

marriage. Applying this analogy to a principate, Grotius concludes that when a prince exceeds or contradicts his office, "he ceases *ipso facto* to be regarded as a prince."[84] Components of republican-sounding arguments are evident in *De Jure Belli* though "for fairly obvious reasons" the particular historical references are absent.[85]

IV. CONSENT AND PROMISE

The final point to consider is the nature of consent in these instances, and marital arrangement forms a solid metaphor on which to give an account of those versions of rule (*regimina*) considered mutually beneficial in the broadest sense. Grotius distinguishes what is proper to parental authority from what is proper to marriage. In marriage, unlike in the guardianship of parents over children, Grotius asserts, there is the right of consent (*ex consensu ius*). Grotius divides this right into two different types, that of "association" or "subjection" (*consociatione* or *subjectione*).[86] Marriage, unlike slavery, is a consenting bond of "association." Although Grotius is perfectly patriarchal in his understanding of masculine sexual hierarchy in marriage, this is not sovereignty like that of an absolute monarch. Grotius's views of the nature of women are complex. For instance, as promising requires the use of reason, he concedes that it may be posited that minors and women are not fully rational actors; they "possess a rather weak judgment" (*non satis firmum judicium habere credantur*). Yet a woman's judgment is not so weak so as to "destroy the force [*vim*] of an action."[87] Further, under Pauline benevolence, she shares mutual rights over the body of her husband in sexuality: "Paul, the apostle an interpreter of the law, gives not only to the husband as much right over the person of the wife as was found also in the state of nature . . . but also equal right to the wife in turn over the person of her husband."[88] Women's legal position, under their husband, is however not in dispute. As the "authority (*imperium*) is not held in common, but 'the husband is the head (*caput*) of the wife.' "[89]

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[84] Grotius, *Commentary*, 399: "ipso facto Princeps non videtur": Gwladys L. Williams, trans., *De Jure Praedae Commentarius* (1950), 130['].
[85] Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), 47.
[86] Neff 126; *DJB* 2.5.8, p. 147.
[87] Neff 189; *DJB* 2.11.5, p. 221; *RWP* 709.
[88] *LWP* 2.5.9, p. 235; *DJB* 148: "non viro tantum jus dat in corpus uxoris, quod & in naturali statu procedebat . . . sed & uxori vicissim in corpus mariti"; *RWP* 520; not in Neff.
[89] Neff 126; *DJB* 147.

Yet there is a catch: such consent, it turns out, is conditional. Grotius defines the natural law of marriage in terms of cohabitation: "Marriage, then, according to the law of nature, we consider [to be] such a cohabitation of a man with a woman that it places the woman under the eye of the man and under his guardianship."[90] This sense of "place" conforms to European Christian reformed practice, where marriage occurred not at a singular instance, but as a process in time and place, where bringing a wife into a residence was the final defining moment giving validity to the marriage.[91] With the essence of marriage to create a household, Grotius explains, "the wife, in fact becomes a member of the husband's family; and so the husband has the right (*jus*) to determine matters of domicile."[92]

If cohabitation is what defines marriage, however—and this is striking—it may be simply a temporary bond, lasting only during the period when husband and wife share a home. One can see how this view advantaged those East India tradesmen and their port wives. Yet it gets to the essence of contract. In Roman law, marriage required no ceremony and depended on cohabitation with equal intention of being together. It could be ended by either party at any time, its validity relevant only with regard to the status of inheritance and children, and was largely a private matter between the consenting couple.[93] Roman marriage law was thus based on a notion of "ongoing consent" rather than "initial consent."[94] Grotius's thinking reflects this distinction. Grotius develops the marital logic from this sense of contract in examining the right of postliminy, that is, the right by which persons and things taken in war are restored to their former status. If a once-free nation is rescued with assistance from allies, it may recover its freedom; but—and this is the case which interests Grotius—

> But if the population which formed the state has been dispersed [*multitudo, quae civitatem constituerat, dissoluta fit*], I think it

[90] Neff, 126; *DJB*, 147: "Conjugium igitur naturaliter esse existimamus talem cohabitationem maris cum femina, quae feminam constituat quasi sub oculis & custodia maris"; cf. *RWP* 514.
[91] Ralph Houlbrooke, "The Making of Marriage in Mid-Tudor England," *Journal of Family History* 10 (1985): 339–52.
[92] Neff 126; *DJB* 147: "nam uxor pars fit familiae marialis. Ideo de domicilio constituere jus est marito"; *RWP* 514.
[93] Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon, 1962), 81–85.
[94] Mathew Kuefler, "The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law," *Journal of Family History* 32, no. 4 (2007): 343–70; at 355. Percy Ellwood Corbett, *The Roman Law of Marriage* (Oxford: Clarendon, 1930), 95. On how Roman and modern law differ on consent, see Peter Goodrich, "The Posthumous Life of the Postal Rule: Requiem and Revival of *Adams v Lindsell*," in *Feminist*

