

## OF COMMONWEALTHS AND OUR COMMONWEALTH: AN INTRODUCTION

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The germ of the idea that became this symposium theme was planted in Bogotá, Colombia, at a conference on comparative constitutionalism held at the University of the Andes in the spring of 2017. Over drinks one night with Amnon Lev—one of the participants in this first iteration of the “Future of the Commonwealth” symposium—I was describing my impending move to the Commonwealth of Kentucky to become Dean of the Louis D. Brandeis School of Law at the University of Louisville. I deliberately referred to Kentucky as a “commonwealth” when speaking with Amnon because much of our conference found us discussing the intricacies of modern constitutional and contractarian theory, with references to the ideas of the “commonwealth” that justified the foundation of liberal democracies created to satisfy shared political, social, and economic needs.

Amnon, a Dane, expressed astonishment. “Commonwealth?” he asked. “The place is actually a commonwealth?” “Indeed, it is,” I explained. Kentucky is, in the U.S. context, an older state. Like three other states, namely Massachusetts, Pennsylvania, and Virginia (of which Kentucky was once a part), the state formally retains the “commonwealth” nomenclature.

Amnon, a scholar of modern legal history and legal philosophy,<sup>1</sup> was absolutely fascinated by this, and asked a series of questions. Did the fact that it was a commonwealth affect the law in Kentucky today? Was this fact reflected in the organization or administration of the state in any particular way? Unfortunately, I had no answers for him; I had yet to move to the Commonwealth of Kentucky.

However, this did lead to an idea that I developed that evening and again further at the conference the next day, with Amnon and with a third contributor to this volume, Daniel Bonilla. I asked them, “What if we were to do a conference on the future of the commonwealth, to explore the meanings of that term when it was in common use, and to examine how it is being used today, to try and connect past with present practice and concept?”

Those discussions led to the symposium that gave birth to this volume, and to an idea for the University of Louisville Law Review going forward.

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<sup>1</sup> See, e.g., AMNON LEV, *THE FEDERAL IDEA: PUBLIC LAW BETWEEN GOVERNANCE AND POLITICAL LIFE* (2017); AMNON LEV, *SOVEREIGNTY AND LIBERTY: A STUDY OF THE FOUNDATIONS OF POWER* (2014).

The idea was simple: as often as it wished, the Law Review would seek to assemble a talented and diverse group of scholars to discuss a topic concerning some aspect of the “Future of the Commonwealth.” The legal focus could be historical or it could be quite contemporary. It could be about the Commonwealth of Kentucky in particular or about the “commonwealth” in the larger, metaphorical sense of our common civic, social, and political goals and challenges.

Upon arriving in Kentucky, I took this to the then-editors of the Law Review, Adam Wetherington and Chase Cunningham. They were sold, and in turn, sold this idea to their respective successors, Elizabeth Penn and Kylie King. An idea was about to become reality.

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For this first iteration, it was decided that we would attempt to lay some of the theoretical foundations for the years ahead. That is, this volume would look back at earlier conceptions of the idea of a “commonwealth,” such that we might build upon the idea in future years by focusing on more current legal and policy challenges, debates, and issues, whether in the Commonwealth of Kentucky or the larger national or international commonwealth that any group seeks to protect or create.

We also settled on a format designed to promote rigorous intellectual debate and interaction. Contributors were invited on the condition that, prior to the event, they produce a draft article well before the symposium. These drafts were then circulated among all other participants and among the members of the Law Review editorial staff who would edit them. On the actual day of the event, contributors had five to ten minutes to reiterate their ideas—working on the assumption that others had already read their contributions—and then debate of the contributions began. Weeks later, informed by these debates and discussions, contributors revised their pieces and resubmitted for publication. The results are what you have here. I think I speak for all of us present that the nature of the interaction was an especially fruitful one, a mode of academic exchange that promoted focused attention on the contributions and frank discussion. It is my hope and expectation that the model will continue to thrive in future “Future of the Commonwealth” symposia.

