

NATURAL LAW, COMMONWEALTHS, AND HIGHER EDUCATION

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I. INTRODUCTION

Contemporary political and legal discourse is typically fixed in the language of rights.¹ Arguments about duty are uncommon, and those resting on *natural* duty are virtually non-existent.² During this symposium on the idea of a commonwealth, I challenge us to reset our discourse, if only briefly, in the language of natural duties. In doing so I will prompt two basic questions. First, do commonwealths heighten natural obligations to pursue the good life? And second, are universities helpful in these pursuits?

II. COMMONWEALTHS AND NATURAL LAW

A “commonwealth” is a type of political community.³ Dating to the fifteenth century, the word stems from the Old English for “wealth,” defined as “well-being,” and, more loosely, from the Latin for “republic.”⁴ It meant, more or less, “common well-being.”⁵ Today the term describes “a state in which the supreme power is vested in the people.”⁶

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¹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223 (Bloomsbury 2013) (1977) (“The language of rights now dominates political debate in the United States.”); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 14–15 (William Marrow 1984) (discussing the expansion of “the civil rights vision”).

² I am not referring to duties fixed in positive law, but rather extra-legal duties. The nearest we come in legal and political discourse is “responsibility” (whether “civic” or “personal”), “public service,” or vague slogans like “be nice” or “just do the right thing.” Sometimes we find the concept of extra-legal duties masked in “rights rhetoric” (say, in the idea that someone *should* have some *right* respected by the community), which only further demonstrates our general discomfort with the language of duties.

³ *Commonwealth*, MERRIAM-WEBSTER DICTIONARY (New ed. 2016).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* The term commonwealth does not imply liberalism. See generally JOSIAH OBER, *DEMOPOLIS: DEMOCRACY BEFORE LIBERALISM IN THEORY AND PRACTICE* (Cambridge Univ. Press 2017); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 62 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) (referencing the “number of petty Common-wealths in the beginning of Ages, and which always multiplied, as long as there was room enough, till the stronger, or more fortunate swallowed the weaker”).

A. Foundations

The idea behind “commonwealth” is traceable to classical Greek dissertations on the polis.⁷ Aristotle believed the polis has a natural foundation.⁸ He wrote that it “belongs to the class of things that exist by nature, and that man is by nature an animal intended to live in a polis.”⁹ It is “the crown” that “completes and fulfils the nature of man; it is thus natural to him, and he is himself ‘naturally a polis-animal’; it is also prior to him, in the sense that it is the presupposition of his true and full life.”¹⁰

The concept of polis is special to humans. “Nature,” wrote Aristotle, “makes nothing in vain; and man alone of the animals is furnished with the faculty of language.”¹¹ He continued:

[L]anguage serves to declare what is advantageous and what is the reverse, and it therefore serves to declare what is just and what is unjust. It is the peculiarity of man, in comparison with the rest of the animal world, that he alone possesses a perception of good and evil, of the just and the unjust, and of other similar qualities; and it is association [in] these things which makes a family and a polis.¹²

A polis solves a high-stakes problem. Aristotle saw that “[m]an, when perfected, is the best of animals; but if he is isolated from law and justice he is the worst of all.”¹³ Without a polis, he is “either a poor sort of being, or a being higher than man.”¹⁴

Aristotle aside, the foundation of a commonwealth need not be natural. Thomas Hobbes famously grounded political communities in social contract theory.¹⁵ For Hobbes, the idea of consent rests in our shared fear of death at

⁷ See ARISTOTLE, *POLITICS* (Ernest Barker ed. & trans., Oxford Univ. Press 1958) (c. 335–323 B.C.E.); see also PLATO, *FIVE GREAT DIALOGUES 6* (Benjamin Jowett trans., Gramercy Books 1995).

⁸ ARISTOTLE, *supra* note 7, at 5.

⁹ *Id.*

¹⁰ *Id.* at 2; Randall Curren, *Aristotle's Educational Politics and the Aristotelian Renaissance in Philosophy of Education*, 36 OXFORD REV. EDUC. 5, 543, 549 (2010) (“As Aristotle conceives it, a political society *should* be a mutually beneficial partnership to which everyone freely consents.” (emphasis added)).

¹¹ ARISTOTLE, *supra* note 7, at 5–6.

¹² *Id.* at 6.

¹³ *Id.* at 7.

¹⁴ *Id.* at 5.