> more correct not to consider the people as the same, nor to restore their property by postliminy in accordance with the law of nations, for the reason that a people, like a ship, obviously perishes by the dissolution of its parts, since its whole nature consists in perpetual union [*conjunctione*].[95]

Grotius continues, "With what we have said regarding a state agrees closely the fact that according to the ancient Roman law, by which the dissolution of a marriage was permitted, it was held that the marriage relation was not restored by postliminy, but renewed by a new agreement."[96] This alternate idea of contract as ongoing consent is at variance to the sense that contract, once made and accepted, is a done deal.

From this idea of ongoing consent in marriage, we come to the knot that marriage thinking helps Grotius untie: what is the nature of promise, then, as the basis of contract. The right of the individual to promise is a free faculty, as Annabel Brett has put it, "an original capital."[97] Grotius holds that promises, as a signification of will, do form a natural obligation. Yet he asks, as did Bodin, in what sense is a promise binding: once made, does it, indeed, limit the authority of sovereign power? In *De Jure*, although Grotius considers that the husband has "custody" over his wife, this custody does not entitle the husband to a new morality. Indeed, he is bound by prior understandings and, with respect to promises, he is bound to fulfill them. His guardianship does not remove that obligation; nor does his accession to fulfill a promise diminish his authority.

As a relation of asymmetrical authority, thus marriage supplies fodder for the question of the extent of, and limits to, sovereign power.[98] In *Jurisprudence*, Grotius puts such guardianship in relation to property relations, where the husband's will may preside, and to override even the wife's own consent; and *De Jure* maintains some of this logic of marital *dominium*, holding that a wife's second marriage is void unless the previous husband has divorced her, "for up to the time of divorce his right (*dominium*) over

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Perspectives on Contract Law, ed. Linda Mulcahy and Sally Weaver (London: Glasshouse, 2005), 75–90; at 82.

[95] Neff 379; *DJB* 3.9, p. 501; *RWP* 1394.

[96] *LWP* 3.9.2, p. 707; *DJB* 502; *RWP* 1394; not in Neff.

[97] Brett, "Natural Right," 44.

[98] On *dominium* as "dominion" not "ownership," see Robert Feenstra, "*Dominium* and *ius in re aliena*: The Origins of a Civil Law Distinction," *New Perspectives in the Roman Law of Property. Essays for Barry Nicholas*, ed. Peter Kirks (Oxford: Clarendon, 1989), 111–22; Gustaaf van Nifterik, "Hugo Grotius on 'slavery,'" *Grotiana* 22, no. 1 (2001): 197–242; at 235–36.

her continues."[99] However, as it turns out, there are some limits to this husbandly power, namely, with respect to promises. Promises involve future thinking, and thus are statements of the will. Although fulfilling promises is a law of nature, that act is nonetheless conditional in several respects: the capacities of reason; the truth of the facts presumed by the promise; the power of the promiser; an external sign; and it must be accepted to be valid. There is a distinction between obligation (which involves intention) and "ius," or right, which involves acceptance. The promise is a statement of intention, but, since conditional upon acceptance, it is not strictly speaking an obligation, as Grotius explains in the chapter on promises (*De Jure* 2.11). There are implications for sovereignty, since "a true promise confers a legal right [*jus*] upon the promisee."[100] This might be considered a fledgling possibility for the concept of "rights"—of the wife or of the one to whom a promise is made. However, in the first book of *De Jure*, Grotius considers that while a promise may be a limitation, it in no way removes the authority of the sovereign. Grotius insists,

> Sovereignty [*imperium*] does not cease to be such even if he who is going to exercise it makes promises—even promises touching matters of government—to his subject or to God. . . . That what I say becomes clear from the similarity of the case under consideration to that of the head of a household [*patrisfamilias*]. If the head of a household promises that he will do for it something which affects the government [*gubernationem*] of it, he will not on that acount cease to have full authority [*jus summum*] over his household. . . . A husband, furthermore, is not deprived of the power [*potestate*] conferred on him by marriage because he has promised something to his wife.[101]