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The symposium articles published here represent a range of considerations of the meaning and implications of the word “commonwealth,” as well as its predecessors and some of its distant

antecedents. In all, the articles cover over 400 years of history. In the first article, historian Sarah Morgan Smith examines a predecessor notion to commonwealth, namely the idea of “communion” among the Puritans of the Massachusetts Bay Colony.<sup>2</sup> Morgan Smith begins with a broad survey of the Puritan notions of communion—or of common purpose dictated by a divine order and moral code—and then turns her attention to the preacher Thomas Shepard and his legal exegesis performed at the request of the Bay Colony’s General Court in 1636. Morgan Smith then examines the theological origins of what today we might call Puritan legal theory, explaining that the process took over a decade to cement such that “Shepard’s vision of a commonwealth grounded in the consent of the governed and guided by strong laws [could] be realized.”<sup>3</sup> As Morgan Smith goes on to demonstrate, the Puritans struggled mightily with the question of how specific men (and they meant men at the time) had to be in the articulation of laws and rules in order for a civic order to function well. For a society based on a religious foundation, this was a question of great moment; religious leaders and “magistrates” were not, as Morgan Smith makes clear, necessarily allied. Indeed, as she points out, for a minister as famous as John Winthrop, there were two kinds of liberty—natural liberty and civil liberty. The latter was that of a covenanted civil society, bound to a code for purposes of working jointly in the service of Christian values. In sum, Morgan Smith’s intricately detailed piece provides a valuable reflection on early statements in what became our own democratic traditions about the ability to secure one’s personal liberty by ascribing to values of a group.

Like Morgan Smith, Luke Milligan’s piece is interested in the interplay between natural law and what we have come to know as social contract theories.<sup>4</sup> Milligan’s article specifically considers the role of higher education in the commonwealth. Milligan begins with a look at some of the natural law bases of society, pressing us to consider the value of establishing commonwealths with a “natural purpose.”<sup>5</sup> He thus argues that thinkers from Aristotle to Locke and beyond have made a case for some sort of “natural purpose” argument as a foundation of political society.<sup>6</sup> Milligan then moves from this argument and uses it as a springboard to consider two questions: “First, do commonwealths heighten natural obligations to pursue ‘the good

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<sup>2</sup> Sarah A. Morgan Smith, *Commonwealth as Civic Communion*, 57 U. LOUISVILLE L. REV. 467 (2019).

<sup>3</sup> *Id.* at 489.

<sup>4</sup> Luke Milligan, *Natural Law, Commonwealths, and Higher Education*, 57 U. LOUISVILLE L. REV. 501 (2019).

<sup>5</sup> *Id.* at 504.

<sup>6</sup> *Id.* at 504–06.

life’? And second, are universities helpful in these pursuits?’<sup>7</sup> In answering the first question, Milligan concludes that “the relative security provided by commonwealths heightens individuals’ obligations to pursue previously neglected aspects of the good life.”<sup>8</sup> With respect to the second question, he observes in part as follows: “three basic goods—knowledge, aesthetic experience, and practical reasonableness—can be advanced through formalized education.”<sup>9</sup> Milligan concludes by proposing a robust set of approaches to help universities refocus on the delivery of these “basic goods.”