¹⁵ THOMAS HOBBS, *LEVIATHAN* (Edwin Curley ed., Hackett Publ’g Co. 1994) (1651). Although Hobbes did not limit his discussions to commonwealths, his views regarding the material bases for state authority extend to commonwealths.

the hands of fellow men.¹⁶ This concept was later developed in the writings of John Locke.¹⁷ Our particular commonwealths (state and federal) fall squarely within the social contract tradition.¹⁸ Rejecting the divine right of kings, the Declaration of Independence provides that “Governments are instituted among Men” and that “their just powers” are derived “from the consent of the governed.”¹⁹ This idea is further affirmed in the preambles of our constitutions.²⁰ Both the United States and Kentucky constitutions make clear that governmental power was “ordain[ed]” and “establish[ed]” by “the People.”²¹

¹⁶ *Id.* at 109–10. As Amnon Lev observes, Hobbes gave us a “tomorrow” but not a “future.” Amnon Lev, *Hobbes, Rawls, and the Theory of Commonwealth*, 57 U. LOUISVILLE L. REV. 519, 521 (2019) (“The foundation of the commonwealth remains incomplete, which means that, formally speaking, the polity it grounds has only a very insecure hold of what is to come. The finality of the founding moment may be a life that is not yet, but, formally speaking, the founding remains tied to the present, a present that is eternal for being constantly repeated. . . . The commonwealth, we may say, is the society that has no future; it only has a tomorrow.”). The American project, drawing from Locke, looked to assure both. See generally U.S. CONST. amend. IV (“The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”) (emphasis added); Luke M. Milligan, *The Forgotten Right to Be Secure*, 65 HASTINGS L.J. 713, 750 (2014) (“[F]ounding-era discourse strongly suggests that, in the context of unreasonable searches and seizures, the framers realized the value of ‘protection’ and ‘freedom from fear.’”).

¹⁷ LOCKE, *supra* note 6, at 62 (“That it was not the natural right of the Father descending to his Heirs, that made Governments in the beginning, since it was impossible, upon that ground, there should have been so many little Kingdoms . . .”); Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. R. 33, 45 (1997) (citing HARRY JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 61–62 (1994)); HENRIK SYSE, NATURAL LAW, RELIGION, AND RIGHTS 190 (2007) (stating that Locke “ended up with a voluntarist, revelation-based natural-law theory . . .”).

¹⁸ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also KY. CONST. § 4.

¹⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); FRANK S. MEYER, IN DEFENSE OF FREEDOM AND RELATED ESSAYS 50 (Liberty Fund 1996) (“[S]ocial and political organization, however important as a condition of existence, is, like oxygen or water, a condition, not the end, of the life of the individual person.”).

²⁰ See KY. CONST. pmb.; see also U.S. CONST. pmb.

²¹ See KY. CONST. § 4 (“All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.”). In his Amistad speech, John Quincy Adams said, “I know of no other law that reaches the case of my clients, but the law of Nature and of Nature’s God on which our fathers placed our own national existence.” John Quincy Adams, *Argument of John Quincy Adams, Before the Supreme Court of the United States: in the Case of the United States, Appellants, vs. Cinque, and Others, Africans, Captured in the schooner Amistad, by Lieut. Gedney (1841)* (transcript available at http://avalon.law.yale.edu/19th_century/amistad_002.asp). Although ambiguous, the statement “on which our fathers placed our own national existence” seems to suggest the contrary view: that the commonwealth we call the United States has at least in part a natural authority.

B. Purposes

Foundation and purpose are distinct concepts. The fact that a commonwealth lacks a natural foundation tells us very little about its purpose. A famed architect commissioned to design a new cathedral may view his work as fully human—independent of God's will—but nonetheless hope and expect it will guide individuals into communion with God. The same might be said of a transcendentalist writer. The point is simply that there is nothing conceptually problematic about a political community lacking a natural foundation all the while serving a natural purpose.

The idea that a commonwealth can serve natural purposes is ancient.²² In *Politics*, Aristotle explained that “any polis which is truly so called, and is not merely one in name, must devote itself to the end of encouraging goodness.”²³ He observed that every polis is “a species of association,” and “that all associations are instituted for the purpose of attaining some good—for all men do all their acts with a view to achieving something which is, in their view, a good.”²⁴ Putting it differently, he wrote that “while it grows for the sake of mere life, it exists for the sake of a good life.”²⁵

Otherwise, a political association sinks into a mere alliance . . . [and] law becomes a mere covenant—or (in the phrase of the Sophist Lycophron) “a guarantor of men's rights against one another”—instead of being, as it should be, a rule of life such as will make the members of a polis good and just.²⁶

On this point, the concept of justice is essential.²⁷ Aristotle believed that “[j]ustice belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association.”²⁸ He explained that “[i]njustice is all the graver when it is armed injustice; and man is furnished from birth with arms which are intended to serve the purposes of moral

²² See ARISTOTLE, *supra* note 7.

²³ *Id.* at 119.

²⁴ *Id.* at 1.

²⁵ *Id.* at 5; *id.* at 121 (“It is only a common scheme for the encouragement of a good quality of life which can be the basis of a polis The same method of exhaustion of possibilities has been followed in the definition of the citizen, and in the discussion of the identity of the state.”).

²⁶ *Id.* at 119.

²⁷ *Id.* at 7.