Grotius nuances the meaning of *imperium*: the magistrate's legal authority as constrained by laws not of his own making.[102] The latter notion contains in it some notion of legal constraint, the idea that imperial power was subject in some way to constitutional rules that were above the exercise of that

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[99] Grotius, *Jurisprudence*: I.V.19: p. 29; Neff 127; *DJB* 2.5.11, p. 149; *RWP* 526.
[100] Neff 60; *RWP* 1.3.16, p. 301; *DJB* 62; *RWP* 301.
[101] Neff 59; *DJB* 61; *RWP* 300–301. Contrast Bodin, in his refutation of the medieval canon law theory of contract, where the Pope had power to dissolve contracts; here the sovereign is bound by his promises, just as is any private individual, in *On Sovereignty*, trans. and ed. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), Bk. 1, Chap. 8, p. 13. I thank Sarah Mortimer for suggesting this direction in the argument here.
[102] On such questions of sovereignty see Kingsbury and Straumann, eds., *The Roman Foundations of the Law of Nations* (Oxford: Oxford University Press, 2010), 7.

power. With this marital analogy Grotius raises the question of a specific kind of limitation of dominion owing to the higher principle of promises.

CONCLUSION

It may come as a surprise to historians of political thought that the major thinkers in the Graeco-Roman tradition, and especially those interested in natural law, the law of nations, and just war theories—Gentili, Grotius, Selden—wrote expansively on the topic of conjugality and marriage. They did so not solely to define relations between Church and State in the newly reorganized polities of post-Reformation and Counter-Reformation Europe. Indeed, from questions of law both internal and external to the state, their conjugal thinking contributed to the development of concepts of rights. This was not solely in order to reconfigure family and state power within a newly secularizing world of international exchange. Marriage thinking also provided some necessary tools for that reshaping, for modern purpose, such concepts of right and duty as inhered in Roman private law. Since Aristotle, the political had long been understood as the sphere in opposition to that of the *oikos*, the family sphere, yet family politics even from Graeco-Roman times was imbued with political concepts, including dominion, patronage, and patriarchy. As recent scholars of global history and transnationalism concur, the "intimate" aspects of colonial governance are not simply a "private" domain, feminized and lost to history.[103] Indeed, to service the new constitutional needs of that transnational world of commerce and war, marriage itself was a means of making that world possible. Grotius does not have a complex theory of marriage per se, but his writings on marriage shed light on several preoccupations central to his thought. Marriage analogies travel—providing tools with which to open up some hard cases of asymmetrical power relations, permissibility, and contract.

While not giving specific advice to those managing overseas holdings, Grotius, in his marriage work, is partly addressing a context in which practices regarding marriage were fluid. Marriage in the colonial enclaves not only took place within and through the jurisdictions, customs, and legal

[103] Sara McDougall and Sarah M. S. Pearsall, "Introduction: Marriage's Global Past," *Gender and History* 29, no. 3 (2017): 505–528; Merry E. Weisner-Hanks, "Crossing borders in transnational history," *Journal of Global History* 6 (2011): 357–79; Susan D. Amussen and Allyson M. Poska, "Restoring Miranda: Gender and the Limits of European Patriarchy in the Early Modern Atlantic World," *Journal of Global History* 7 (2012): 342–63.

frameworks of the corporations and local indigenous populations, but also engaged multiple forms of sovereignty, family relations, and administrative structures as well as pertained to inter-imperial rivalry and rapid transfers of sovereignty in that interconfessional framework. Marriage, perhaps most fundamental of the topics taken up by early modern thinkers, was a clear and urgent matter of international law. Thus the study of marriage in the history of political thought challenges an approach beyond one focused on the nation-state as a site for exploring natural rights. Even today, marriage can entitle a preferred status for foreigners as regards citizenship, reaching across territorial borders with its own special claims. In many ways, as this article has shown, for Grotius, marriage was a useful concept in developing accounts of sovereignty and order appropriate for corporate, or temporary, site-specific jurisdiction. The story of European constitutional change has recently begun to take seriously international contexts and has been refreshed by an understanding of the way that private law as well as the emerging law of corporations were formidable presences in the creation of colonial governance and international trade.[104] Marriage is part of that story.

Johns Hopkins University.

[104] Koskenniemi, "Expanding Histories of International Law," *American Journal of Legal History* 56 (2016): 104–12; Armitage, "Wider Still and Wider: Corporate Constitutionalism Unbounded," *Itinerario* 39, no. 3 (2015): 501–3.