The next two contributions to this symposium use as their starting point the political philosophy of Thomas Hobbes, the social contractarian thinker whose ideas are so central to the intellectual history of modern democratic societies, including the United States. The first of these is Amnon Lev’s contribution.<sup>10</sup> In his contribution, Lev seeks to lay bare the challenge for democratic theory—in commonwealths—of “sociality,”<sup>11</sup> and then to engage a discussion between Hobbes and the twentieth century U.S. political theorist John Rawls. In this, says Lev, he seeks “to consider the attempt by Rawls to reframe contract theory so as to disembed it from its Hobbesian setting and give it purchase on social life.”<sup>12</sup> As Lev notes, Rawls omitted Hobbes from his list of social contract theorists in whose steps he followed, a choice with curious consequences. As Lev goes on to explain, “Hobbes is in fact hovering in the background” of Rawls’s thought,<sup>13</sup> as the latter seeks to account for social discord. I will leave it to the reader to engage with Lev’s dissection of Rawls’s thought looked at through the lens of Hobbes’s ideas (and vice versa). As Lev notes in concluding, Rawls reveals the limitations of Hobbes as a social contractarian, just as “Hobbes shows Rawls’s belief in the capacity of human nature to work itself pure to be naïve, anachronistic, and misguided.”<sup>14</sup>

My own contribution here<sup>15</sup> also uses Hobbes as its point of departure, though looks at his ideas more narrowly. Moreover, my article shares some of the thematic concerns of Milligan’s, discussed above, as I, like him, seek

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<sup>7</sup> *Id.* at 501.

<sup>8</sup> *Id.* at 508.

<sup>9</sup> *Id.* at 511–12.

<sup>10</sup> Amnon Lev, *Hobbes, Rawls, and the Theory of Commonwealth*, 57 U. LOUISVILLE L. REV. 519 (2019).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 520.

<sup>13</sup> *Id.* at 531.

<sup>14</sup> *Id.* at 540.

<sup>15</sup> Colin Crawford, *On the Role of Universities in the Commonwealth*, 57 U. LOUISVILLE L. REV. 543 (2019).

to understand better the theoretical justification for institutions of higher learning in a commonwealth. In particular, I work to understand what an early contractarian thinker like Hobbes believed to be the role of learning and in particular of higher education. As I show, Hobbes had a low view of the universities of his day, finding them temples of ancient and socially destructive backward thinking. Nonetheless, Hobbes also believed that universities, when well-run and forward-thinking, were essential to the operation of a modern, enlightened state.<sup>16</sup> I then put these ideas in a mirror, to compare them to modern debates about universities. In this, I attempt to show that modern debates reveal an inverted picture: the radical Hobbes would be welcomed in today's universities where, many claim, more conservative, order-respecting ideas are rejected.<sup>17</sup> I will leave it for readers to draw their conclusions about the meaning and value of these debates, whether in Hobbes's time or our own, although I do suggest that universities may usefully serve to strike a balance between order and intellectual disruption in order to realize a well-functioning society.

The next contribution, from Daniel Bonilla, considers aspects of the thought of the French Enlightenment thinker Montesquieu.<sup>18</sup> Bonilla sets out to understand a basic question, namely "to explore how the comparative method, geography, and climate intersect in Montesquieu to explain the basic structures of political communities."<sup>19</sup> In so doing, Bonilla's further aim, as he explains, is to understand Montesquieu's role as "the paradigmatic representative of the first and more prominent efforts to use the comparative method in modern law and politics."<sup>20</sup> This matters, Bonilla argues, because the assumptions underlying and analytical implications of Montesquieu's method "remains rooted in contemporary legal and political imagination."<sup>21</sup> This method, Bonilla demonstrates, has profound consequences for how we view different legal systems and their societies since Montesquieu's comparativism determines how we understand and view the subjects of law. As Bonilla writes: "Montesquieu's argumentation constructs a subject that is constituted both by what it is and what it is not. . . . The northern man is masculine, valiant, enterprising, daring, active, and not very sensitive, and he

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<sup>16</sup> See *id.* at 554.

<sup>17</sup> See *id.* at 557.

<sup>18</sup> Daniel Bonilla Maldonado, *Montesquieu and Modern Comparative Law, Climate, Geography, and the Structure of Political Communities*, 57 U. LOUISVILLE L. REV. 561 (2019).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 562.