²⁸ *Id.*; HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 119 (John Hopkins Press 1949) (“The law speaks on all subjects and more or less rightly commands the practice of all the virtues. Justice, then, in this sense, may be said to be the practice of entire virtue toward one's neighbors.”).

prudence and virtue, but which may be used in preference for opposite ends.”²⁹

Locke shared many of these ideas about the purpose of a political community. A basis for Lockean consent is the widespread desire of human beings to live in accord with natural law. Locke believed that “natural law imposes on man a duty to glorify God” and that we are “constrained to act in accordance with Divine Law.”³⁰ In order “to attain these ends,” we consensually enter into a political society.³¹ More recently, John Finnis explained that “[t]he ongoing life of a human community is not a limited technical context, and the common good of such a community cannot be measured as an aggregate, as utilitarians suppose.”³²

The conventional American view at the time of the founding was that the best political communities exist for the sake of the good life.³³ And our particular commonwealths (state and federal) were designed in order (at least in part) to facilitate individuals’ pursuits of natural ends.³⁴ Pointing us to “truths” that are “self-evident,” the Declaration of Independence states that we are “endowed by [our] Creator with certain inalienable Rights” and that “to secure these [natural] rights, Governments are instituted among Men.”³⁵ These concepts are further reflected in the Kentucky constitution, which in its preamble states that “[w]e, the people of the Commonwealth of Kentucky, are grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.”³⁶

²⁹ ARISTOTLE, *supra* note 7, at 7.

³⁰ Kennedy, *supra* note 17, at 45 (citing JAFFA, *supra* note 17, at 65).

³¹ *Id.*; see KIRSTIE M. MCCLURE, JUDGING RIGHTS: LOCKEAN POLITICS AND THE LIMITS OF CONSENT 53 (1996) (arguing that the laws of nature are meant by Locke to direct man toward a life of virtue); SYSE, *supra* note 17, at 198 (saying that this is not evident from Locke’s *Second Treatise* but “[o]n the other hand, Locke’s ‘law of nature’ eventually comes to be closely identified by Locke with New-Testament law and morality . . . and this identification of natural law and revelation may make it more plausible to call natural law a ‘law of virtue’”); Letter from John Locke to Edward Clarke, of Chipley, Esq. (Mar. 7, 1692) (transcript available at <https://sourcebooks.fordham.edu/mod/1692locke-education.asp>) (stating that “virtue” is the “knowledge of a man’s duty, and the satisfaction it is to obey his maker, in following the dictates of that light God has given him, with the hopes of acceptance and reward”).

³² JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 213 (2d ed. 2011).

³³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁴ Kennedy, *supra* note 17, at 45 (citing JAFFA, *supra* note 17, at 65) (“Locke’s ideas about the purpose of government eventually found their way into the Declaration of Independence . . .”). This is not to suggest they expected every individual would benefit in their pursuit of the good life, or that all those whom they expected to make gains would benefit equally.

³⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³⁶ KY. CONST. pmbli.; see also *id.* § 1 (stating that “[a]ll men” have “certain inherent and inalienable rights”).

At the time of the founding, the idea of natural law was widely accepted.³⁷ Thomas Jefferson explained that the Declaration was based on “[t]he harmonizing sentiments of the day, whether expressed in conversations, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.”³⁸ In *Federalist No. 31*, Alexander Hamilton wrote that “[i]n disquisitions of every kind there are certain primary truths, or first principles, upon which all subsequent reasonings must depend” and “[t]hese contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind.”³⁹ James Wilson articulated the Constitution’s natural law assumptions in his influential lectures at the College of Philadelphia.⁴⁰ And in the late eighteenth century decision *Calder v. Bull*, the Supreme Court indicated that judges should be free to strike any law offending natural law principles—irrespective of textual authority.⁴¹ Citing to “certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power,” Justice Chase wrote that “[a]n ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”⁴²

C. Heightened Natural Obligations

The fact that commonwealths have been designed to *secure* the good life raises a critical question: Do individuals within commonwealths have

³⁷ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see Paul Moreno, *The U.S. Supreme Court and Natural Law*, NAT. L., NAT. RTS., & AM. CONSTITUTIONALISM, <http://www.nlnrac.org/american/u.s.-supreme-court> (last visited Mar. 21, 2019) (“The notion of natural law pervaded the period of the American founding. It was expressed in the Declaration of Independence’s claims of ‘self-evident truths’ about human equality, the necessity of consent, and the right to revolution.”).

³⁸ Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in THE POLITICAL WRITINGS OF THOMAS JEFFERSON 88 (Edward Dumbauld ed., Bobbs-Merrill Co. 1955).

³⁹ THE FEDERALIST NO. 31 (Alexander Hamilton).

⁴⁰ Mark David Hall, *James Wilson’s Law Lectures*, 128 PA. MAG. HIST. & BIOGRAPHY 63, 63–76 (2004).

⁴¹ *Calder v. Bull*, 3 U.S. 386 (1798).

⁴² *Id.* at 388; but see *id.* at 398 (Iredell, J., dissenting) (stating that the Court “cannot pronounce [a piece of legislation] to be void, merely because it is, in their judgment, contrary to the principles of natural justice”).

heightened obligations to *pursue* the good life?⁴³ The analysis begins with a basic recognition that one's ability to flourish in accord with natural law is unavoidably related to material constraints. For example, if your several decades on Earth fall not within an era of peace and leisure, but war and poverty, then your pursuit of certain goods (for instance, knowledge) will be relatively hindered.⁴⁴ Aristotle realized this, noting that citizens "must have leisure from productive activities so they can acquire the highest virtue and make activity in accordance with it the dominating concern of their lives."⁴⁵ Hobbes famously observed that in a condition of perpetual insecurity

there is no place for industry, because the fruit thereof is uncertain, and consequently no culture of the earth, no navigation nor use of the commodities that may be imported by sea, no commodious building, no instruments of moving and removing such things as require much force, no knowledge of the face of the earth; no account of time, no arts, no letters, no society, and, which is worst of all, continual fear and danger of violent death, and the life of man solitary, poor, nasty, brutish, and short.⁴⁶

In more reserved terms, Finnis got at the same point, explaining that discerning right action requires surveying "all aspects of human opportunity and flourishing" and understanding "their limited commensurability" rooted in "economic and other material conditions of social interaction."⁴⁷

Our framers knew this. Not content to simply announce their view that governments should facilitate individuals' pursuits of the good life, our founding documents go further, looking to establish the practical preconditions for natural flourishing.⁴⁸ For instance, the Preamble to the United States Constitution states the government is formed to "insure domestic Tranquility," "provide for the common defence," and "promote the general Welfare."⁴⁹ Section 4 of the Kentucky constitution states that

⁴³ John Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1075 n.63 (1994) ("[T]he first principal of a sound morality must be: In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and will those and only those possibilities whose willing is compatible with integral human fulfillment."). By "heightened" I mean *generally* (across commonwealths) and *relatively* (in comparison to the state of nature). Of course, the pursuit of the good life may be stunted by a commonwealth which creates or acquiesces to extreme levels of individual insecurity. Moreover, the pursuit of the good life within even the most just commonwealth may be hindered from time to time by a countervailing duty to obey law. See FINNIS, *supra* note 32, at 149.

⁴⁴ HOBBS, *supra* note 15, at 76.

⁴⁵ Curren, *supra* note 10, at 550.

⁴⁶ HOBBS, *supra* note 15, at 76.

⁴⁷ See FINNIS, *supra* note 32, at 15.

⁴⁸ See KY. CONST. pmb.; U.S. CONST. pmb.

⁴⁹ U.S. CONST. pmb.

government is instituted for the people's "peace, safety, happiness, and protection of property."⁵⁰ When secured, these objects free up new resources, time, and energy for individuals.⁵¹ And because duty has no use for idleness,⁵² new resources, time, or energy serve to heighten individuals' natural obligations.⁵³ Put more succinctly, the relative security provided by commonwealths heightens individuals' obligations to pursue previously neglected aspects of the good life (again, as a general matter).⁵⁴

III. NATURAL LAW AND HIGHER EDUCATION

The view that commonwealths heighten individuals' obligations to pursue the good life invites a more detailed discussion of natural law's content. The following sections briefly describe the concept of basic goods and the role of formal education in the pursuit of such goods.

A. Basic Goods

Those who agree on the existence of natural law often disagree about its content. For instance, Aquinas identified the basic goods of life, procreation, social life, knowledge, and rational conduct.⁵⁵ Finnis set forth a list of basic goods, which includes life, knowledge, play, aesthetic experience, sociability of friendship, practical reasonableness, religion, and marriage.⁵⁶ Germain Grisez and Mark Murphy have offered up their own modified catalogs.⁵⁷

⁵⁰ KY. CONST. § 4.

⁵¹ *Id.*

⁵² Here I mean "idleness" in the purest, most wasteful sense—providing not even indirect benefits in the pursuit of goods. It's important to distinguish this concept from "leisure," which undoubtedly can facilitate an individual's pursuit of the good life. See *School*, MERRIAM-WEBSTER DICTIONARY (New ed. 2016) (providing that the English word "school" comes from the Greek "schol," which meant "leisure").

⁵³ In law this idea animates the concepts of "reasonable care" and "reasonable person," which seek to accommodate situations where individuals are limited in their ability to act by practical constraints. See 6 THOMAS D. SAWAYA, FLA. PRACTICE § 2:1 (2018–2019 ed.). As a general matter, one's obligations pursuant to these concepts become "heightened" with added time and resources.

⁵⁴ See *supra* note 43. I am not claiming that the meaning of "the good life" changes when one moves from a state of nature to a commonwealth, but rather that the abilities and hence obligations of an individual to pursue its various aspects changes.

⁵⁵ 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. 2, q. 96, art. 4 (Fathers of the English Dominican Province trans., Benzinger Bros., Inc. 1948) (1271).

⁵⁶ FINNIS, *supra* note 32, at 90; Finnis, *supra* note 43, at 1064.

⁵⁷ See 1 GERMAIN GRISEZ, CHRISTIAN MORAL PRINCIPLES: THE WAY OF THE LORD JESUS (Franciscan Harold Press 1983) (self-integration, practical reasonableness, authenticity, justice and friendship, religion, life and health, knowledge of truth, appreciation of beauty, and playful activities); MARK C. MURPHY, NATURAL LAW AND PRACTICAL RATIONALITY 96 (2001) (life, knowledge, aesthetic experience, excellence in work and play, excellence in agency, inner peace, friendship and community, religion, and happiness).