<sup>21</sup> *Id.* at 563. This is a theme that Bonilla has been developing, in different work, in recent years. See, for example, Daniel Bonilla Maldonado, *The Political Economy of Legal Knowledge*, in CONSTITUTIONALISM IN THE AMERICAS 29–78 (Colin Crawford & Daniel Bonilla Maldonado eds., 2018).

values his individual autonomy positively. The southern man is weak, effeminate, cowardly, not very enterprising, timid, lazy, and sensitive, and he does not value his individual autonomy very much.”<sup>22</sup> As Bonilla goes on to analyze, this narrative—despite Montesquieu’s claimed commitment to human autonomy—sets some (those from the Global North) up to be viewed as succeeding at law and enlightened living, while leaving others (those in the Global South) to fail. Bonilla thus powerfully invites us to question the methods for comparing legal systems established at least since the Enlightenment—a time influential in forming the bases of the U.S. legal tradition, among others.

Like Bonilla, Deirdre Bowen’s contribution reflects a concern with the dominance of a theoretical structure purportedly designed to enlighten and defend beneficial social values while in fact reifying divisions and inequalities.<sup>23</sup> In particular, Bowen turns to an unlikely source for thinking about the commonwealth, namely sociological theory and in particular the texts of Emile Durkheim. Her starting point is unlikely because, as she begins: “[t]he notion of the commonwealth is not a concept clearly articulated in sociological theory.”<sup>24</sup> In Bowen’s view, although Durkheim was a powerful articulator and defender of what we now understand as human rights and individual dignity, he also developed a theory that largely excluded from his “human rights paradigm”<sup>25</sup> over half of the human population—that is, his theory devalued and delegitimized the social role of women. Specifically, Bowen argues that Durkheimian theory protects and rationalizes “a patriarchal society that continues to subjugate women on the basis of a discourse of biological and social determinism.”<sup>26</sup> Bowen then goes on to contemplate the #MeToo movement and demonstrates how many of the ways it was characterized reflect the continuing and, for women, pernicious social, civil, and political consequences of Durkheim’s theory.

In the symposium’s last contribution, Justin Walker and Kirk Smith<sup>27</sup> use Abraham Lincoln’s first message to Congress to understand what the Kentucky-born President had to say about a number of issues pressing to the state and future of our commonwealth (by which I mean our country and not the Commonwealth of Kentucky). In particular, in their article, they “want to explore what Lincoln had to say about four specific topics that are important to the commonwealth: the balance required by federalism; the balance

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<sup>22</sup> Bonilla Maldonado, *supra* note 18, at 580–81.

<sup>23</sup> Deirdre M. Bowen, *#NotMe: A Commonwealth for Mankind*, 57 U. LOUISVILLE L. REV. 587 (2019).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 588.

<sup>27</sup> Justin Walker & Gregory Kirk Smith, *Lincoln’s Lessons*, 57 U. LOUISVILLE L. REV. 613 (2019).

between security and liberties; the balance between presidential and congressional power; and the balance for statesmen between listening and leading.”<sup>28</sup> In their article, Walker and Smith examine a number of controversial moments and decisions during Lincoln’s presidency and his response to them, suggesting that Lincoln’s example “illuminate[s] a journey of discovery each American must travel with his or her own compass. The progress of our commonwealth does not depend on perfect answers. It requires only that with humility and good faith, with one eye on yesterday’s tutors and the other on tomorrow’s possibilities, every citizen continues asking the questions that demanded the attention of history’s wisest President.”<sup>29</sup>

In sum, this volume reflects a diverse and provocative set of contributions that undertake to excavate the meaning of our “commonwealth” and to understand how those meanings, and the values they represent, can advance or detract from the achievement of our individual and shared interests. It is my sincere hope that this will be but the first of many such symposium editions that explore our potential for building a stronger and more just commonwealth, whether in the Commonwealth of Kentucky or in commonwealths beyond its border.

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<sup>28</sup> *Id.* at 614.

<sup>29</sup> *Id.* at 638.