Many natural law philosophers hold that basic goods need not be revealed by higher authority, but can be realized through right reason.⁵⁸ In this way, Finnis explained that basic goods are “self-evident.” Using the example of the good of knowledge, he wrote:

Is it not the case that knowledge is really a good, an aspect of authentic human flourishing, and that the principle which expresses its value formulates a real (intelligent) reason for action? It seems clear that such indeed is the case, and that there are no sufficient reasons for doubting it to be so. The good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration.⁵⁹

An important point is that self-evident does not mean evident to all. As Finnis stated:

This is not to say that everyone actually does recognize the value of knowledge, or that there are no pre-conditions for recognizing that value. The principle of truth (and knowledge) . . . is not somehow innate, inscribed on the mind at birth. On the contrary, the value of truth becomes obvious only to one who has experienced the urge to question, who has grasped the connection between question and answer, who understands that knowledge is constituted by correct answers to particular questions, and who is aware of the possibility of further questions and of other questioners who like himself could enjoy the advantage of attaining correct answers.⁶⁰

Along these lines, Hadley Arkes explained:

A “self-evident” truth is not one of those things “evident” to every “self” happening along the street. It was closer to what Aquinas described as a truth that had to be grasped *per se nota*, as something true in itself. Aquinas

⁵⁸ Aquinas held this view. For him, natural law is that part of the eternal law discernible through human reason. AQUINAS, *supra* note 55, at pt. 2, q. 96, art. 4; *see also* SYSE, *supra* note 17, at 190 (stating that Locke “ended up with a voluntarist, revelation-based natural-law theory”).

⁵⁹ FINNIS, *supra* note 32, at 64–65; *id.* at 69 (“Such principles of theoretical rationality are not demonstrable, for they are presupposed or deployed in anything that we would count as a demonstration. They do not describe the world. But although they cannot be verified by opening one’s eyes and taking a look, they are obvious—obviously valid—to anyone who has experience of inquiry into matters of fact or of theoretical (including historical and philosophical) judgment; they do not stand in need of demonstration. They are objective; their validity is not a matter of convention, nor is it relative to anybody’s individual purposes.”).

⁶⁰ *Id.* at 65; *see* Curren, *supra* note 10, at 545 (describing Aristotle as holding the view that “[s]tudents must have been ‘well brought up in good habits’ and be experienced ‘in the actions that occur in life’ in order to grasp ‘the facts’ that are the ‘starting-points’ of ethical and legislative inquiry”) (internal citations omitted).

remarked that it was one of those “evident” principles of what he called “speculative reason,” a truth that is “the same for all, but . . . not equally known to all. Thus it is true for all that the three angles of a triangle are together equal to two right angles, though it is not known to all.”⁶¹

To demonstrate the idea of a self-evident claim, Arkes pointed to Lincoln:

Lincoln offered, in the most concentrated form, a model of principled [natural] reasoning: There was nothing one could cite to disqualify the black man as a human being, and the bearer of rights, that would not apply to many whites as well. There was an apt lesson to be drawn in pointing out that nowhere, in this chain of reasoning, was there an appeal to faith or revelation. Lincoln’s argument could be understood across the divisions of religion or race or class . . . It could be understood then by ordinary people, using the wit of rational creatures, and in my own experience no one, hearing the argument, has failed to grasp it. For the natural law to function as law, it has to be accessible, fairly commonly, to those creatures of reason who walk among us.⁶²

B. Goods and Education

So where can individuals living within commonwealths turn for guidance in their pursuits of basic goods?⁶³ For millennia natural law philosophers have emphasized the value of formal education.⁶⁴ Aristotle observed that “there is no lesson which we are so much concerned to learn” as that of “forming right judgments on, and feeling delight in, fine characters and good actions.”⁶⁵ Similarly, Locke wrote:

He, whose mind directs not wisely, will never take the right way . . . [A]nd I think I may say, that of all the men we meet with, nine parts out of ten are what they are, good or evil, useful or not, by their education. ‘Tis that which

⁶¹ HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS 56 (2010) (giving the examples of the law of contradiction and the law of identity); see HENRY B. VEATCH, ARISTOTLE: A CONTEMPORARY APPRECIATION 12 (1974) (characterizing Aristotle’s philosophy as “what to all men everywhere in their saner moments is known to be the truth is, indeed, really the truth”).

⁶² In addition, Lincoln repeatedly articulated the first principles of “all men are created equal” and “consent of the governed.” See ARKES, *supra* note 61, at 61.

⁶³ Here I do not address the question of whether there exists for individuals (or the commonwealth as a whole) a natural obligation to *provide* formal education to others. The question whether formal education is able (when done well) to facilitate individuals’ natural obligations to pursue basic goods is conceptually distinct from whether there is a natural obligation to provide it.

⁶⁴ See generally ARISTOTLE, *supra* note 7; JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (John W. & Jean S. Yolton eds., Oxford Univ. Press 1989) (1692).

⁶⁵ ARISTOTLE, *supra* note 7, at 343.

makes the great difference in mankind.⁶⁶

Elsewhere Locke stated that “[t]is virtue then, direct virtue, which is the hard and valuable part to be aim’d at in education.”⁶⁷

To get a fuller sense of the relationship between formal education and natural obligations, it is helpful to turn back to Finnis. Three of Finnis’s basic goods seem strongly suited to what we mean when we talk about formal education.⁶⁸ Describing the basic good of knowledge, Finnis wrote that “it would be more accurate to call it ‘speculative knowledge,’ . . . to distinguish knowledge as sought for its own sake from knowledge as sought only instrumentally, i.e. as useful in the pursuit of some other objective, such as survival, power, popularity, or a money-saving cup of coffee.”⁶⁹ A second basic good identified by Finnis is “aesthetic experience.”⁷⁰ Identifying “beauty” as its indispensable element, Finnis explained:

[It] need not involve an action of one’s own; what is sought after and valued for its own sake may simply be the beautiful form “outside” one, and the “inner” experience of appreciation of its beauty. But often enough the valued experience is found in the creation and/or active appreciation of some work of significant and satisfying form.⁷¹

A third basic good in Finnis’s model is “practical reasonableness.”⁷² He wrote that “there is the basic good of being able to bring one’s own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one’s actions and lifestyle and shaping one’s own character.”⁷³

It is widely understood that the pursuits of these three basic goods—knowledge, aesthetic experience, and practical reasonableness—can be

⁶⁶ LOCKE, *supra* note 64, at 83.

⁶⁷ *Id.* at 132.

⁶⁸ FINNIS, *supra* note 32, at 88–89.

⁶⁹ *Id.* at 59.

⁷⁰ *Id.* at 87.

⁷¹ *Id.* at 87–88.

⁷² *Id.* at 88.

⁷³ *Id.*; VEATCH, *supra* note 61, at 103 (“[I]f there be such a thing or goal or final cause of human existence, then no sooner would we come by a knowledge of it than we should find ourselves implicated in a rather different sort of cognitive enterprise. Rather than theoretical knowledge, it would be the so-called practical knowledge of ethics and politics that we would be pursuing.”).

advanced through formalized education.⁷⁴ Liberal arts programs regularly claim to pursue the good of knowledge through close study of the humanities and sciences.⁷⁵ Knowledge is also thought to be pursued in various professional or trade programs. (While these undoubtedly hold instrumental value, many professional and trade programs are neither designed nor pursued solely for instrumental reasons.⁷⁶) Aesthetic experience is promised through sustained engagement with literature, music, fine art, philosophy, and theology.⁷⁷ And the good of practical reasonableness is believed to be pursued through examination of methods of inquiry and proof, which cut across nearly all fields of formal education, but are central to philosophy, the physical sciences, and the social sciences (as well as professional training in law, engineering, and medicine).⁷⁸

C. Heightened Obligations to Obtain Education

Commonwealths serve to heighten individuals' obligations to pursue knowledge, aesthetic experience, and practical reasonableness. This is due to the operative principle, discussed earlier, that commonwealths heighten

⁷⁴ Secondary (or non-basic) goods may also be advanced by formal education. Finnis explained that "besides life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion, there are countless objectives and forms of good." FINNIS, *supra* note 32, at 90. He suggested "that these other objectives and forms of good will be found, on analysis, to be ways or combinations of ways of pursuing (not always sensibly) and realizing (not always successfully) one of the seven basic forms of good, or some combination of them." *Id.*

⁷⁵ See Thomas Dudley, *The Charter of the President and Fellows of Harvard College Under the Seal of the Colony of Massachusetts Bay, and Bearing the Date May 31st, A. D. 1650* (transcript available in the Harvard University Archives), <http://library.harvard.edu/university-archives/using-the-collections/online-resources/charter-of-1650> (providing for "the advancement of all good literature, arts, and sciences in Harvard College"); *College of William and Mary Royal Charter (1693)* (available in the William & Mary Digital Archive), <https://digitalarchive.wm.edu/handle/10288/20102> (stating the directive to "make, found and establish a certain Place of Universal Study, a perpetual College of Divinity, Philosophy, Languages, and other good arts and sciences").

⁷⁶ Purely instrumental programs are still highly relevant to the pursuit of alternative goods in Finnis's framework. See FINNIS, *supra* note 32, at 125 (stating that one of the nine requirements of practical reason is to "contribute to the common good").

⁷⁷ *Id.* at 87–88.

⁷⁸ *Id.* at 88; PLATO, *supra* note 7, at 6 ("What the Athenians seemed to need most, according to Socrates, was not a siren to flatter and soothe them with sham promises of a speedy return to prosperity and grandeur, but a gadfly to sting them to unflinching self-examination, to see where in the past they had been wrong-headed and mistaken, and how with patience and hard thinking they might yet build better lives for themselves and for their city."); see also John Mearshamer, R. Wendell Harrison Distinguished Service Professor of Political Sci., *Aims of Education Address at the University of Chicago* (Sept. 23, 1997) (transcript available at the University of Chicago), <https://sourcebooks.fordham.edu/mod/1692locke-education.asp> ("There is a powerful bias at the University of Chicago against providing you with the truth about the important issues we study. Instead, we aim to produce independent thinkers who can reach their own conclusions.").

obligations to pursue previously neglected aspects of the good life.⁷⁹ Even primitive commonwealths provide a base level of security, which frees up resources for individuals to flourish in accord with the natural law in new ways.⁸⁰ There is no reason to think that the obligations to pursue the goods of knowledge, aesthetic experience, and practical reasonableness are exempt from this general principle. Moreover, the heightening of individuals' obligations to pursue knowledge, aesthetic experience, and practical reasonableness has the effect of heightening their obligations to seek some type of formal education.

It should be mentioned here that our particular commonwealths were designed with the conscious object to facilitate the pursuit of knowledge, aesthetic experience, and practical reasonableness.⁸¹ One can look to the face of our founding documents, which reference “the pursuit of happiness,” “domestic tranquility,” and “the blessings of liberty.”⁸² More directly on point are the hundreds of government initiatives in the seventeenth and eighteenth centuries to establish places of learning.⁸³ Twenty years after the founding of Massachusetts Bay Colony, Governor Dudley issued a charter “for the advancement of all good literature, arts, and sciences in Harvard College . . . and all other necessary provisions, that may conduce to the education of the . . . youth of this country, in knowledge and godliness.”⁸⁴ In 1693, the College of William and Mary was founded under a royal charter to “make, found and establish a certain Place of Universal Study, a perpetual College of Divinity, Philosophy, Languages, and other good arts and sciences . . . to be supported and maintained, in all time coming.”⁸⁵ And just six years after Kentucky became a state, its General Assembly passed the Endowment of Seminaries Act, granting 6,000 acres of public land to Jefferson Seminary, precursor to the University of Louisville.⁸⁶ The purpose of the Act was to “protect individuals in the free exercise of their natural rights” and “to

⁷⁹ See *supra* Part II.C.

⁸⁰ See generally AQUINAS, *supra* note 55; see also FINNIS, *supra* note 32.

⁸¹ For a discussion of the difference between facilitating and providing, see LOCKE, *supra* note 64, 102–03.

⁸² The Declaration of Independence cites to “the pursuit of happiness” and the Kentucky constitution references “happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); KY. CONST. pmb1. The United States Constitution points to “domestic Tranquility” and the “general Welfare.” U.S. CONST. pmb1.

⁸³ See generally Sarah A. Morgan Smith, *Commonwealth as Civic Communion*, 57 U. LOUISVILLE L. REV. 467 (2019).

⁸⁴ The Charter of the President and Fellows of Harvard College Under the Seal of the Colony of Massachusetts Bay, and Bearing the Date May 31st, A. D. 1650, *supra* note 75.

⁸⁵ College of William and Mary Royal Charter, *supra* note 75.

⁸⁶ 2 WILLIAM LITTELL, THE STATUTE LAW OF KENTUCKY 107 (1810).

illuminate, as far as possible, the minds of the people at large, and more especially to give them knowledge of those facts which history exhibiteth.”⁸⁷

The General Assembly further explained that “to aid and accelerate this most desirable purpose must be one of the first duties of every wise government.”⁸⁸

D. Reform

While formal education can be pursued in a multitude of ways, one institution has long held itself out as uniquely suited to the pursuit of knowledge, aesthetic experience, and practical reasonableness. I am speaking of course of the university. And from this arises a related obligation for those of relevant position and authority within our universities: to verify they are doing what they at least implicitly claim. In other words, to examine if they are adequately facilitating the pursuit of knowledge, aesthetic experience, and practical reasonableness (and if they are not, to help identify alternatives). While in no way exhaustive, the following paragraphs briefly survey the kinds of issues integral to any such assessment.

1. Challenges

Universities are still widely perceived as places that direct individuals’ pursuit of knowledge, aesthetic experience, and practical reasonableness. Yet over the last century, a large number of peripheral enterprises—athletics, hospitals, law clinics, social clubs, real estate investment trusts (just to name a few)—have ensconced themselves within university life and in time crowded out more traditional pursuits.⁸⁹ Addressing the perennial question, “what should the university be?,” former Columbia University professor Walter Metzger observed:

[E]very need has clamored for recognition, every craft has hoped to belong—and the result has been the unhappy association of piddling vocational and important intellectual interests, the nestling together—under one faculty—of searchers, conservers and craftsmen, the crowding together of institutes, departments, hospitals, dormitories, restaurants, apartment houses and football stadium all under the canopy of a single administration.

⁸⁷ *Id.* The statute points generally to two worldly benefits: the prevention of tyranny and the making of wise laws.

⁸⁸ *Id.*

⁸⁹ Robert Hutchins, *College Football Is an Infernal Nuisance*, SPORTS ILLUSTRATED (Oct. 18, 1954), <https://www.si.com/vault/1954/10/18/546757/college-football-is-an-infernal-nuisance> (“Since there is no visible connection between big-time football and higher education, the tremendous importance attached to it by colleges and universities can only confuse the public about what these institutions are.”).

The university in America is not a community of scholars, but an enormous agglomerate service station, where one can be born, go to kindergarten, lower school and high school, meet the girl friend and get married; where one can get religious solace or psychiatric help; where one learns to turn out a newspaper, to do bookkeeping, to cook. No wonder the universities have been hiring generals to run this domain.⁹⁰

Further undermining the university's purported role as a place to pursue knowledge, aesthetic experience, and practical reasonableness is the rise of postmodern thought,⁹¹ and the growing sense that study at a university should be undertaken primarily, if not exclusively, for instrumental reasons.⁹² As Randall Curren wrote:

[A]n academic institution's mission cannot be understood in a purely or even dominantly instrumental sense, because the goods belonging to the enterprise of higher education are in large measure internal to the practices of inquiry and learning; i.e., internal to the unimpeded activities of academic communities themselves. If institutions of higher learning do not initiate students into forms of inquiry and other practices (such as the arts) that are more intrinsically rewarding than what they could devote themselves to without a higher education, then they will have failed.⁹³

2. Options

While reform efforts across institutions of higher education will (and should) vary widely, it seems worthwhile to outline three broad approaches to reform. A relatively modest option is to simply shore up the pursuits of knowledge, aesthetic experience, and practical reasonableness within institutions of higher education. This would involve developing

⁹⁰ Walter Metzger, *Some Perspectives on the History of Academic Freedom*, 13 *ANTIOCH R.* 275, 279 (1953). Of course these peripheral projects are not without value. They can easily be justified in relation to other goods, such as life, play, or sociability. But because there exists a variety of alternative channels to pursue such goods, it is difficult to justify the prevalence of these projects, as a matter of natural law, within formal education systems.

⁹¹ See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987) (attacking moral relativism as a barrier to truth, critical thinking, and genuine knowledge); PLATO, *supra* note 7 (attributing to Socrates the charge that “[w]e shall be better, braver, and less helpless if we think that we ought to inquire than we should have been if we indulged in the idle fancy that there was no knowing and no use in trying to know”).

⁹² See WILLIAM DERESIEWICZ, *EXCELLENT SHEEP: THE MISEDUCATION OF THE AMERICAN ELITE* 12–28 (2014); Curren, *supra* note 10, at 551 (“Yet, [Aristotle] notes that even music becomes illiberal or ‘mechanical,’ if it is pursued in order to entertain others (making it an activity that is not complete in itself) and is pursued in such a way that it interferes with the development and exercise of virtue.”).

⁹³ Curren, *supra* note 10, at 555 (internal citations omitted).

infrastructures and guidelines to strengthen the historical academic mission of universities while leaving in place their more peripheral components. One might imagine a push for certain enterprises (such as athletics and hospitals) to demonstrate fuller respect for the “higher obligations” to pursue knowledge, aesthetic experience, and practical reasonableness. A variety of smaller, tactical reforms also come to mind, such as ending the practice of using mandatory student fees to support offerings associated with recreation centers, health clinics, and athletics.

A second, more confrontational option is to begin the hard work of divesting universities of their more peripheral enterprises. In the 1950s, former University of Chicago President Robert Maynard Hutchins predicted (wrongly) that the rise of professional football would finally allow universities to break their “addiction” to athletics.⁹⁴ He foresaw that without big-time football:

Students will come to college to study. Alumni will believe that this is something a normal, red-blooded, young American can properly do. Donors will understand that they are asked to support the institution, not because it has succeeded in attracting a few boys who are huskier and faster than those representing another college, but because when they give it, their money will be well spent in improving education and advancing knowledge. The colleges and universities will be set free to be as good as they know how to be.⁹⁵

A third way forward is simply to abandon the modern university and start anew. This calls to mind Allan Bloom, who famously celebrated the distinction between the university and its spirit.⁹⁶ “The philosophic life,” he wrote, “is not the university.”⁹⁷ Bloom reminded us that philosophers up until the nineteenth century had little use for universities.⁹⁸ What mattered, he counseled, was the “philosophic experience.”⁹⁹

IV. CONCLUSION

Commonwealths provide a kind of security that would have been unfathomable to our faraway ancestors, who for thousands of generations lived crouched and guarded in a state of nature. The security afforded by

⁹⁴ Hutchins, *supra* note 89.

⁹⁵ *Id.*

⁹⁶ See BLOOM, *supra* note 91, at 272.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 273.

commonwealths has heightened individuals' natural obligations to pursue previously neglected aspects of the good life, including knowledge, aesthetic experience, and practical reasonableness. Sensing both the value and difficulties of these pursuits, individuals have sought guidance from others, oftentimes in the form of a university education. But like the shadows of Plato's cave, the assurances of universities have misled. In our time, a select few—those of influence and authority—will be called upon to study the point, surveying how well universities guide the pursuits of knowledge, aesthetic experience, and practical reasonableness. And when the failures of the universities are laid bare, it will be easy to turn away. It always is. Yet we can be certain of a day, perhaps not too far from us, when the glib and cynical will fall back, and the wise and honest (yes, the wise and honest!) will take full account of all that is wasted in the shadows: the natural flourishing of our fellow citizens, millions of whom place an all-too-easy faith in our commonwealths' academic institutions.

